

Corporate Law

Local Legal Update France

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Law No. 2008-649 dated July 3, 2008 (published on the official French legal gazette on July 4, 2008) has implemented the EU merger directive 2005/56/CE dated October 26, 2005.

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According to that French law, the SA (*sociétés anonymes*), SCA (*sociétés en commandites par actions*), European companies registered in France, SARL (*sociétés à responsabilité limitée*) and SAS (*sociétés par actions simplifiées*) can now be part of a European cross-border merger (with companies referred to in article 2, § 1 of that directive), under a specific regime listed in new articles L.236-25 and seq. of the French Trade Code; certain existing articles of the French Trade Code, such as L. 236-10 and L. 236-11, are also amended. That specific regime is in substance an implementation of the above directive. Note that certain provisions still need to be elaborated by a Decree.

One of the features of that specific regime is that in the event of a merger of a company into its 100% parent company (the so-called “simplified mergers”), per article L. 236-11 of the French Trade Code, court appointed contribution auditors (“*commissaire aux apports*”) are no longer required. Under the former regime, contribution auditors were entrusted to appreciate the value of the assets contributed and special advantages. That new feature now applies to both national and cross-border mergers. This is a major simplification to the former regime. One can anticipate that simplified mergers will be more used on a go-forward basis than before. For instance, simplified mergers can be retroactive from an accounting standpoint contrary to the dissolution without liquidation regime (the so-called “TUPs”) which was often used in lieu of simplified mergers.

In the event of a sidestream merger, while the previous legal regime provided for a court appointed auditor to prepare both a contribution report (containing appreciation of the value of the assets contributed and special advantages) and a merger report (containing appreciation as to the relative value of the shares of the companies parties to the transaction and that the exchange ratio is consistent), article L. 236-10 of the French Trade Code now states that the merger report can be waived upon a unanimous shareholders decision. The contribution report of the court appointed auditor is still required, unless no assets are contributed. This also applies to both national and cross-border mergers. This also is a major simplification to the former regime. Indeed, in an intra-group context where the merger must occur at book value, that new regime - if opted for - will avoid to perform a valuation of the participating companies to calculate the exchange ratio and the amount of increase in capital of the absorbing company, which was previously controlled by the merger auditor.

Apart from the above features (and the existing regular French legal merger regime), the following rules, among others, apply to cross-border mergers only:

(i) A special negotiation group of the employees has to be put together should one of the participating companies have more than 500 employees (according to article L. 2372-1 of the French labor code) and apply the specific participation regime of the employees in its/their management body(ies).

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(ii) A notary or the clerk of the relevant commercial court will have to ensure (after the 30-day opposition period open to creditors has elapsed) that the merger at stake occurred in compliance with laws and regulations (article L. 236-30 of the French Trade Code), the so-called “contrôle de légalité” (in English: the legality check). The time period upon which the notary or the clerk should perform their legality check should be elaborated by a Decree.

(iii) the cross-border merger will only take effect as from the above-mentioned legality check by the notary or the clerk.

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