

PORTUGAL

the liabilities' side of its balance sheet equal to the total amount of the financial assistance;

- when a third party acquires shares from the company pursuant to section 2 of article 622 of the code, or through a subscription by the beneficiary to a capital increase, with the financial assistance of the company, the acquisition of the company's shares must occur at a fair price.

Except for the requirement of sufficient distributable profits, the conditions do not apply when financial assistance is granted to company staff or to affiliate companies controlled by that staff.

Reporting requirements

Without doubt, the new rules facilitate the granting of financial assistance by a company in view of the acquisition of its shares by a third party. However, the question remains whether, in practice, companies will not be deterred from applying the procedure for financial assistance in acquisitions because of its strict conditions.

Indeed, new article 629 of the companies code imposes on the company a requirement to publish the report, as drafted by the board of directors, in its whole, containing, for example, the details of the conditions of the transaction, in the annexes to the *Belgian Official Journal*. Some companies will be reluctant to disclose such sensitive information to the public.

Pursuant to these new rules, the board of directors is responsible for the financial assistance to the extent it has to investigate whether the assistance is given under fair market conditions or not, and whether the purchaser of the shares is creditworthy or not. Pursuant to the companies code, the directors of the target company can be held jointly and severally liable towards the company and third parties for any damages resulting from any breaches to the rules and they can also be held criminally liable for any such breach. Such liabilities will have a dissuasive effect on the directors when confronted with the possibility of applying the financial assistance rules in less clear-cut cases.

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Taking harmonised steps over borders

Portugal has introduced new rules governing cross-border mergers. Diogo Perestrelo and Marta Costa Martins explain

A set of harmonised rules on cross-border mergers – Law 19/2009 – was introduced in Portugal last May, transposing into the country's law European Directive 2005/56/EC.

The Directive, adopted by the European Commission on 2005, aimed at harmonising the regime for cross-border mergers within the member states, since prior to adoption limited liability companies wishing to take part in cross-border mergers had encountered many legislative and administrative difficulties.

The Directive identifies which legislation shall be applicable in the event of a merger to each of the merging companies. Once the new entity emanating from the merger has been created, a single body of national legislation applies – that of the member state in which the entity has established its registered offices.

Basic principles

The basic principle of the Directive is that cross-border mergers shall be governed in each member state by the principles and rules applicable to 'domestic' mergers, except in the cases where the specific regime for cross-border mergers provides differently.

The new Portuguese legislation amended the *Código das Sociedades Comerciais* (the companies' code) as well as the *Código de Registo Comercial* (companies registry code) and introduced to the country's legal system not only important measures regarding the implementation

of cross-border merger operations, but also the legal regime applicable to the participation of the employees in the companies resulting from the cross-border mergers.

Law 19/2009 is applicable to mergers between limited liability companies in which at least one of the merging companies has its registered offices in Portugal and the other company has been incorporated in accordance with the legislation of another member state and has its registered office, central administration or principal place of business within the Community. Therefore, the procedures exclude mergers of companies within the same member state.

The main steps involved in a cross-border merger procedure are as follows:

- Drafting common terms of the cross-border merger by the management or administrative bodies of the merging companies; in addition to the information required for domestic mergers, the common draft terms of the merger shall also contain: the rules governing the transfer of shares and other securities representing the share capital of the company resulting from the cross-border merger; information on the date of closure of the merging companies' accounts used to establish the conditions of the cross-border merger; possible repercussions of the merger on the job positions of the companies involved in the transaction;

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Focus Europe

PORTUGAL

and if applicable, information on the procedures by which arrangements for the involvement of the employees in the definition of their rights of participation in the company resulting from the cross-border merger.

- Registration of the common draft terms of the cross-border merger together with the Commercial Registration Department. As for domestic mergers, there is also a duty to register and disclose the common draft terms of the merger to allow creditors, workers and shareholders the exercise of their opposition right to the merger.
- Approval of the merger by the shareholders. A general shareholders meeting shall be held in each of the merging companies to approve the draft terms of the cross-border merger. The rules governing domestic mergers concerning the approval as well as the formal requirements for the general shareholders meetings shall be applicable.

- Execution of public deed. This formality may be replaced by a private document if the merging companies do not hold immovable property.
- Issuance of a certificate attesting the completion of the pre-merger requirements by the Commercial Registration Department. One of the most important improvements of Law 19/2009 is the establishment of rules for the control of the legality of the cross-border mergers. As such, the Directive foresaw that the member states should elect the entity to control the legality of the cross-border merger, and in the Portuguese case, such entity is the Commercial Registration Department.

- Definitive registration of the merger together with the Commercial Registration Department. The application for merger registration must be presented, together with the certificate referred to above and the common draft terms of the cross-border merger within six months from the issuance of said certificate.

Following the definitive

registration of the cross-border merger, the incorporated companies or, when a new company is formed, all the merged companies cease to exist, with all respective rights and obligations transferred to the surviving company or to the new company. In addition, the shareholders of the extinguished companies become shareholders of the surviving company or, as the case may be, of the new entity.

Employee rights

Besides the introduction of a new legal framework on cross-border merger, Law 19/2009 has also the merit of introducing important principles and rules with regard to employee participation on cross-border mergers. It is now required that, on the specific cross-border mergers identified in the legislation, the merging companies form a special negotiating body that is the responsible entity for safeguarding the employee participation rights during the course of the merger procedure and to agree on the workers participation rights on the company resulting from the merger.

Negotiation shall begin on the initiative of the merging companies as soon as the special negotiation body is formed, and it shall be finished within six months. On agreement, this period may be extended for another six-month period. At the end of the negotiation, the parties shall execute a written agreement that shall be sent to the labour ministry.

Until now, according to the information provided by the Commercial Registration Department, no cross-border merger has been registered with such entity. It remains to see what impact the new legislative framework on cross-border mergers will have on future restructurings.

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POLAND

Greater flexibility

Recent changes to the taxation of real estate transactions in Poland allow taxpayers wider options.

Piotr Augustyniak and Aleksandra Grabarska analyse the benefits

The amended provisions to the law on Goods and Services Tax have brought about important changes in the way the supply of real estate is taxed in Poland.

A VAT exemption has been introduced that permits taxpayers to choose which tax will apply to a transaction. The amendment has been introduced through Directive 2006/112/EC and provides Polish taxpayers with the option to pay VAT or Civil Law Activities Tax on a real estate transaction in certain circumstances.

Until the end of December 2008, the position regarding VAT charged on real estate transactions would depend on whether the subject of the transaction related to land, buildings, fixed installations or parts thereof. From 1 January 2009, the supply of buildings, infrastructure, or their parts will generally be exempt from VAT, except in situations where: there is a 'first inhabitation' of the property; or the period between 'first inhabitation' and the supply of buildings, fixed installations or their parts is less than two years.

First inhabitation

Under the new regulations, 'first inhabitation' is understood as being the delivery of the buildings, fixed installations or their parts that fall within the scope of activities that are subject to VAT for the first purchaser or dweller, after the initial completion or improvement (provided that the expenses incurred constitutes at least 30 per cent of the initial value of the property) of the buildings and fixed installations and parts thereof.

In certain circumstances, a