



COELHO RIBEIRO E ASSOCIADOS
SOCIEDADE CIVIL DE ADVOGADOS

CROSS-BORDER MERGERS OF LIMITED LIABILITY COMPANIES

Harmonizing its laws and practices with EU Law, Portugal has finally implemented the European Directives 2005/56/EC and 2007/63/EC in its national legislation by approving Law nº 19/2009 of 12th of May which also altered articles 98^o, 99^o and 101^o and added a new section (section II) to Chapter IX both of the Companies Law.

On October 26, 2005, the European Parliament and the Council approved the Directive 2005/56/EC on cross-border mergers of limited liability companies. The Directive has introduced a uniform and simplified procedure in order to pursue cross-border mergers between limited liability companies incorporated under the laws of a Member State and having their registered office, central administration or principal place of business within the Community, provided that at least two of them are governed by the laws of different Member States.

The Directive 2007/63/EC, was approved in November 2007. This Directive amended Council Directives 78/855/ECC and 82/891/ECC as regards to the requirement of an independent expert's report on the occasion of merger or division of public limited liability.

The Directive sets that "cross-border merger of limited liability companies", shall mean the merger of limited liability companies incorporated in accordance with the legislation of a member state and having their registered office, central administration or main place of establishment within the Community, on condition that at least two of these companies are regulated by the laws of different member states.

As a result, Law nº 19/2009 lays down the procedure and conditions for the cross-border mergers of limited liability companies where one or more of the merging limited liability companies has its main place of establishment in Portugal and the other has been incorporated in accordance with the legislation of a Member State and having their registered office, central administration or main place of establishment within the Community.

The law does not apply to cross-border mergers involving companies, whose object is the engage in collective investment of public capital, operating on the principle of risk spreading whose units are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of that company.

Hereunder is a summary of the general terms and provisions applicable to a cross border merger involving a Portuguese limited liability company as set out by the law. The said terms and provisions are set to come into force with effect from 11th of June 2009.



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1. Conditions relating to cross border mergers

Cross-border mergers shall only be possible between types of limited liability companies incorporated under the provisions of national law of the relevant Member States according to Directive nº 2005/56/CE.

A Portuguese company taking part in a cross-border merger shall comply with the provisions and formalities of the national law, including the decision- making process relating to the merger, the protection of creditors of the merging companies, debenture holders and the holders of securities or shares as well as provisions to ensure appropriate protection for employees where not accounted for in special regulations.

2. Common Plan -Draft terms of Cross-border Mergers

The Directors of each of the Portuguese companies taking part in the cross-border merger shall describe common draft terms of the cross-border merger which shall include at least details according to the terms of the Third Directive as well as the following particulars:

- the form, name and registered office of the merging companies, as well as the information proposed for the limited liability company resulting from the cross-border merger;
- the ratio applicable to the exchange of securities or shares representing the company's capital and the amount of any cash payment, if applicable;
- Dates of the merging companies' accounts used to establish the conditions of the cross-border merger.
- where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the limited liability company resulting from the cross-border merger
- Possible repercussions to employees resulting from the cross-border merger.



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3. Scrutiny of Common Plan of Cross-border Mergers

Scrutiny of common draft terms of the cross-border merger may, at the will of the merging companies, be performed by a unique expert or group of experts who accordingly will examine the common draft terms of cross-border merger and draw up a single written report to all the members of the merging limited liability companies.

The common plan – draft terms of cross border mergers is subject to approval by general meeting conducted by each merging company.

The general meeting may also reserve the right to make implementation of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the limited liability company resulting from the cross-border merger.

4. Form and Publication

Form and publication of limited liability companies with a main place of establishment in Portugal where a cross-border merger is taking place is subject to Portuguese national law.

5. Pre-merger Certificate

According to law nº 19/2009 the competent entity to scrutinise the legality of cross-border mergers in cases where one or more of the merging limited liability companies has its main place of establishment in Portugal is the Registrar of Companies.

Each merging Portuguese company shall apply to the Registrar of Companies and shall request the issuance of a certificate conclusively attesting to the proper completion of the pre-merger acts and formalities.

The Registrar of Companies, on becoming satisfied that the procedures referred to on points 2, 3 and 5 hereinabove have been complied with, shall issue without delay the certificate to each merging Portuguese company.

6. Scrutiny of the Legality of the Cross-border Merger

The Registrar of Companies of the district where the registered office of the said company is situated shall be competent to scrutinize the legality of the cross-border merger as regards to part of the procedure which concerns with the completion of the cross-border merger.



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In exercising such control the Registrar of Companies shall in particular monitor whether the merging limited liability companies have approved the common draft terms of cross-border merger in the same terms and, as the case may be, that arrangements for employee participation have been determined in respect of each merging Portuguese company in accordance with the provisions of the national legislation transposing the provisions of Article 16 of Directive 2005/56/EC.

