

The UmRUG is here: More flexibility for cross-border corporate structural measures –  
What opportunities does the new law create?

# Presentation & Outline

# Speakers

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# Outline

- I. Introduction
- II. Overview: the new transformation law after the UmRUG
- III. Labor law implications
- IV. Tax framework
- V. Q&A / Q&A session



# Introduction

# Introduction



## Background

- **No uniform legal framework** for cross-border transformation transactions to date
- To secure **freedom of establishment**  
Adoption of the Company Law Package
- largest reform of European company law
- **Central object:** Facilitation and promotion of cross-border business mobility.
- **Adoption European Conversion Directive 2019/2121**



## Legislative procedure

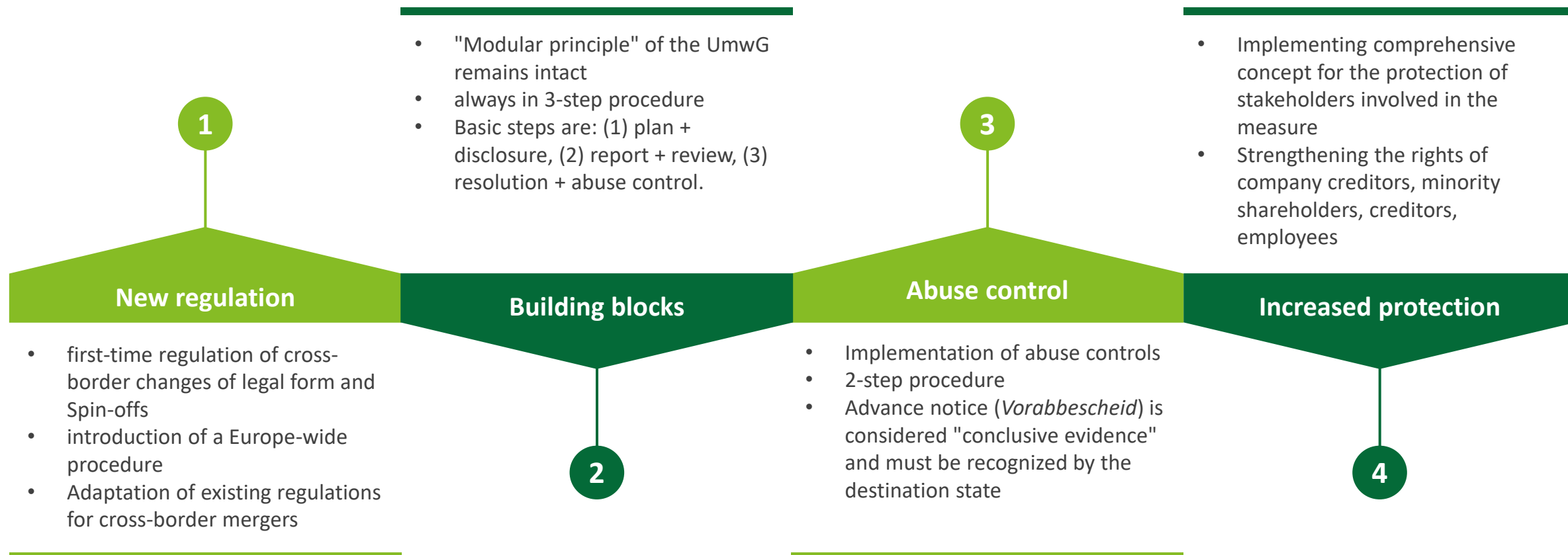
- **tough legislative process** to transform the directive into German law through the so-called UmRUG
- End of December 2022: Referral of UmRUG-E back to responsible legal committee, amendments by legal committee
- **Adoption** of the amended UmRUG in the Bundestag on **January 20, 2023**
- **Approval** by Federal Council made last Friday, **February 10, 2023**.
- Entry into force 1 day after promulgation



## Implementation EU

- Germany **pioneer in** implementation despite delay
- **many EU legislators in** other member states have **not yet reached the point of**
- in the **Netherlands**, the **draft law** is currently being discussed, but finalization is still pending
- However, in those countries where transformation into national law has not yet taken place, the measures can be implemented **directly on the basis of the Directive.**

