LEGAL INFORMATION NEWSLETTER

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We are pleased to provide you with the new issue of our legal information newsletter.

Topical legal questions are discussed and those related to issues that you might encounter.

We hope that you will find it of interest.

We would welcome any comment you might have.

OVERVIEW OF THE MAIN DOMESTIC STATUTORY REGULATIONS ON TRANSFER OF BUSINESSES (*PART I)*

Act No. 244/07
Act No. 633/72
Act No. 917/86
EU Directive No. 435/90
EU Directive No. 434/90
EU Directive No. 434/03

INTRODUCTION – Several amendments to domestic statutory regulation have been enforced during the recent years, following the general goal of simplifying procedures.

In relation to merger, consolidation and split up, statutory law provides that specific rules are set for drawing up the first balance sheet subsequent to merger and split up operations.

The first balance sheet subsequent to a merger or consolidation involving exchange of stock shares must report the exchange ratio and values agreed upon for such share exchange, and not their market value. [1]

Vice-versa, when a deficit emerges from a consolidation without share-exchange, the business activities of the acquired company are adjusted, even if such adjustment is not consistent with the values adopted by the acquiring company for its own activities, and maintained after the consolidation process.

MERGER & CONSOLIDATION OF COMPANIES - The law on corporations makes a distinction between merger and consolidation.

A merger is effected when one or more companies become a part of or merge with another company.

The former company or companies cease to exist but the latter company continues to exist.

By contrast, in consolidation two or more companies unite to form a new company and the original companies cease to exist.

Those companies undergoing a winding up process, and have commenced distribution of the assets are not allowed to merge or consolidate.

This rule does not apply if only insolvency proceedings have been instituted but winding up has not been ordered.

It is now possible to make limited amendments to the merger plan upon approval of the merger.

PROCEDURAL STEPS - The following are the procedural steps of a merger or consolidation:

[A] Drawing up the merger plan

[B] Filing the merger plan at the legal address of the companies participating in the merger

[C] Filing the merger plan with the Companies' Registry for registration

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[1] Act No. 366/01.

[D] Drawing up financial statements of the companies participating to the merger. Financial statements must not be older than 120 days from the date of filing of the merger plan

[E] Drawing up the report by the management board, commenting and justifying, from a legal and economic perspective, the merger plan and in particular, the exchange ratio of the shares or stock quotas

[F] Drawing up the appraisal reports for each company involved in the merger, on the adequacy of the exchange ratio of shares or stock quotas

[G] Depositing a set of documents at the legal address of the companies participating in the merger.

Such documents shall remain deposited for the thirty days preceding the meeting unless stockholders unanimously waive this term, and until the merger have been resolved.

They are the followings:

[1] Merger plan

[2] Annual accounts of the last three fiscal years of participant companies, reports of directors and the Board of auditors along with the certification report

[3] Balance sheets of the companies participating in the merger drawn up[2]

[H] Calling the Shareholders' Meetings of the participant companies for the purpose ofpassing the merger resolution and adopting the merger act, which shall be in the form of a public deed drafted by a notary

[I] Depositing and filing of the merger resolution with the Companies' Registry

[L] Dealing with subsequent opposition by creditors

[M] Drawing up and filing of the merger act with the Companies' Registry.

Publicity on the Official Gazette of an extract of the merger plan is no longer required.

Shareholders may now waive the term of one month between the date set for passing the merger resolution and the filing of the merger plan.

The appraiser, who must be either an auditor or an auditing company, shall draw up the report on the congruity of the share exchange ratio.

If the company resulting from the merger or consolidation process is a corporation (S.p.a. or S.a.p.a.), then the expert shall be appointed by the Tribunal.

If the Corporation is listed on the stock exchange, the expert must be an auditing company.
In case of merger of partnership into a limited company, the appraiser shall draw up an appraisal report on the assets of the partnership in accordance with the provisions of the Civil code 2343.[3]

The merger shall be approved by each participant company through approval of the relating merger plan.

If the Articles of association or the Bylaws do not provide otherwise, the merger decision shall be adopted:

[A] By partnerships through voting of its members. Each member shall have a vote proportionate to the percentage of its holding set out in the partnership agreement

[B] By limited companies, in accordance with the rules that regulate amendments to the Articles of Association or the By-Laws.

Any shareholder who did not consent to the merger is entitled to appraisal rights.

The Civil code provides that the merger resolution must be filed with the Companies' Register along with its relevant documentation.[4]

The merger shall be enforced (by way of the act of merger) only after 60 days from the last of such filings, unless:

[A] There is a previous agreement with creditors to the filing of the merger plan

[2] Pursuant to Civil code, Article 2501quater.

[3] Civil code, Article 2343.
[4] Civil code, Article 2502bis.

[B] There is a previous settlement of the all creditors, who did not express their consent; or

[C] The appraisal report has been filed for all the participant companies by a single auditing company, which must certify under its own responsibility, that the economical and financial situation of the participant companies makes it unnecessary to set up guarantees and securities for the creditors.; or

[D] The amount correspondent to the accounts payable to the creditors is deposited at a bank.

If the above provisions are not complies with, and there is objection by creditors within 60 days, the Tribunal may enforce the merger anyway upon posting of a bail.

