

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^[2] adopted in order to transpose Directive 2005/56/EC of October 26, 2005^[3] (which has, since then, been incorporated into Directive (EU) 2017/1132 of June 14, 2017^[4]).

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^[5], 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^[6], 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^[7], 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^[8] 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.

[1] [Article L. 236-9 of the French Commercial Code](#) (in French only)

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

[3] [Directive 2005/56/EC of the European Parliament and of the Council of October 26, 2005 on cross-border mergers of limited liability companies](#)

[4] [Directive \(EU\) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law](#)

[5] Article 124 of Directive 2017/1132

[6] Article 15 “*Simplified formalities*” of Directive 2005/56/CE (or Article 132 of Directive (UE) 2017/1132)

[7] [Directive \(EU\) 2019/2121 of the European Parliament and of the Council of November 27, 2019 amending Directive \(EU\) 2017/1132 as regards cross-border conversions, mergers and divisions](#)

[8] Article 121 of Directive 2017/1132

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