## Overview: The new transformation law after the UmRUG



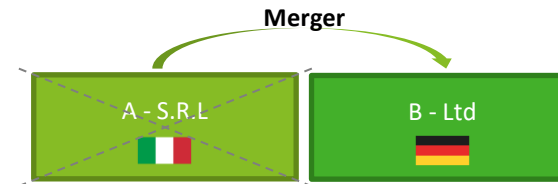


## (Cross-border) merger and change of legal form

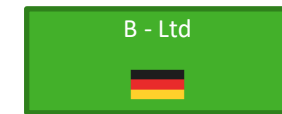
### Merger

- Merger of two companies with dissolution of one legal entity without liquidation (universal succession).
- Insertion of a new 6th book "Cross-border conversions" and embedding of the previous now adapted provisions.
- § 305-319 UmRUG

Before



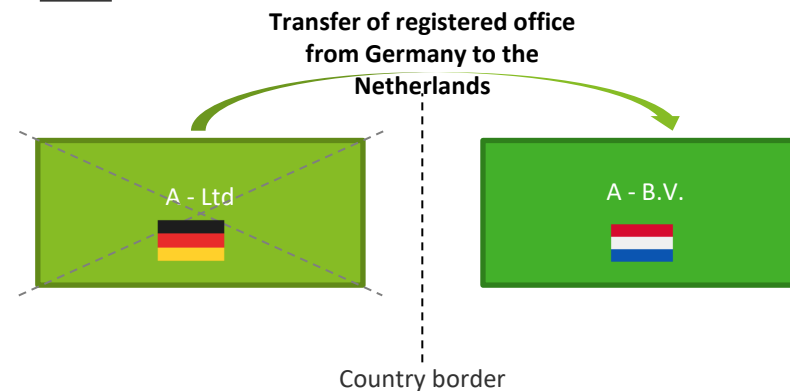
After



### Change of legal form

- Any change in the legal form of the legal entity while retaining its identity, thus the legal entity only changes its "garb".
- codified for the first time for cross-border situations.
- §§ 333- 345 UmRUG

Before



After

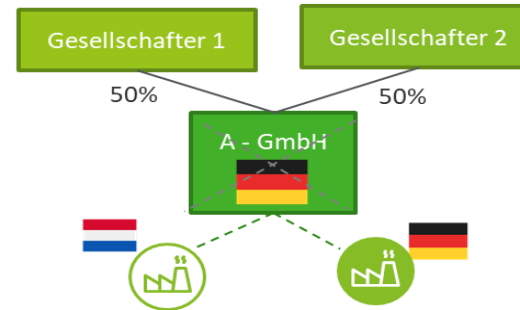


## (Cross-border) Demerger

### Demerger (Aufspaltung)

- A legal entity is divided into two legally independent legal entities with the consequence that the previous legal entity ceases to exist.
- In return, the shareholders of the terminating legal entity receive shares in the new legal entities.

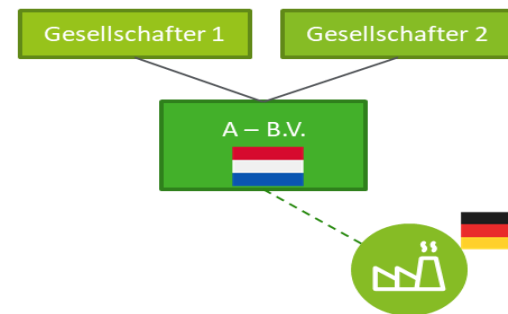
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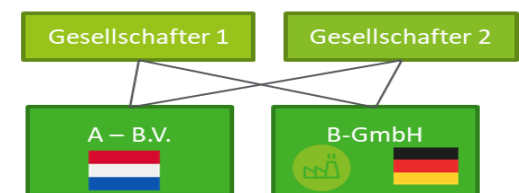
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### Spin-off (Abspaltung)

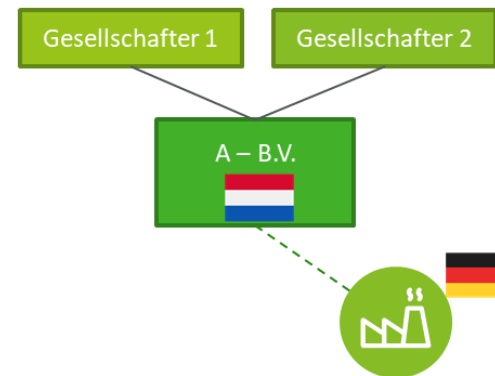
- Part of the assets of the previous legal entity is transferred to another legal entity in which the spinning-off legal entity does not hold an interest. The old legal entity continues to exist.
- The shareholders of the previous legal entity shall receive shares in the absorbing legal entity as consideration.

