

Market Update

Re-domiciling a holding company to the Netherlands

Many foreign investors in Kazakhstan are currently considering re-domiciling^[1] the company holding their Kazakh investment to the Netherlands. The reason is generally to be able to access the beneficial double taxation agreement and bilateral investment treaty between the Republic of Kazakhstan and the Netherlands. This Market Update summarises the necessary steps to successfully re-domicile a company to the Netherlands.

1. Introduction

The Netherlands applies the incorporation doctrine, according to which a company is subject to the laws of the country of its incorporation. Under Netherlands corporate law it is not possible to directly transfer the corporate seat of a company that is not incorporated under Netherlands law to the Netherlands (an exemption applies to the Societas Europaea as will be explained in paragraph 3). There are, however, two alternatives to achieve the same result, which are described below.

2. Alternative 1: Transfer of corporate seat followed by a merger

Consider the structure shown in figure 1. In this structure the Investor holds its investment in Kazakhstan through an intermediate holding company in the British Virgin Islands.

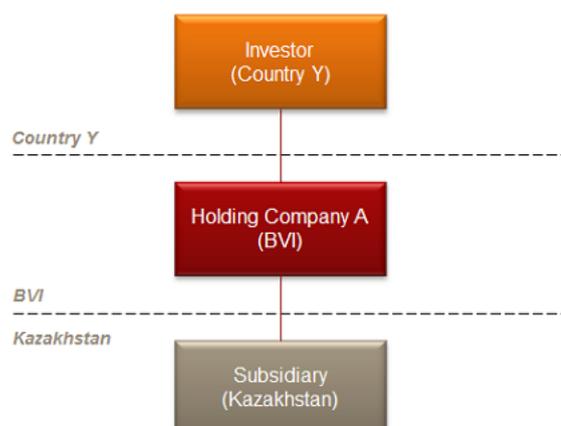


Figure 1

Figure 2 shows the structure that the Investor ultimately wants to establish. Two Netherlands holding companies will generally be used for tax purposes.

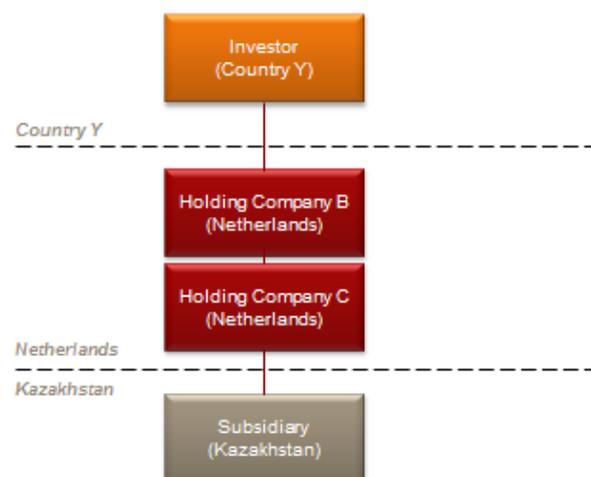


Figure 2

As explained above, it is not possible to transfer the corporate seat of a non-Netherlands company directly to the Netherlands even though its head office or principal place of business may be located in the Netherlands. In order for a company to obtain 'legal personality' under Netherlands law, the company must be formally incorporated as a Netherlands company in accordance with the relevant legal requirements. Non-EU and/or non-EER^[2] companies cannot directly merge with a Netherlands company. Therefore, to achieve the structure shown in figure 2, the following steps would need to be taken:

Step 1:

The corporate seat of Holding Company A is transferred to an EU jurisdiction that allows for such a direct migration^[3]. As a result of the transfer the company is governed by the laws of that respective EU country^[4].

Step 2:

Investor incorporates two new Netherlands holding companies, Holding Company B and Holding Company C.

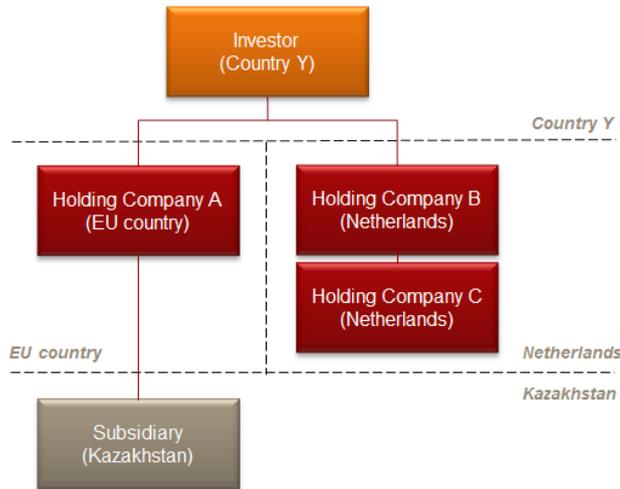


Figure 3

Step 3:

EU Holding Company A is merged cross-border into the Netherlands Holding Company C under the EU Cross Border Merger Directive ("inbound merger"). Each of the merging companies must comply with the provisions and formalities of the national law to which it is subject. From a Netherlands corporate laws perspective the Netherlands formalities are the following (based on the assumption that there are no employees):

1. Common terms of merger, to be agreed by the managing boards of Holding Company A and Holding Company C. In view of the filing of the common draft terms of merger with the Netherlands Trade Register, the common draft terms of merger should, in principle, be available in the Netherlands language. Common terms of merger include the current and proposed articles of association of Holding Company C and financial information (annual reports) for the merging companies for the three most recent financial years (to the extent available).
2. The managing board of each of the merging companies must draw up a report for its respective shareholders explaining and justifying the legal and economic aspects of the cross-border merger and explaining the implications of the cross-border merger for the shareholders and creditors to the merging companies. Under Netherlands law, the managing board of a merging company does not have to produce a report if all the

company's shareholders have agreed to this. This report will not be publicly available and is for shareholders information only.

