



THE NOTARY’S DRAFTING PROCESS FOR A CROSS-BORDER TRANSFER OF COMPANY HEADQUARTERS VIA THE CONVERSION PROCEDURE FROM BELGIUM TO LUXEMBOURG AND FROM BELGIUM TO THE NETHERLANDS

I. INTRODUCTION

In the context of the transfer of a company’s registered office, the doctrine states that European States are divided, legally speaking, by three types of connecting criteria:

1. Incorporation: formal criterion (for example the Netherlands, Great Britain). The company is governed by the law of the place of incorporation (*lex societatis*).
2. Place of operation: economic criterion (in particular Italy). The company is governed by the law of its place of business.
3. The actual registered office: organisational criterion (e.g. Belgium and Luxembourg).

This document aims to clarify the notary’s drafting procedure in the context of a cross-border transfer of the registered office of a company in Belgium to Luxembourg, respectively to the Netherlands. The document is a joint effort by the Belgian, Dutch and Luxembourg notariats.

II. NATIONAL LAWS

The connecting factor in national laws:

Belgium: The Belgian PIL Code stipulates in Article 110 that “the legal person is governed by the law of the State in whose territory its principal place of business is located as soon as it is incorporated”.

In order to determine the principal place of business of a legal person, Article 4.3 of the PIL Code stipulates the following parameters: “the centre of management in addition to the centre of business or activities and, finally, of the registered office”.

Luxembourg: Article 2. 3

Article 2.3 of the amended law on commercial companies of 10 August 1915 states: *“The domicile of any commercial company shall be located at the head office of the company's central administration.*

The central administration of a company shall be presumed, until proven otherwise, to coincide with the place of its registered office.”

The law on commercial companies contains provisions concerning companies incorporated in a foreign country. Article 159 of the law on commercial companies states: *“Any company whose central administration is located in the Grand Duchy shall be subject to Luxembourg law, even though the instrument of incorporation has been drawn up in a foreign country. Where a company is domiciled in the Grand Duchy of Luxembourg, it shall be of Luxembourg nationality and Luxembourg law shall be fully applied to it.”*

The Netherlands:

In the Netherlands, the so-called “incorporation theory” is applied. This theory (i) is applicable to companies governed by Dutch law and (ii) is used as a principle in Dutch private international law.

- (i) With respect to companies governed by Dutch law, the Dutch incorporation theory is laid down in the legal provisions applicable to such companies, like section 2:66 paragraph 3 Dutch Civil Code, which states that a Dutch N.V. (*naamloze vennootschap*, i.e. public company with limited liability, hereinafter: “Dutch NV”) must have its statutory seat (*statutaire zetel*) in the Netherlands. Similar provisions are applicable to other legal persons governed by Dutch law.
- (ii) With respect to companies governed by foreign (i.e. non-Dutch) law (hereinafter: transferring company), the incorporation theory is laid down in section 10:118 Dutch Civil Code, which states that, from a Dutch private international law perspective, companies are governed by the laws of the state where a company has, according to its articles of association, its seat.

➤ **The procedure:**

The procedure applicable to the transfer of a registered office is not legally defined in the countries.

- Belgian doctrine and practice apply the conversion procedure.
- Luxembourg doctrine and practice then apply the conversion procedure if it is applied in the country of departure.
- As Dutch corporate legislation is silent on cross-border conversions, Dutch notaries follow the minimum requirements applicable to the incorporation of a Dutch NV (such as the execution of a notarial deed of conversion and amendment to the articles of association of a foreign company).

III. APPLICABLE PROCEDURE

- 1. Board of Directors of the transferring company organising the extraordinary general meetings, and more specifically the drafting of the agendas, which will be taken up in greater detail in the following general meetings.**

The minutes of the Board of Directors may be drawn up in private.

2. Convening of the general meetings of the transferring company.

- a. General meeting to be held in the country of departure (Belgium) and in the host countries (Luxembourg and the Netherlands)
- b. The convocations will have the same agenda but will respect the forms imposed in the host country and in the country of departure.

3. Extraordinary general meetings of the transferring company held before the notary in the country of departure and in the host country.

The authentic minutes shall be identical in each country but shall respect, where applicable, the forms, quorum of presence and majority (qualified or unanimous) imposed in the country of departure and in the host country, which may be different.