## (Cross-border) splitting

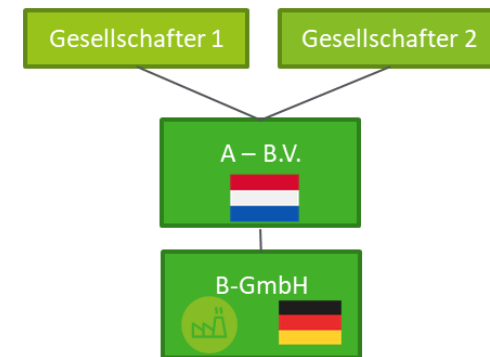
### Spin-off (Ausgliederung)

- Form of spin-off: Part of the assets of the previous legal entity is transferred to another legal entity in which the transferring legal entity holds or will hold an interest. The old legal entity continues to exist.
- Part of the assets are transferred to the new legal entity.
- The transferring legal entity itself receives shares in the new legal entity as consideration (creation of a subsidiary).

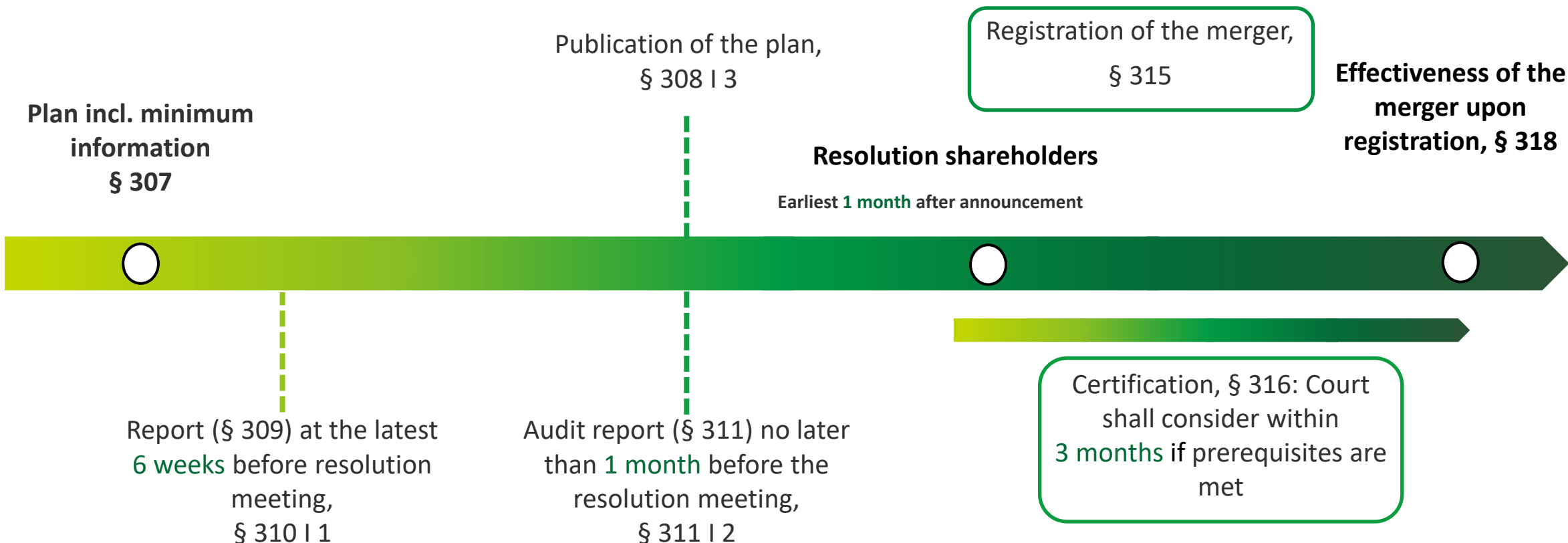
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# Procedure of a cross-border conversion using the example of a merger



## The procedure at a glance - the essential basic elements of the procedure

### Conversion plan

- Basic document of all conversion types
- Minimum disclosures differ according to the type of transformation (e.g. indicative schedule for demergers and changes of legal form)

### Conversion Report

- Report of the management or administrative body(ies) of the company(ies) to shareholders and employees
- Content: legal and economic aspects of the measure, explanation of the impact on employees.
- Formal: two separate reports or one report with separate sections; employees or works council have the right to comment on the employee part of the report.

