

The system of cross-border mergers introduced into French law

The law of 3 July 2008 transposes into French law the directive 2005/56/CE of 26 October 2005 on the cross-border mergers of joint-stock companies.

It brings precious clarifications to the legal system and the practical terms and conditions of these cross-border operations.

Which companies can participate in a cross-border merger?

Public limited companies, limited partnerships with shares, European companies registered in France and simplified joint-stock companies can take part, with one or more joint-stock companies governed by the law of a member state of the European Union, in the merger operation (article L.236-25 of the Commercial Code).

It is also noted that the companies existing under the laws of France are restrictively listed by the law that has excluded from the system the civil companies such as the SICAV.

Furthermore, the law concerns merger operations. This operation includes the simplified mergers. On the other hand, the dissolution-confusion operations such as demerger or partial business transfers are excluded from this system.

What rules are applicable to the merger?

This merger operation will be subject to two types of rules:

- The special provisions enacted by the law of 3 July 2008 and codified in articles L 236-25 to L.236-32 of the Commercial Code,
- The common law of mergers for the non contrary provisions applicable to “national” mergers (articles L.236-1 to L.236-24 of the Commercial Code).

It can be noted that the application of this corpus of rules comes down to submitting, unless otherwise contractually provided for, mergers to the same conditions of majority as those provided for the statutory modifications, even if the operation in

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question would have for effect to lead to a change of nationality of the company of which the partners of the acquired company will become shareholders.

Possibility of making a balancing cash adjustment:

- The possibility of granting a balancing cash adjustment of more than 10% of the nominal value of the shares when the legislation to which one of the parties to the operation provides for it.
(article L.236-26)

The option for the payment of such a balancing cash adjustment would however deprive a French company from the benefit of beneficial treatment of article 210 A of the General Tax Code) under which the balancing cash adjustment should not exceed 10% of the nominal value.

Information given to the employees:

The law of 3 July 2008 increases the employees' right to be informed by imposing the placing at disposal of the report established by the administrative management body or the management to the staff representatives or fault of which to the employees themselves.

Furthermore, the opinion of the Works Council in application of article L.2323-19 of the Labour Laws is attached to this report.

However, the application of these provisions is subject to terms and conditions, in particular concerning time limits, that will be set by the Council of State.

Conditions for cross-border mergers:

Under article L.236-28 of the Commercial Code, the partners of the merging companies can:

- subordinate the achievement of the merger to their approval of the applicable terms for the participation of the employees in the acquiring company, the term "participation" being understood in the sense given by new article L.2371-1 of the Labour Laws, i.e. "the influence exercised by the body representing the employees or by the employees representatives on the business of a company."
- Adopt a resolution providing for the possibility of altering the deed exchange report or compensating the minority shareholders when one of the legislations to which one of the merging companies is subject provides for it.

The decision taken in application of these procedures binds the company resulting from the merger.

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Control of the merger:

The control of the cross-border merger is twofold:

- In the first place, within a time limit set by the Council of State, the clerk of the Court in the jurisdiction of which the company taking part in the operation is registered delivers, after the usual verification in matters of common law relating to mergers (article L236.6 of the Commercial Code), a certificate of compliance of the acts and formalities accomplished prior to the merger which, if applicable, specifies whether a procedure for the alteration of the exchange report or indemnification of the minority holdings is in progress.
- In the second place, a notary or the clerk of the Court in the jurisdiction of which the acquiring company is to be registered controls, within a time limit set by decision of the Council of State, the legality of the achievement of the merger and the incorporation of the company such as it results from this merger.

Effective date of the merger:

In the event of the creation of a new company, the merger becomes effective at the date of registration of this new company at the Companies Registry.

If the acquiring company already exists, the effective date is fixed in the merger contract, but shall not be prior to the above mentioned legality control, nor any later than the date of closing of the current accounting period.

The law stipulates that the nullity of a cross-border merger cannot occur after the operation has become effective.

These provisions bring the keys necessary for the achievement of merger operations between Community companies.

However, the achievement of the first operations remains subject to the publication of the various application decisions and the auditing of the accounts relating to certain new provisions and the French tax regulations concerned.

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