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Crossborder mergers, demergers and transformations

Decree-Law 114-D/2023 of December 5 amends, among other regimes, the merger, demerger and transformation regimes established in the Portuguese Commercial Companies Code and introduces new regimes on crossborder demergers and transformations.

Portugal - Legal Update

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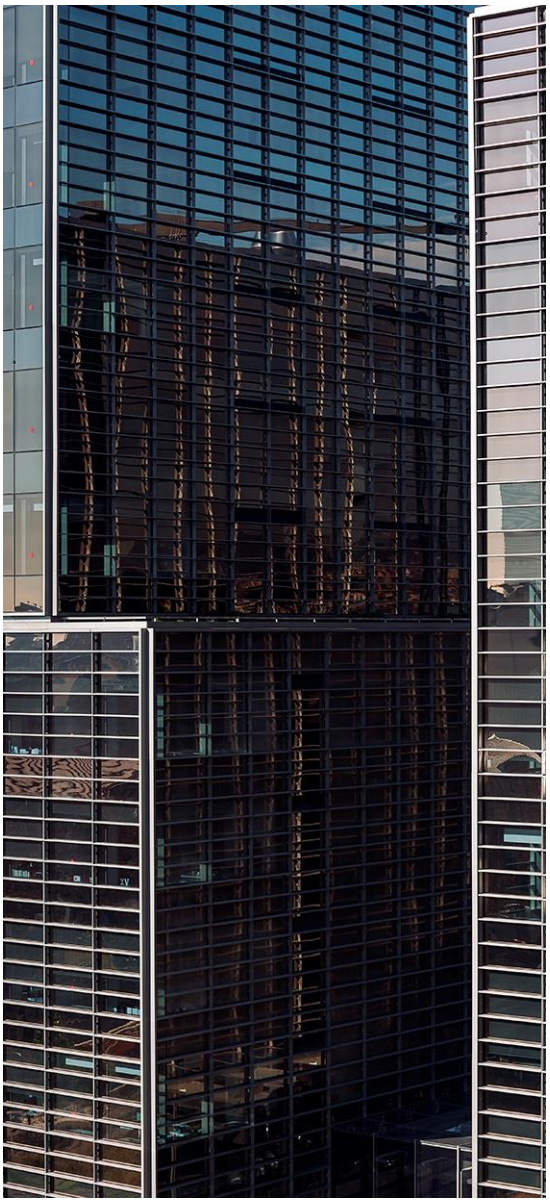

Key aspects

- Transposes into Portuguese law the part of Directive (EU) 2019/2121 that concerns crossborder transformations, mergers and demerger of limited liability companies
- Amends the merger (internal and crossborder), demerger and transformations regimes established in the Portuguese Commercial Companies Code
- Establishes greater accountability for members of management bodies in company demergers or transformations
- Introduces new regimes on crossborder demergers and transformations
- Extends the time limit for creditors to file an objection from one to three months
- Requires the management bodies of participating companies to prepare a report for shareholders and employees in cases of crossborder reorganization
- Establishes the non-applicability of certain legal provisions concerning resolution tools, powers and mechanisms of central counterparties under the now partially implemented Regulation (EU) 2021/23.

New legal regime on crossborder mergers, demergers and transformations

Decree-Law 114-D/2023 of December 5 ("Decree-Law 114-d/2023"), which will come into force on January 4, 2024, transposes into Portuguese law Directive (EU) 2019/2121 of November 27, 2019, which aims to harmonize the rules on crossborder mergers, demergers and transformations of limited liability companies. This will guarantee additional and adequate protection for employees, creditors and shareholders. This decree-law includes amendments to the merger, demerger and transformation regimes established in the Portuguese Commercial Companies Code, while also introducing new regimes on crossborder demergers and transformations.