### Conversion test

- Conversion plan shall be audited by an independent expert and an audit report shall be prepared
- Audit report must be made available to shareholders no later than 1 month prior to adoption of resolution
- Dispensable, provided that all shareholders waive it

## The procedure at a glance - the essential basic elements of the procedure

### Publication

- Conversion plan and expert report shall be made publicly available at least one month before the shareholders' meeting and the conversion shall be formally announced
- Publication takes place via national register (i.e. in Germany via the *commercial register*)

### Resolution

- Shareholders' meetings of the participating legal entities must approve the Terms of Conversion and resolve on the conversion
- Regarding majority, guideline left room for maneuver between min 2/3 - max 90%.
- Remains at the previously applicable majorities of 3/4

### Abuse Control

- Two-stage legality control provided for all projects:
- Stage 1: Examination by authority of departure state - compliance with procedural steps as well as abuse control; deadline: 3 months; issuance of preliminary certification
- Stage 2: Examination by authority of country of immigration
- Final review of national regulations

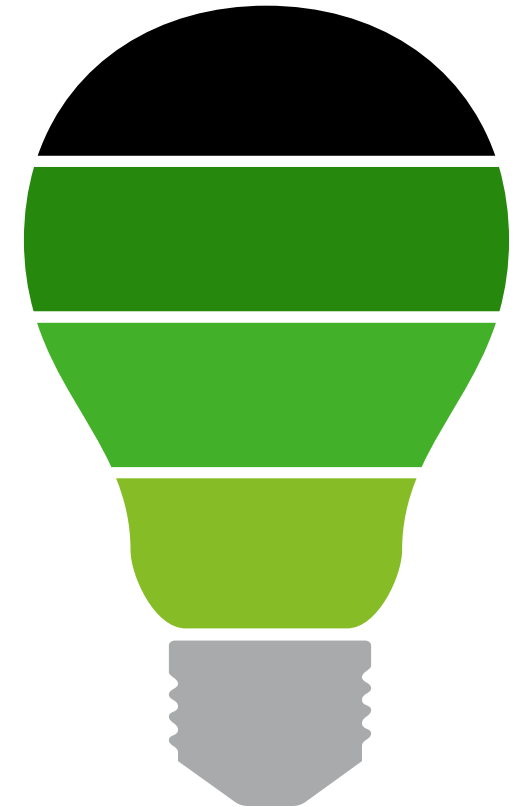
## Overview: the new transformation law after the UmRUG - interim conclusion

### Positive

- Uniform legal framework for cross-border transformation processes creates legal certainty, protects legitimate third-party interests and promotes the competitiveness of European companies
- Excessive implementation of the Directive by Germany: cross-border demergers for inclusion now also possible

### Need for improvement

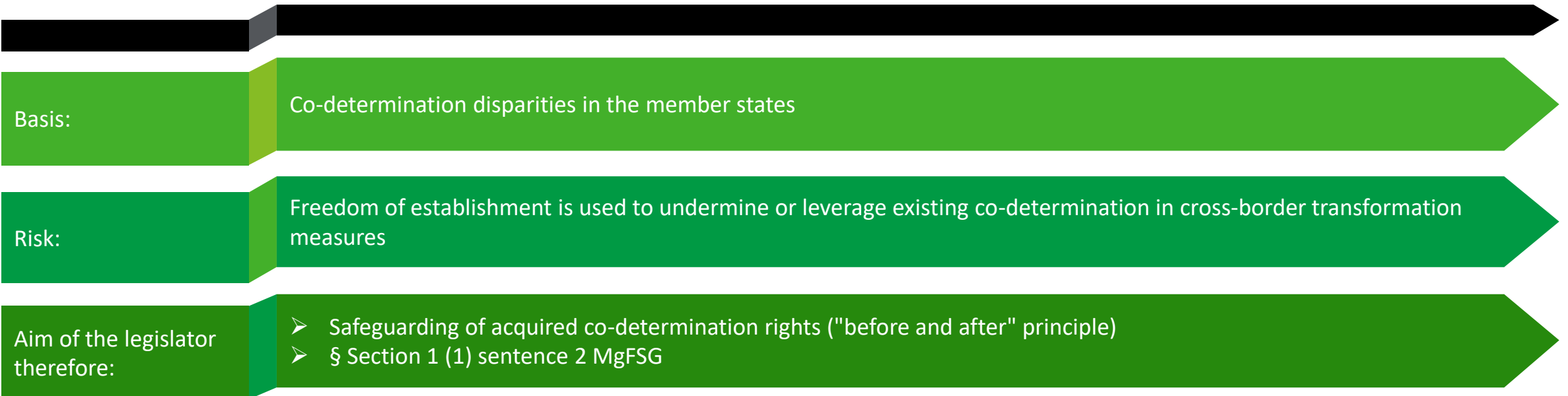
- No extension to partnerships
- Increased stakeholder protection potentially leads to higher procedural complexity
- Possibility of granting additional shares instead of additional cash payment only in case of acquiring or new AG (SE, KGaA)



