Cross-border simplified mergers: The management bodies of the companies involved in the merger are required to prepare a written report

The Legal Committee of the Association Nationale des Sociétés par Actions (French association of joint stock companies, commonly referred to by its acronym “ANSA”) met on March 2, 2022 to express its opinion on the application, in the context of cross-border simplified mergers, of the exemption from the obligation to prepare a written report provided for in the context of domestic simplified mergers.

A brief reminder of the applicable rules in this area is necessary before presenting the issue at stake and the clarification given by ANSA.

Exemption from the obligation to prepare a written report in the context of a domestic simplified merger

The management bodies of stock companies (sociétés anonymes (joint stock companies), sociétés en commandite par actions (limited partnerships with shares) and sociétés par actions simplifiées (simplified joint stock companies) involved in a domestic merger are theoretically required to prepare and make available to the shareholders a written report on the contemplated transaction[1].

They are, however, exempted from preparing such a report when the companies they manage are involved in a so-called “simplified” merger (i.e., a short-form merger) governed by Articles L. 236-11 and L. 236-11-1 of the French Commercial Code.

This type of merger refers to mergers in which a company acquires:

- its wholly-owned subsidiary or a sister company; or
its subsidiary in which it owns 90% of the capital or a sister company (in which the parent company owns at least 90% of the capital of the acquiring company and the to-be-acquired company), provided that the minority shareholders have been offered, prior to the merger, to have their shares bought-back at a price corresponding to their value.

No exemption from the obligation to prepare a written report in the context of a cross-border merger

Under French law, the regime applicable to cross-border mergers is based on Law 2008-649 of July 3, 2008 adopted in order to transpose Directive 2005/56/EC of October 26, 2005 (which has, since then, been incorporated into Directive (EU) 2017/1132 of June 14, 2017).

As for domestic mergers and in accordance with Article L. 236-27 of the French Commercial Code which transposed Article 7 of Directive 2005/56/EC, the management bodies of each of the companies involved in the transaction must prepare and make available to the shareholders a written report.

While Directive 2005/56/EC did provide for “simplified formalities” applicable to cross-border mergers, it did not include any exemption for the management bodies of each company involved in the merger to prepare a written report describing the contemplated transaction.

Article L. 236-27 of the French Commercial Code, derived from the transposition of the aforementioned Directive, does not, therefore, provide for any exemption from this obligation.

The simplified formalities applicable to cross-border mergers resulting from Directive 2005/56/EC have, however, been amended by Directive (EU) 2019/2121 of November 27, 2019, which now provides for an exemption from the obligation to prepare a written report only for the benefit of the to-be-acquired company.

The transposition of this Directive, which must take place no later than January 31, 2023, has not yet been implemented into French law.

What about simplified cross-border mergers?

Pursuant to Article 4 of Directive 2005/56/EC and Article L. 236-25 of the French Commercial Code, a company involved in a cross-border merger must comply with the provisions applicable to domestic mergers, unless otherwise provided for by the provisions applicable to cross-border mergers.

A simplified cross-border merger procedure may, therefore, be implemented in accordance with Articles L. 236-11 and L. 236-11-1 of the French Commercial Code, provided that it does not conflict with the provisions applicable to cross-border mergers.
However, as detailed above, there is a contradiction in that the French Commercial Code provides for an exemption from the obligation to prepare a written report in the context of a domestic simplified merger, but does not (as per the transposed Directive) provide for such an exemption in the context of a cross-border merger.

In these circumstances, the Legal Committee of the ANSA provided the following clarification on March 2, 2022:

- The management bodies of a **to-be-acquired** French company involved in a cross-border simplified merger do not benefit, pending the transposition of Directive (EU) 2019/2121, from the exemption from the obligation to prepare a written report provided for by said Directive.
- The management bodies of an **acquiring** French company involved in a cross-border simplified merger do not benefit from an exemption from the obligation to prepare a written report provided for by Article L. 236-11 of the French Commercial Code.

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[2] Law No. 2008-649 of July 3, 2008 containing various provisions adapting corporate law to Community law (in French only)


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