The minutes of the extraordinary general meeting held in Luxembourg shall contain a preamble stating, among other things, that the shareholders present or duly represented declare that they have been informed of the agenda submitted for their deliberation and the content of the articles of association as they will be published after the transfer of the company headquarters. The documents at the disposal of the extraordinary general meeting will also be mentioned.

4. A. Agenda of general meeting in the country of departure, Belgium, and procedure followed.

1. Report of the Board of Directors on the proposal to transfer the registered office of the transferring company from the country of departure to the host country using the existing processing procedure in both countries.

This report also justifies the conversion of the form of the company to be adopted in the host country and describes the details of the operation.

Attached to this report is the statement summarising the assets and liabilities of the company, drawn up at a date not exceeding three months from the date of the general meetings.

2. Report of the auditor on this statement (in the absence of a company auditor or external auditor)
 - Conclusions of the report
 - Certificate of compliance (if any) of the auditor of the host country.
3. Recognition of the legal compatibility of the cross-border transfer of the company's registered office.
4. Recognition of the legal compatibility of the transferring company's conversion in the country of departure and in the host country.
5. Approval of the legal basis for the conversion of the transferring company for the cross-border transfer of the transferring company.

6. Decision to transfer the registered office of the transferring company (from the country of departure to the host country)
 - The registered office (corresponding to the actual registered office of the company) is transferred for the benefit of the continuity of the company's legal entity, without giving rise to a negative conflict arising from the two *lex societatis* of the country of departure and the host country
 - The transfer will take place without dissolution, the transferring company being already subject to the requirements of *the lex societatis* of the host country
 - The transfer of the transferring company therefore takes place without any change in legal personality, provided that the company adopts the form closest to that of a company governed by the law of the host country, and that the activity and purpose remain unchanged and are compatible with the requirements of the law of the host country
 - Capital and reserves remain intact as well as all assets and liabilities, depreciation, capital losses and capital gains. The company in the host country will continue to keep the records and accounts kept by the company in the country of departure
 - The conversion is carried out based on the assets and liabilities of the company as determined at a date fixed by the general meeting. All transactions carried out since that date by the transferring company shall be deemed to have been carried out for the company in the host country, in particular with regard to the preparation of the parent company accounts.

7. Nationality of the transferring company
The transferred company becomes a company governed by the law of the host country and is henceforth subject to the rules of that law, with the transfer of the registered office resulting in a change of nationality.

8. Adoption of the articles of association of the transferring company, taking into account the legislation of the host company.

9. Confirmation of the members of the management body.

10. Conditions precedent
 - Holding of the extraordinary general meeting of the transferring company in the host country, deliberating on the same agenda
 - Double recording of the cancellation of the transferring company's registration in the country of departure and the registration in the host country.

11. Powers to be conferred on the agent(s) to be appointed for the purposes of:
 - Recording the fulfilment of the conditions precedent
 - Recording the completion of the cross-border transfer of the transferring company's registered office.

All the stages of the procedure as well as the necessary documents are analysed and checked by the Belgian notary, country of departure.

B. Agenda of the general meeting in the host country, Luxembourg, and procedure followed.

1. Examination of the documents presented at the general meeting held in Belgium
 - Report of the Board of Directors on the proposal to transfer the registered office of the transferring company from the country of departure to the host country, using the existing conversion procedure in both countries.
 - The auditor's report on this statement (in the absence of a company auditor or external auditor)
 - Interim accounts
 - Statutory accounts of the cross-border transfer of the company's registered office
 - Any clarifications by the Chair, such as the total value or particularities of the assets transferred to Luxembourg.
 - Copy of the resolution passed by the general meeting of shareholders of the company held in Belgium, deciding on the transfer of the company's registered office and actual headquarters to Luxembourg. (A copy or certified copy of the minutes of this meeting, issued by the notary in Belgium, will remain attached to this document if necessary).
2. Ratification of the decisions to transfer the headquarters of the transferring company and decision to transfer the registered office, the place of effective management, the central administration and the principal place of business to Luxembourg, adoption of the closest corporate form without loss of legal personality and submission of the company to Luxembourg law, in particular, confirmation of the company's name, its corporate purpose, as follows: "...” and capital of the company and adoption of Luxembourg nationality.
3. Amendments to the company's articles of association to the extent necessary to bring them in line with Luxembourg law.
4. Approval of interim accounts closed as at... and opening balance sheet with confirmation of continuation of the entries and accounts kept before transfer. All transactions carried out since that date by the transferring company are deemed to have been carried out for the Luxembourg company (host country), in particular with regard to the preparation of the company accounts.
5. Confirmation of the mandates of the management and supervisory bodies.
6. Decisions are subject to the double condition precedent that the transferring company's registration in Luxembourg must be established and that the registration in Belgium must be subsequently cancelled.