**Labor law implications**



## Protection of employee rights



## Protection of employee rights

Which cases are included?

- Incoming-conversions: Companies of German legal form resulting from cross-border demergers or changes of legal form.

Spin-off

- The co-determination regime of the country of entry is applicable to the resulting company.
- However, if there is a negotiation situation, the seat state principle is overruled
  - Negotiation - agreement - fall-back solution

## Protection of employee rights

Employee involvement procedures must be carried out if

1. company employs an average number of employees in the 6 months preceding the disclosure of the conversion plan that is at least 4/5 of the national threshold that triggers national co-determination in the country of departure.
2. the national law of the country of residence applicable to the resulting company does not provide for at least the same level of employee participation as previously existed in the company being subject to transformation.
3. the law of the country of entry does not grant employees working in foreign establishments the same right to exercise co-determination that it grants to domestic employees.

## Protection of employee rights

New: Abuse control by register court

Is the cross-border conversion measure carried out for abusive purposes aimed at evading Union or national law?

Question: Is the choice of more attractive co-determination arrangements, in particular the "freezing" of the current co-determination status abusive in law?

# Tax framework

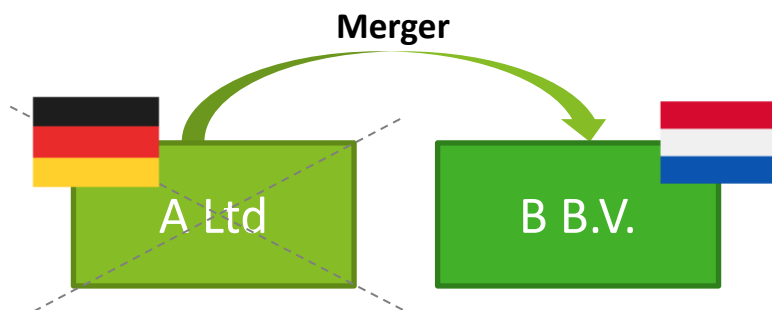


## 1 General

- Cross-border restructurings within the meaning of the UmwStG have been possible under tax law for some time.
- Until the entry into force of the KöMoG, only cross-border restructurings involving EU / EEA entities were generally covered (with the exception of the contribution of a business, part of a business or partnership interest § 24 UmwStG, which was already previously possible with the participation of legal entities from non EU / EEA countries).
- With KöMoG, the scope of the UmwStG was 'globalized', i.e. extended to non EU / EEA countries under the condition that the restructuring is a 'comparable foreign transactions'. Since then, the EU / EEA reference only concerns the transactions covered by the Sixth to Eighth Parts of the UmwStG (contribution of parts of a company to a corporation and share-for-share exchange §§ 20 - 23 UmwStG; change of legal form of a partnership to a corporation § 25 UmwStG).
- However, for tax-neutral restructurings, the in part very restrictive conditions for restructurings must still be met, in particular the taxation right of the Federal Republic of Germany must neither be restricted nor excluded by the restructuring.



