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Amendments to the Companies Law No 31/1990 on cross-border mergers, conversions, and spin-offs, with effect from July 23, 2023

The amendments to Companies Law No 31/1990 concern the procedure applicable to cross-border mergers, as well as the regulation, as a novelty, of cross-border conversions and spin-offs, with the aim of facilitating the cross-border mobility of companies and ensuring a greater protection for the shareholders, creditors and employees of companies involved in this type of operations.

Amendments to the Companies Law No 31/1990 on cross-border mergers, conversions, and spin-offs, with effect from July 23, 2023

Law No 222/2023 on amending and supplementing the Companies Law No 31/1990, as well as of the Law No 265/2022 on the Trade Register and on amending and supplementing other legislation affecting registration in the Trade Register ("**Law No 222/2023**") transposes the provisions of Directive (EU) 2019/2121. Law No 222/2023 entered into force on July 23, 2023, and amended (i) the Companies Law No 31/1990 ("**the Companies Law**") and (ii) Law No 265/2022 on Trade Register.

The new rules apply to cross-border transactions involving joint-stock companies, partnerships limited by shares, limited liability companies and European companies with their registered office in Romania or with their registered office or, as the case may be, their central business administration or principal place of business in other Member States of the European Union or countries participating in the European Free Trade Association.

A. Cross-border merger

The main **changes to the Companies Law regarding cross-border mergers** concern:

- **publicity of the joint merger project** - this may be done by means of (i) the electronic bulletin of the Trade Register or (ii) the website of each company participating in the cross-border merger; if publicity is done by means of its own website, the company will still be required to file a document with the Trade Register office containing, *inter alia*, information on the steps taken to ensure the exercise of the rights of creditors, of employees and of the shareholders;
- **the introduction of protection measures for the shareholders** of the companies participating in the cross-border merger:
 - o the obligation to include in the joint cross-border merger project of the price of the shares for the case where the shareholders exercise their right to withdraw from the company;
 - o the directors/members of directorate of each of the merging companies are required to draft a report containing a section for the shareholders, or a separate report for the shareholders, on the economic implications of the operation;
 - o drafting the report of the directors/board members of the companies involved in the cross-border merger, for the shareholders, or the examination of the merger project by an independent expert, are **not** mandatory in the case of limited liability companies with a sole shareholder or where all the shareholders expressly waive them;
 - o the directors/board members of each of the merging companies are required to inform the shareholders, before the date of the general meeting convened to approve the cross-border merger or, at the latest, at that meeting, if, after the date when the joint cross-border merger project and the report(s) of the directors/ board members have been drafted, there have been significant changes in the company's assets or level of income;
 - o the shareholders who did **not** vote in favour of the resolution of the general meeting, and wish to withdraw from the company, have the possibility to apply to the court for additional cash compensation, if they consider that the price of the shares set by the company in the cross-border project is insufficient; the certificate prior to the cross-border merger can only be issued if the company provides sufficient guarantees / evidences of the existence of cash available for the payment of the price of the shares;
 - o shareholders who have decided not to exercise their right of withdrawal, but who claim that the exchange rate is not appropriate, can ask the court to order the company involved in the cross-border merger to pay cash compensation;
 - o the deadline for the general meeting of shareholders to approve the cross-border merger may not be less than six weeks from the date of its convocation;
- **ensuring enhanced protection for creditors** of companies involved in the cross-border merger:
 - o the obligation to include in the joint cross-border merger project particulars of guarantees granted to creditors for the satisfaction of their claims;
 - o creditors are provided with the possibility to request adequate collaterals if they consider that there will not be sufficient cash in the company to satisfy their claims;

- the prior certificate of the cross-border merger may be issued only if the company provides evidence of the provision of collaterals in accordance with the joint merger project or following notification of the company by the creditors or as ordered by the court;
Note: these provisions replace the opposition period provided for in the old regulation, making the implementation of the operation conditional on the granting of adequate guarantees to creditors.
- any creditor who has a claim which is prior to the date of publication of the merger project, and which is not due on that date, may continue to apply to the court in respect of that claim for a period of two years from the date on which the cross-border merger takes effect;
- introduction of **protection measures of the employees** of the companies involved in cross-border mergers:
 - the directors/board members of each of the companies involved in the merger are required to draft a report containing a section for employees, or a separate report for them, on the economic implications of the operation, which must be made available to them at least 6 weeks before the date of the general meeting approving the merger;
 - employee representatives or, in their absence, the employees themselves, have the right to express an opinion on the directors/board members report explaining the legal and economic aspects of the cross-border merger;
 - consulting employees' opinion must be carried out at least 5 days before the date of the general meeting convened to approve the project;
 - the directors or board members of the company involved in the merger must submit a reasoned reply to the opinion expressed by the employees' representatives or employees, at least one day before the date of the general meeting approving the merger.
- **changes to the checking and approval procedure for cross-border mergers:**
 - the case of a merger by absorption, which is carried out
 - (i) either by a company owning all the shares of the absorbed company/companies,
 - (ii) either by a person who directly or indirectly holds all the shares in the acquiring company and in the company/companies being acquired;and the acquiring company does not allocate any shares in the merger process, **the cross-border merger shall be approved by decision of the board of directors or the management board**, with prior information of the shareholders.
 - the competence to verify the legality of the cross-border operation, from the procedural point of view, lies with the registrar of the trade registry office or, where applicable, with the tribunal in whose territorial area of competence the registered office of the company participating in the transaction is located;
 - the trade registry office obtains, from its own registers and from registries kept by other public institutions, on an inter-institutional basis, on the basis of a protocol, if necessary, for the purpose of verification by the registrar of the legality of the cross-border merger, information on the company involved in the merger such as: information from the tax record, information from the criminal record and information from the national integrated computer system for the recording of claims arising from criminal offences - ROARMIS;
 - the registrar checks, based on the documents submitted, whether the cross-border operation is carried out for abusive or fraudulent purposes, with the intention of leading to evasion or avoidance of EU or national law, and if so, refers the matter to the competent court;
 - the time limit for the assessment of the application for a preliminary certificate under the new regulations may not exceed 3 months from the date of submission;
- an action for a declaration of nullity of the resolution of the general meeting of shareholders approving the cross-border merger may be filed within 30 days from the date of its publication in the Official Gazette of Romania.

B. Cross-border spin-off

In addition to amending the rules applicable to cross-border mergers, Law 222/2023 introduces, **as a novelty, the concept of cross-border spin-off**, the rules of which are similar to those for cross-border mergers.

Specifically for this operation, we note that:

- Law No 222/2023 regulates three types of spin-off: total or partial spin-off in the interest of the shareholders and spin-off by separation in the interest of the company;
- asymmetric partial spin-off is expressly regulated.

C. Cross-border conversion

Another novelty is the introduction of the concept of **cross-border conversion** - i.e., the operation whereby a company, without being dissolved or going into liquidation, converts the legal form under which it is registered in the commercial register of a Member State, called the State of departure, into the legal form of a company governed by the law of another Member State, called the State of destination, and transfers at least its registered office to that State, while retaining its legal personality.

In this case too, Law 222/2023 provides the same protection for the shareholders of the converted company, its creditors, and employees as in the case of cross-border mergers and spin-offs. Moreover, the procedure applicable to this operation is similar to the procedure applicable to cross-border mergers and spin-offs.

For further questions regarding the aspects mentioned in this alert, please contact us.



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