3. An independent expert for each of the merging companies (an auditor) must examine the common draft terms of merger and issue a statement and report for the Investor.
4. Filing of common terms of merger, annual reports, auditor's statement and report with the Trade Register in the Netherlands.
5. Announcement in the Netherlands national gazette.
6. Creditors may object to common terms of the merger on limited grounds only, i.e. if the creditor fears that its claim will not be satisfied. Objections must be filed within one month after publication.
7. After the one-month objection period has lapsed (assuming no objections were filed), merger resolutions can be adopted by the shareholders.
8. Pre-merger certificate conclusively attesting to the proper completion of the pre-merger acts and formalities in the other EU jurisdiction.
9. Execution of a notarial deed of merger by a Netherlands civil law notary. The merger will take effect on the day following the day of execution of that deed.
10. Filings of official copies of the merger deed with appropriate registers (Netherlands Trade Register and others).

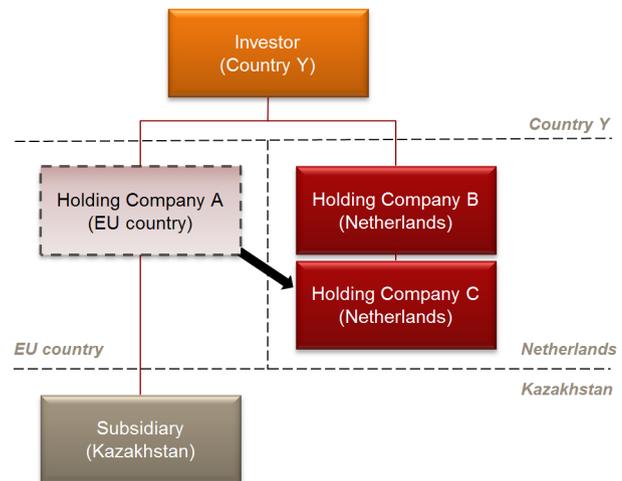


Figure 4

After the merger shown in figure 4 has been effected, Investor has established the structure shown in figure 2.

Alternative 1 can, depending on the jurisdictions involved, generally be effected in less than 3 months.

3. Alternative 2: Using an European limited liability company (“SE”)

The second possibility to achieve a cross-border transfer of corporate seat is to transfer the corporate seat of a company first into an EU jurisdiction and subsequently change its legal form into a European limited liability company, a Societas Europae (“SE”), and ultimately into a Netherlands limited liability company (“NV”). The starting point is again the structure shown in figure 1.

Step 1:

The corporate seat of Holding Company A shown in figure 1 is transferred to an EU jurisdiction^[5].

Step 2:

After the transfer of the corporate seat Holding Company A changes its legal form into an SE^[6].

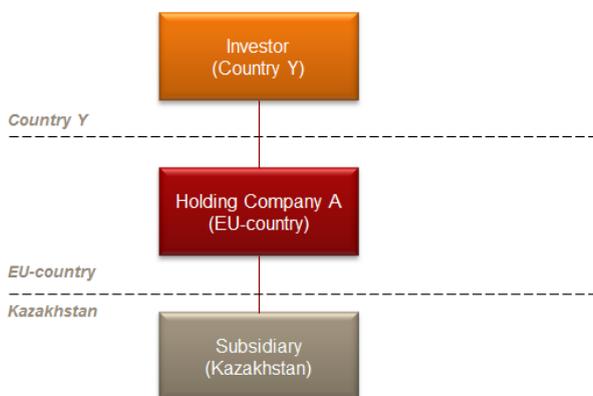


Figure 5

Step 3:

The corporate seat of Holding Company A (as SE) can be transferred to the Netherlands to become a Netherlands SE.

Step 4:

Approximately two years after the transfer of the corporate seat to the Netherlands, Holding Company A can change its legal form into a Netherlands NV.

Please note that Alternative 2 is often less preferred from a Netherlands tax law perspective.

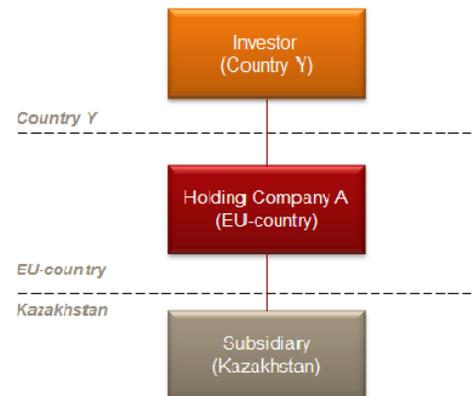


Figure 6

4. Final remarks

Successfully re-domiciling a company to the Netherlands will always be a joint effort of the legal and tax advisors in all jurisdictions involved. De Brauw's M&A/Corporate practice is the single largest practice in the firm and at the heart of the firm's practice, providing services to a range of corporate clients and financial institutions on a broad spectrum of corporate and commercial matters, including assistance with and implementation of cross-border mergers and restructurings. De Brauw also regularly acts as a lead transaction counsel in cross-border mergers and multi-jurisdictional restructurings.

[1] Re-domiciliation to the Netherlands means the transfer of the corporate seat of a company to the Netherlands.

[2] EU member states and European Economic Area states.

[3] For example, Luxembourg, Cyprus or Ireland.

[4] The steps to be taken depend on the laws of the relevant EU country.

[5] For example, Luxembourg and Ireland.

[6] The steps to be taken depend on the laws of the relevant EU country.

Contact

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