## 2 Cross-border merger

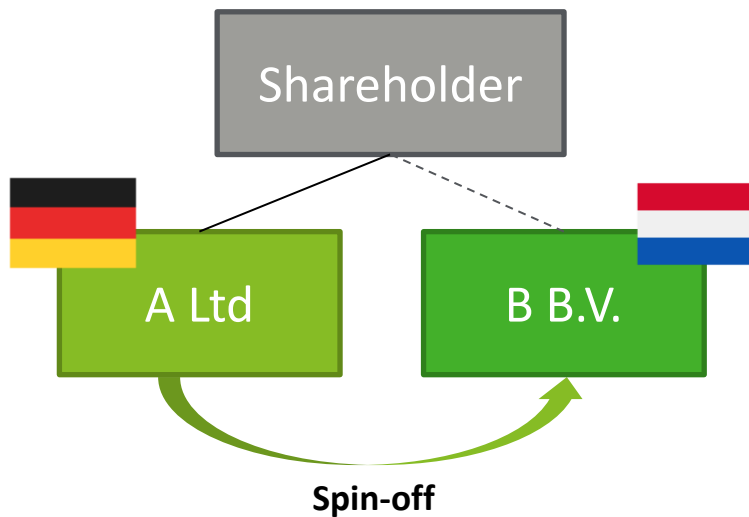


### Typical pitfalls from a tax perspective

- The taxation right of the Federal Republic of Germany may neither be limited nor excluded by the cross-border merger.
  - Continuation of a German permanent establishment with essential personnel functions required.
  - Qualifying personnel functions are required in particular for the retention of intangible assets.
- Loss carryforwards of the transferring entity forfeit (asset step-up for loss utilization, if applicable).
- In case of transfer at fair market value, reconciliation of transfer values with destination state required.
- Real estate transfer tax consequences to be observed. Group clause (Sec. 6a GrEStG) may be applicable.



## 2 Cross-border spin-off

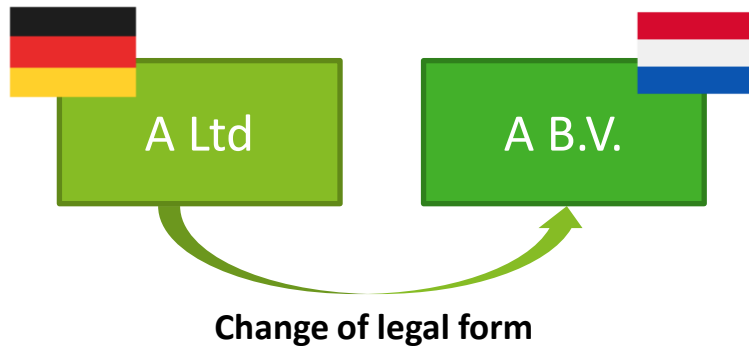


### Typical pitfalls from a tax perspective

- A separate business unit (*Teilbetrieb*) is transferred to the transferee and a separate business unit (*Teilbetrieb*) remains with the transferor (double separate business unit (*Teilbetrieb*) requirement).
- Legal certainty regarding the qualification of a separate business unit (*Teilbetrieb*) can often only be achieved through a binding ruling. The joint use of essential business assets (e.g. IP or real estate) can lead to the denial of separate business unit (*Teilbetrieb*) qualification.
- Holding periods must be observed:
  - 3 years for the existence of separate business unit (*Teilbetrieb*) before the spin-off
  - 5-year holding period for shares in participating companies (disposal with a value <20% harmless)
  - 5-year holding period of the investment before separation of shareholder chains
- Proportionate loss forfeiture.
- Consider real estate transfer tax implications.



## 2 Cross-border change of legal form



### Typical pitfalls from a tax perspective

- Reference can be made to the pitfalls of the previous cases, in particular the taxation right of the Federal Republic of Germany may neither be restricted nor excluded by the cross-border change of legal form.
- No triggering of real estate transfer tax in the case of legal form identity and loss carryforwards can be retained.

