Portugal
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Cross-border mergers

Beginning this summer, Portuguese limited liability companies are able to merge on a cross-border basis in which all assets and liabilities of the merged entity (including employees) are automatically transferred to the surviving entity and the merged entity ceases to exist without a liquidation process. This became possible with the enactment of Law 19/2009, which implemented the cross-border merger directive (Directive 2005/56/EC).

As with the Directive, in order for a merger to qualify as cross-border, it must have a true cross-border scope: at least two limited liability companies governed by the laws of different EU member states.

In basic terms, the process for a cross-border merger starts with the fulfilment by each company of the applicable formalities. In the case of the Portuguese company these formalities are broadly (i) adoption of the common terms of merger and issuance of an independent expert's report as to the reasonableness of the valuation methods and share-to-share exchange ratio (this report may be waived by the shareholders of both merging companies), (ii) registration of the common terms of merger with the commercial registry, (iii) online publication of a call for the company's shareholders meeting to approve the common terms of merger, and (iv) shareholders meeting approval of the common terms of merger, followed by the execution of the merger document. Where the merger is an absorption of a wholly-owned or 90%-or-more owned subsidiary, the independent expert's report is not required, nor is the shareholder approval so long as certain requirements are met.

Once each jurisdiction's formalities are completed, both companies must apply for a per-merger certificate. The local competent authority for the purpose is the commercial registry. The pre-merger certificate and the common terms of the merger must then be registered with the competent entities in each jurisdiction. If the surviving company is Portuguese, registration is made with the commercial registry, which conducts a final legality check.

When compared to mergers among Portuguese companies, cross-border mergers have the added benefit of, once registered, not being able to be declared null and void. This may add certainty to leveraged acquisitions.

Structuring a transaction as a cross-border merger has a number of benefits as opposed to a pure asset transfer, particularly since the merger (i) does not require counterparty (including employee) consent for transfer of contracts, tackling the commercial risk of contract renegotiation, (ii) operates a global transfer, providing certainty that no potentially relevant asset is left out, (iii) entails an automatic dissolution of the merged entity, and (iv) does not trigger the 5% stamp duty levied on most transfers of businesses as a going concern.

In light of these benefits, the cross-border merger is expected to be a useful instrument for intra-group reorganisations and a valid structural alternative for business transfers.

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