



## LEGAL ALERT

04 January 2024

# Amendment to the regime of cross-border conversions, mergers and demergers

Decree-Law no. 114-D/2023, published in the Official Gazette (Diário da República), which comes into effect on 4 January 2024, transposes into national law Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 as regards cross-border conversions, mergers and demergers, and amends several laws, namely the Companies Corporate Code, the Commercial Registry Code, Decree-Law no. 24/2019, of 1 February, *which establishes the rules applicable to electronic communication between the national commercial registry and the registries of other Member States*, and the Emoluments Regulation for Registers and Notaries.

The national regime for mergers, demergers and conversions is amended. Moreover the scope of cross-border mergers is extended and it is established a new legal regime for cross-border demergers and conversions, in order to provide adequate protection for the parties concerned, namely employees, creditors and shareholders.

Among the main alterations to the aforementioned legislation, we would like to, in summary, point out the following:

### At national level

#### i. National mergers

- ✓ Extension of the elements that must be included in the merger project.
- ✓ The expert report drawn up under the terms of the law by the supervisory body and the statutory auditor or independent auditor must contain a reasoned opinion on the adequacy and reasonableness of the share-exchange and of the acquisition ratio.
- ✓ Amendment to the information that must be comprised in the notice convening the general meeting of the participating companies in which the merger project will be approved.
- ✓ There has been an increase, from 1 month to 3 months, in the deadline (after publication of the registration of the merger plan) for the judicial opposition of creditors of the participating companies whose claims date back to before the publication and provided that they have requested the company to honor their claim or provide an adequate guarantee at least 15 days before, without their request having been attended.

#### ii. National demergers and conversions

- ✓ The members of the management body of each of the participating companies are jointly and severally liable for the damage caused by the demerger/conversion to the company and its shareholders and creditors, provided that, when verifying the

companies' assets and finalizing the demerger/conversion, they failed to observe the diligence of a careful and orderly director.

### At cross-border level

#### i. Cross-border mergers

- ✓ In addition to the elements previously provided for, the joint project must contain the draft amendments to the articles of association and, where appropriate, the bylaws of the acquiring company, or the draft articles of association and, where appropriate, the statutes of the new company.
- ✓ Elaboration of a report by the management bodies of each of the merging companies, for the shareholders and the employees, setting out the legal and economic grounds for the merger, as well as explaining its implications for the employees and for the future business of each of the merging companies. A single report, or two separate reports may be prepared, one for shareholders and the other for employees. Both shall be made available electronically at least six weeks before the date set for the general meeting to approve the operation.
- ✓ An opinion from the employees' or employees' representatives may be submitted by the date designated for the general meeting approving the operation, and the board of directors must inform the shareholders of this, attach it to the report and provide a reasoned response by the date of the general meeting.
- ✓ The management bodies of the participating companies must promote the preparation of a report drawn up by the supervisory body and the statutory auditor or independent auditor, which may be waived in certain cases.

The company resulting from the merger must pay all the consideration for the acquisition of the shareholdings offered in the common merger

project to the shareholders within two months of the final registration of the merger before the Commercial Registry.

Regarding the regime for the protection of shareholders in participating companies, it is stipulated that shareholders who deem that the consideration for the acquisition of their shareholdings is inadequate have the right to apply to the court, within six months, for adequate consideration to be set. In addition, shareholders who have also voted against the cross-border merger project also have the right to demand, within one month, that the company acquires or arranges for the acquisition of its shareholding for adequate consideration.

#### ii. Cross-border demerger

- ✓ There were alterations to the notion and scope of demerger, and the following types of demergers were introduced: partial, total and by separation.
- ✓ Regarding the applicable law, the provisions on national demergers apply to companies with registered offices in Portugal on a subsidiary basis.
- ✓ New elements have been included in the cross-border demerger project.
- ✓ With regard to the drafting of the expert report, the protection of company creditors and the control of the legality of operations, there have been similar changes to the cross-border merger regime.

#### iii. Cross-border conversion

- ✓ There have been alterations to the notion and scope of cross-border conversion.
- ✓ Regarding the applicable law, the provisions on national conversions apply to companies with registered offices in Portugal on a subsidiary basis.
- ✓ New elements have been included in the cross-border conversion project.

With regard to the drafting of the expert report, the protection of company creditors and the control of the legality of operations, similar

changes have been made to the cross-border merger and demerger regime, namely the provision of a 3-month deadline for the creditors of the participating companies to file a legal opposition.

**iv. Registration of cross-border mergers, demergers and conversions**

- ✓ The registration of these cross-border operations is carried out *ex officio* by the commercial registry services, which notify, through the system of interconnection of registers, the competent registry of the Member State of each of the participating companies of **(i)** the registration of the respective project, **(ii)** the issue of the prior certificate,

**(iii)** the start of the production of effects of each of the companies, with registered offices in the European Union, participating in the merger, demerger or conversion, respectively.

**v. Updated fee regime**

- ✓ Deposit of the merger, demerger or conversion project - € 120,00
- ✓ Registration of merger, demerger or conversion - € 225,00
- ✓ Issue of preliminary merger, demerger or conversion certificates - € 250,00
- ✓ Please note that there are exceptions to the application of this regime to companies in liquidation or which are subject to resolution instruments, powers and mechanisms.

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