**Q&A / Q&A session**

**Thank you for your attention!**

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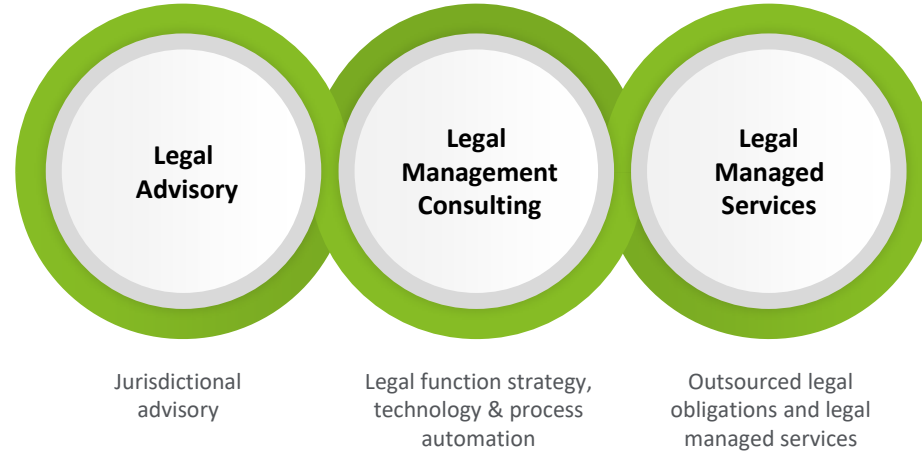
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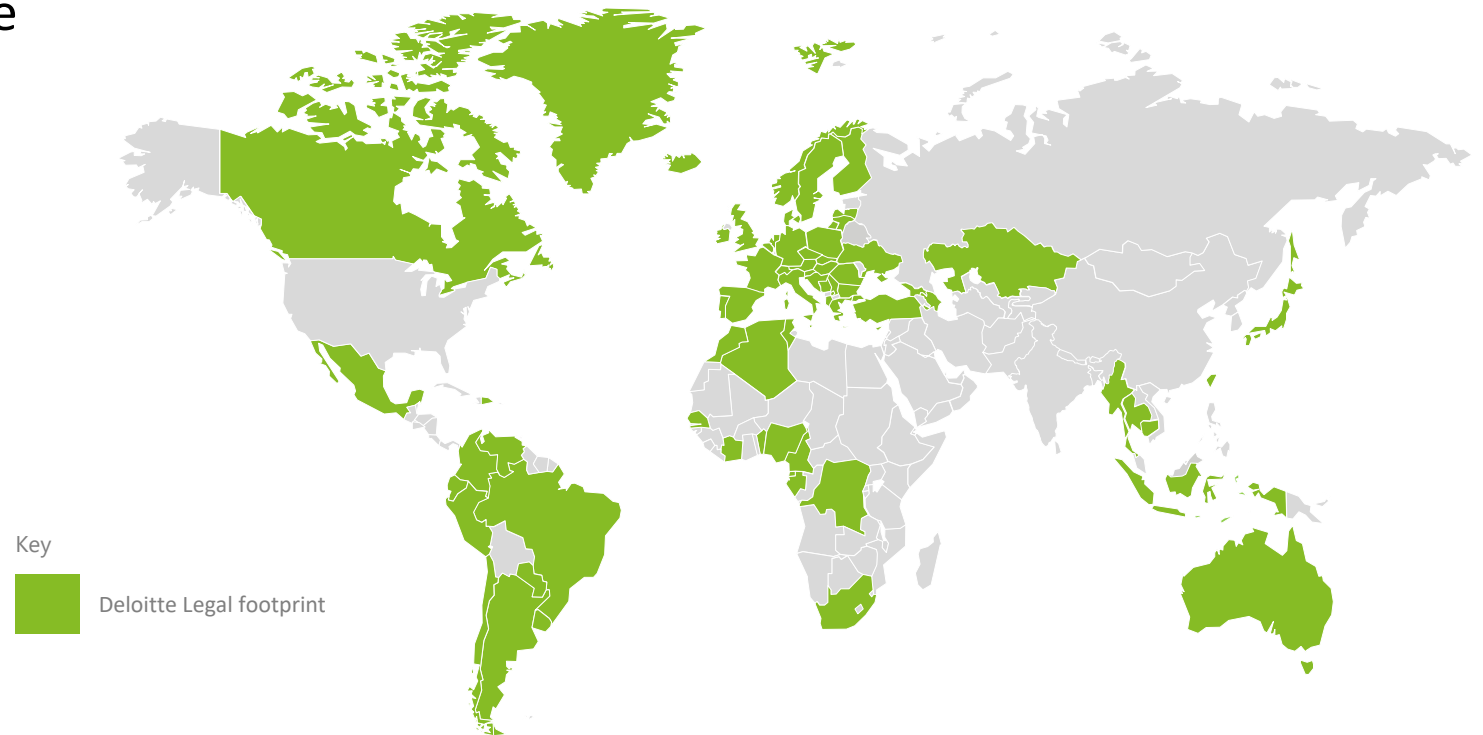


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