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Reform of the Commercial Code Brings New Provisions Relating to National Mergers

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Introduction
Mergers and Split-offs
Absorption Merger of a Wholly Owned Company
Limited Liability Companies Registered as SARLs
Double Voting Rights

Introduction

In addition to transposing the EU Cross-Border Mergers Directive (2005/56/EC) (for further details please see "New Law Implements Cross-Border Mergers Directive"), the Law on the Adaptation of Corporate Law to EU Law (649/2008) has amended provisions relating to national mergers. It is complemented by the Law on the Modernization of the Economy (776/2008), one of the most recent steps in France's attempt to modernize and streamline its economy, which also includes provisions applicable to national mergers.

The laws:

- transpose provisions from EU Directive 2007/63/EC;
- simplify proceedings related to the absorption merger of a fully owned company;
- extend bondholders' protection in mergers or split-offs involving a limited liability company registered as a *société à responsabilité limitée* (SARL); and
- provide for the transfer of double voting rights following a merger or split-off.

Mergers and Split-offs

Following a merger or split-off, pursuant to Articles L225-147 and L236-10 of the Commercial Code, a court-appointed independent appraiser must submit two reports to the shareholders in addition to the management report: (i) a report on the terms of the merger or split-off detailing whether the values attributed to the shares of the involved companies are pertinent and whether the exchange ratio is fair; and (ii) to the extent there are any in-kind contributions or specific advantages (eg, preferred shares), a report on the value of the in-kind contributions, as the value of the net assets contributed must be at least equal to the amount of the new capital issued, and on the specific advantages.

However, pursuant to the revised Article L236-10 that transposes the directive, shareholders may now decide not to have an independent appraiser appointed for the preparation of a merger report. Such a waiver requires a unanimous decision of the shareholders of both the absorbing and the absorbed companies. In addition, the decision must be made at least one month before the date of the shareholders' meeting that approves the merger or split-off (according to Article R236-3 of the code). In practice, the one-month delay should be increased to take into account the time needed to have an appraiser appointed in case unanimity is not reached.

In addition, the revised article no longer requires a contribution report when the merger or split-off does not include any in-kind contribution (which is rare in practice) or the granting of specific advantages.

Finally, the revised article clarifies that when a merger includes in-kind contributions or specific advantages, the independent appraiser of the merger can prepare both the merger report and the contribution report, and if no such independent appraiser is appointed, an independent appraiser of contributions must still be appointed.

Absorption Merger of a Wholly Owned Company

French law provides for a simplified procedure for absorption by a parent company of a fully owned subsidiary; the independent appraiser's merger report, the shareholders' meeting of the absorbed company and the management report are not required. However, Article L236-11 of the code still requires the appointment of an independent appraiser of contributions.

The Law on the Adaptation of Corporate Law to EU Law has amended Article L236-11, eliminating this latter requirement in order to simplify further absorptions of wholly owned companies because such absorptions do not give rise to a share capital increase and therefore do not require the verification of the value of the net assets contributed against the value of any capital. However, if the company to be absorbed has issued securities giving access to its capital, a parity must be established and reviewed by the independent appraiser of asset contributions pursuant to Article L228-101 of the code.

Some may argue that this modification deprives the absorbing company's shareholders and the creditors of detailed information on the value of the assets and liabilities contributed to the absorbing company. However, the reform could have been more extensive and does not include certain other simplification provisions included in the directive on internal mergers, in particular, the possibility to apply the simplified merger procedure to the absorption by a parent company of a subsidiary where at least 90% of the shares are owned by the parent.

Limited Liability Companies Registered as SARLs

According to Ordinance 274/2004, a limited liability company registered as an SARL may issue bonds when it has appointed a statutory auditor and its accounts for the last three years have been approved by its shareholders (according to Article L223-11 of the code).

Articles L236-2 and L236-23 of the code have therefore been amended so that SARL bondholders benefit from the same protection in a merger or split-off as those of limited liability companies registered as a *société anonyme* (ie, submission of the contemplated merger or split-off to the bondholders of the absorbed company), unless the bonds can be refunded at the request of the bondholders (pursuant to Articles L236-13 and L236-18 of the code). Bondholders that have not requested a refund within three months of publication of the draft treaty in a legal newspaper become bondholders of the absorbing company under the conditions set forth in the treaty.

Double Voting Rights

A revised version of Article L225-124 of the code, applicable from January 1 2009, will allow shares with double voting rights to retain those rights when transferred in a merger or split-off of the shareholder company, unless otherwise provided in the bylaws of the shareholder company that granted the double voting rights (according to Statute 776/2008). Additionally, transfer via merger or split-off will not affect the period of time for which shares are considered to have been held for the determination of eligibility of such rights.

For further information on this topic please contact Isabelle MacElhone *or* Edouard Eltvedt *at Hogan & Hartson MNP by telephone (+33 1 55 73 2300) or by fax (+33 1 55 73 2310) or by email (*imacelhone@hhlaw.com *or* eeltvedt@hhlaw.com*).*

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