In compliance with the law and following the scrutiny of the legality of the cross-boarder merger, each merging Portuguese company shall submit to the Registrar of Companies the Pre-merger Certificate as per point 6 in above and every other non-Portuguese merging company shall submit the certificate issued by the competent authority in accordance with the provisions of the national legislation transposing the provisions of Article 10(2) of Directive 2005/56/EC. This must be done within six months following the date of issuance of the aforesaid Pre- Merger Certificate along with the common draft terms of cross-border merger approved by the general meeting where Portuguese and other non-Portuguese merging companies are concerned in accordance with the provisions of Article of Directive 2005/56/EC.

8. Entry into Effect of the Cross-border

The effect of the cross-border merger shall commence on the date determined by the national legislation for the purposes of Article 12 of Directive 2005/56/EC.

As a result, the cross-border merger shall begin to take effect when registered at the registrar of companies as per article 117^oH of the Portuguese Commercial Law.

However, Portuguese law allows retroactive effects of a merger to the first day of the year for accounting and tax purposes.

9. Registration

In case where the decision to approve the completion of the cross-border merger is issued by the Registrar of Companies, registration of the cross-board merger will be performed by it as well as notification in respect of each merging company of another member state over the registry kept on the basis of the national legislation in the Member State in accordance with Article 3 of the Directive 68/151/EEC and also in which the registry of each of the said merging companies is required to file the documents demonstrating that the cross- border merger has taken effect.

10. Consequences of the cross-border merger



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A cross-border merger *shall* have the following consequences from the date of its registration:

- (a) all the assets and liabilities of the company being acquired shall be transferred to the acquiring company;
- (b) the members of the company being acquired shall become members of the acquiring company;
- (c) the company being acquired shall cease to exist.

The limited liability company resulting from the cross-border merger shall carry out the formalities that may be required under the law or on the basis of legislation governing any of the non-Portuguese merging limited liability companies with respect to the right to object against third parties before the transfer of certain assets, rights and obligations offered by the merging limited liability companies.

The rights and obligations of the merging limited liability companies arising from contracts of employment or from employment relationships and existing at the date when the cross-border merger takes effect shall, by reason of that cross-border merger taking effect, be transferred to the limited liability company resulting from the cross-border merger on the date on when the cross-border merger takes effect.

It is noted that no shares in the acquiring company shall be exchanged for shares in the company being acquired, which are held either:

- (a) by the acquiring company itself or through a person acting in his or her own name but on the company's behalf; or
- (b) by the company being acquired itself or through a person acting in his or her own name but on its behalf.

A cross-border which has taken effect as provided in the law may not be declared null and void.

10. Simplified formalities

Portuguese law foresees simplified formalities only in the case of the absorbent company holding all the shares or capital participations of the absorbed company. The merger procedure by a company that holds 90% or more but not all of the share capital of the merged company follows the general regime.



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Similarly, law n° 19/2009 excludes simplified formalities in case of cross-border by acquisition carried out by a company which holds 90 % or more but not all of the share capital or voting rights of the company being acquired. Therefore, the independent report and the scrutiny documents are mandatory, even if the law applicable to the absorbent company so requires.

11. Employee participation

It is noted that the limited liability company resulting from the cross-border merger will be subject to the domestic Portuguese labour legislation whenever its registered office is in Portugal.

However, the domestic legislation in force concerning employee participation shall not apply where:

(a) at least one of the merging limited liability companies has, in the six months before the publication of the draft terms of the cross-border merger an average number of employees that exceeds 500 and is operating under an employee participation system; or

(b) domestic Portuguese labour law does not provide for at least the same level of employee participation as that applicable in the relevant merging limited liability companies, measured by reference to the proportion of employee representatives amongst the members of the board of directors or their committees or of the management group which manages the profit units of the company, where such employee representation is foreseen, or

(c) domestic Portuguese labour law does not provide for employees of establishments of the limited liability company resulting from the cross-border merger that are situated in other Member States, the same participation rights as those enjoyed by those employees engaged in the Member State where the limited liability company resulting from the cross-border merger has its registered office.

In such cases, labour provisions laid down in law n° 19/2009 shall apply.

In accordance with law n° 19/2009, after the register of the Common Plan and its publication the employees shall constitute a negotiation body with the purpose of discussing their participation and their rights to representation pursuant to the outcome of the merger.

The provisions on worker participation apply to any domestic merger subsequent to a cross-border merger for a period of three years after the cross-border merger has taken effect.



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This is a brief outline of the new cross-border merger regime. Please feel free to contact Nuno Almeida Ribeiro (nuno.ribeiro@cralaw.com), Tânia Nóbrega (tania.nobrega@cralaw.com) or if you prefer, any attorney in the firm with whom you are regularly in contact with should you need any further clarification.

Kind Regards,



COELHO RIBEIRO E ASSOCIADOS
SOCIEDADE CIVIL DE ADVOGADOS

Ph. (+351) 21 383 90 60

Fax. (+351) 21 385 32 02

www.cralaw.com

Av. Eng.º Duarte Pacheco, Emp. Amoreiras, Torre 2 - 13º A
1099-042 Lisbon – Portugal

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Av. Eng.º Duarte Pacheco, Emp. Amoreiras, Torre 2 - 13º A
1099-042 Lisbon – Portugal

www.cralaw.com

www.cra-global.com

Ph. (+351) 21 383 90 60

Fax. (+351) 21 385 32 02