The bondholders may object to the merger, unless consent to the merger was previously given in the bondholder assembly.

With reference to convertible bonds, there is a requirement of publicity on the Official Gazette ninety days at least prior to the filing of the merger plan, which is aimed at allowing bondholders to exercise their right to conversion of the bonds within one month from the date that the above mentioned publicity was made.

The company resulting from the merger or the acquiring company takes on rights and liabilities of the other participants.

The merger shall be recorded into a public deed.[5] The deed of merger must remain deposited for filing with the Companies' Registry for thirty days.

The filing referred to the acquiring company or the company resulting from the merger cannot be done prior to the filings referred to the other participant companies.

According to the provisions of the Civil code the merger takes effect when the last of the required filings has been made. Such date may be postponed in case of mergers.[6]

Setting an earlier date is admissible with reference to dividend distribution and to the date they are charged to the accounts of the company.

The first balance sheet subsequent to the merger shall report the assets and liabilities at the values resulting from the accounting records at the date of effectiveness of the consolidation or merger.

If a loss emerges from the consolidation or merger, such loss must be attributed, to the extent possible, to the items of the assets and liabilities of the companies participating to the consolidation or merger and to goodwill for the difference, as the provisions of the Civil code set forth.[7]

In case of companies which make recourse to the market of risk capital, accounting reports indicating the values attributed to the assets and liabilities of the companies which have participated in the consolidation or merger together with the appraisal report must be attached.

The merger cannot be challenged under a claim of invalidity, after filing of the act of merger with the Companies' Registry. Compensation for damages may however be claimed instead.

LEVERAGED AND MANAGEMENT BUY-OUTS – Specific rules have been enforced with reference to those takeovers and subsequent mergers carried out using borrowed funds, when either the stock asset or the asset of the target company represent the guarantee or the source of repayment of such debt undertaken.

The specific rules are that:

[A] The merger plan must detail the financial resources of the company resulting from the merger, budgeted for debt repayment

[B] The directors' report must specify the reasons that justify the operation and provide for a comprehensive economic and financial plan detailing sources for financial commitments and description of the goals

[C] The appraisal report must certify the reasonableness of the information reported in the merger plan

The report of the auditing company of either the targeted or the acquiring company must be attached to the plan. It is not possible to apply

[5] Civil code, Article 2504.
[6] Civil code, Article 2504.
[7] Civil code, Articles 2504bis and 2426.

for short-form merger (either wholly owned or 90 % owned companies).

THE WHOLLY OWNED COMPANIES - In case of merger with a wholly owned company , the merger plan need not make mention of information relating to the exchange-share ratio, the procedure for assignment of the shares, and the accounting date for the operations. Directors' report and expert report are not required as mandatory.

If there is compliance with statutory provisions relating to the merger plan, and with reference to the acquiring company also with those provisions relating to the filing of documents, the By-Laws may provide that the resolution of merger with a fully owned subsidiary is passed by each Board of Directors by way of public deed.

Upon request by 5% of shareholders of the acquiring company, the standard procedure that Civil Code, Article 2502 sets forth shall be adopted. The relating request shall be filed within 8 days from the date of filing of the merger plan.

THE 90% OWNED COMPANIES – In this case the appraisal report is not required, if the minority shareholders of the 90% owned company are given the right that their shares are to be purchased by the acquiring company at a price determined with the same criteria established for exercising appraisal rights by the withdrawing shareholder.

Moreover, either the Articles of Incorporation or the By-Laws may provide that the decision to merge may be taken by the management body.
In this latter case the overall merger process is subject to those conditions and to the same procedures that the law sets forth in case of merger with wholly owned subsidiaries, and to the additional condition that the filing of the merger plan of the acquiring company must be done at least one month prior to the date fixed for the resolution of merger by the target company.

THE COMPANIES WITHOUT STOCK CAPITAL REPRESENTED BY SHARES – The Civil code provides for a simplified procedure in order to ease the merger process among these companies.[8] In particular, the following statutory requirements are not mandatory:

[A] Prohibition of merger for winding up companies, which have initiated distribution of the assets

[B] Price adjustment over 10% of the par value of the shares.

Requirements for drawing up the appraisal report may be waived with the unanimous consent by all of the stockholders of the participant companies. In addition, the following terms are halved:

[A] One month between the date fixed for passing the merger resolution and the filing of the merger plan

[B] One month for the documents that must be deposited at the company before decision is taken

[C] Two months for objection by the creditors.

SPLIT-UP OF COMPANIES – There are several express references to the statutory regulation of mergers, which apply.

The Civil code provides that with a split up a company transfers:

[A] All of its assets and liability to more than one company, pre-existing or newly established, or

[B] Part of its assets and liabilities, in such case also to a single company, and the relevant shares or quotas to its stockholders.[9]

An adjustment in cash is permitted provided that it is not higher than 10% of the par value of the shares or the quotas allocated. It is also permitted, with unanimous consent, that shares of the split company are given to certain members, rather than shares of one of the companies benefiting from the split.

The split company may, with the split, either terminate its activities without liquidation or may continue its activities. Companies in liquidation, which have started distribution of their assets are not allowed to split.

Article contributed by Riccardo G. Cajola

[8] Civil code, Article 2505quater.

[9] Civil code, Article 2506.