5. Powers to be conferred on the agent(s) to be appointed for the purposes of:
 - Recording the fulfilment of the conditions precedent
 - Recording the completion of the cross-border transfer of the transferring company's registered office.

All the stages of the procedure as well as the necessary documents are analysed and checked by the Luxembourg notary, country of arrival.

C. Agenda of the general meeting in the host country, the Netherlands, and procedure followed.

When effecting an inbound conversion, Dutch notaries could follow the following procedure to effect the inbound conversion:

1. The management board of the transferring company prepares a written proposal to effect the inbound conversion;
2. The general meeting of shareholders of the transferring company resolves to realise the inbound conversion (at that time, the transferring company is still governed by foreign law);
3. The management board of the transferring company issues a statement, addressed to the Dutch civil-law notary (to – inter alia – confirm certain factual matters with respect to the transferring company);
4. The general meeting of shareholders issues a statement, addressed to the Dutch notary (to – inter alia – confirm certain factual matters with respect to the transferring company);
5. A Dutch external auditor issues a statement to confirm that the transferring company meets the Dutch minimum capital requirements applicable to a Dutch NV;
6. Obtaining a trade register extract of the transferring company from the foreign trade register and corporate documents from the sole shareholder of the transferring company (if the transferring company has a sole shareholder);
7. Foreign counsel issues a confirmation addressed to the Dutch civil-law notary confirming – inter alia – that the inbound conversion is feasible under the foreign laws, the transferring company is validly existing under the foreign laws and the interests of stakeholders of the transferring company have been adequately protected under the foreign laws prior to the Inbound Conversion;
8. Execution of a Dutch notarial deed of conversion and amendment of the articles of association of the transferring company by a Dutch civil-law notary; the transferring company will be converted into a Dutch NV as per the moment of the execution of the notarial deed of conversion and amendment of the articles of association;
9. Registration of the Dutch NV with the Dutch Trade Register; and

10. Reregistration of the transferring company from the foreign trade register.

➤ **Checks are carried out by each notary in charge of the transfer (notary of the State of departure and notary of the host State) in order to guarantee the legal certainty of the operation.**

5. Publication of extraordinary general assemblies in the country of departure and in the host country.

In Belgium, an extract from the minutes of the extraordinary general meeting is published in the Annexes to the Belgian Official Gazette (*Moniteur belge*).

In Luxembourg the transferring company will be registered with the Trade and Companies Register (*Registre de commerce et des sociétés* - RCS) and the minutes of the extraordinary general meeting deciding on the transfer to Luxembourg will be published in the electronic compendium of companies and associations (*Recueil électronique des sociétés et associations* - RESA).

In the Netherlands, the foreign company is converted into a Dutch NV as per the moment of the execution of the notarial deed of conversion and amendment of the articles of association. This will be followed by the registration of the Dutch NV with the Dutch Trade Register, and the deregistration of the foreign company from the foreign trade register.

6. Cancellation of registration of the transferring company in the country of departure (Belgium) and registration of the transferring company in the host country (Luxembourg and the Netherlands)

The registration of the transferring company will be subject to the condition precedent of the cancellation, which can be obtained subsequently.

7. Recognition of compliance with the conditions precedent.

Unilateral appearance of the agent(s) appointed for the purpose of obtaining a declaration in the presence of the two notaries of the country of departure and the host country:

- The holding of extraordinary general meetings of the transferring company in the country of departure and in the host country
- The filing of photocopies of the transferring company's certificates of cancellation of registration in the records
- Completion of the cross-border transfer operation of the transferring company's registered office.

In Luxembourg, no form is required regarding whether the conditions precedent have been met. The registration of the transferring company becomes effective when the certificate of cancellation is handed over to the notary, who is in charge of verifying that all the conditions are met. It is common practice to align with the form applied in the country of departure. In this case in Belgium.

In this context, the agents will appear before a notary in Luxembourg and a copy or duplicate of the document will be sent to the notary in Belgium.

8. Publication of the completion of the cross-border transfer operation of the transferring company's registered office in the country of departure and the host country.