Internal reorganization

Amendments to internal merger regime

Merger proposal

In addition to the information already required, the internal merger proposal must now include:

- the type of company resulting from the merger (and not only its registered office and name);
- any guarantees offered by the incorporating company or the new company regarding the types of protection for creditors' rights;
- as regards the rights guaranteed by the incorporating company or the new company to special rights shareholders of the company being incorporated or the companies to be merged, the merger proposal must now include information on the consideration offered for the acquisition of shares by the acquiring company or the new company to the shareholders of the company being acquired or the companies to be merged, as well as the rights granted by these companies to special rights shareholders.

Proposal oversight

Regarding the report to be drawn up by the auditors containing their reasoned opinion on the appropriacy and reasonableness of the exchange ratio and the consideration for the acquisition of the shares, the merger proposal must now consider and include, in addition to the required information:

- the market price of the shares of the companies participating in the merger before the announcement of the draft merger proposal or the value of the companies, excluding the effect of the proposed merger, determined in accordance with commonly accepted valuation methods;

- the method(s) used to determine the consideration for the proposed acquisition of shares; and

- the justification for the application to each specific case of the methods used to determine the exchange ratio and the consideration for the acquisition of the shares, indicating (i) the amounts obtained using each of these methods; (ii) the relative importance of each of these methods in determining the proposed amounts; and (iii) where applicable, the justification for the use of different methods—the provision no longer refers to special difficulties that the auditor(s) may have encountered in their valuations.

Convening notice for the general shareholders meeting to approve the proposed merger

In addition to other information, the convening notice for the general shareholders meeting must now include:

- a statement that the merger proposal and the attached documentation can be viewed not only by the company's shareholders and creditors, but also by the employee representatives or, in their absence, by the participating company's employees; and

- a notice that they can send their comments on the proposed merger to the company within five business days before the date set for the general shareholders meeting.

Creditor objections

The time limit for creditors whose claims predate the publication of the registration of the merger proposal to file an objection to the merger is extended from one to three months after the date the registration of the merger proposal is published.

Companies in liquidation and mergers of dissolved companies

Dissolved companies can now merge with other dissolved or non-dissolved companies, even if liquidation has been ordered by the courts, provided they meet the requirements to resume their activity. However, this does not apply to companies in liquidation that have already started distributing assets to their shareholders.

Amendments to regime on internal demergers and transformations

Liability of the members of the management body

Decree-Law 114-D/2023 expressly establishes the joint and several liability of the members of the management body of the participating companies for any damage caused by the demerger or transformation to the company, its shareholders and creditors if they fail to follow the diligence criteria of a judicious and organized manager in verifying the company's asset situation and closing the transaction.

Crossborder reorganizations

Amendments to crossborder mergers regime

Types

In addition to taking one of the forms provided for in article 97.4 of the Portuguese Commercial Companies Code, crossborder mergers can now also be carried out by transferring all the assets of one or more companies to another without the latter issuing any new shares, provided (i) one person holds—directly or indirectly—all the shares of the companies to be merged; or (ii) the shareholders of the companies to be merged hold the same proportion of securities and shares in all the companies to be merged.

Joint crossborder merger proposal and report

The joint crossborder merger proposal must now also include the draft amendments to be made to the memorandum of association and, where applicable, the bylaws of the incorporating company, or the draft memorandum of association and, where applicable, the bylaws of the new company.

The management bodies of the participating companies now have a duty to draw up a **report for the shareholders and employees** containing the legal and economic grounds for the merger, as well as an explanation of its implications for the employees and for each participating company's future business activity.

This report must include a section for the shareholders and a section for the employees. These sections can be combined into a single report or constitute two separate reports and must explain the following:

Shareholders section/report	Employees section/report
a) The consideration for the acquisition of the shares to be allocated to the shareholders and the method used to determine it b) The exchange ratio of the shares and, where applicable, the method(s) used to determine it	a) The effects of the merger on employment relationships and, where applicable, measures to safeguard these relationships b) Any significant changes in the applicable working conditions or the

c) The implications of the merger for the shareholders d) The rights that shareholders have under this chapter **Waiver**: This section is not required if all the shareholders and other holders of voting securities of the participating companies waive it.	locations where the company carries out its activity c) How the factors established in the preceding points affect the company's subsidiaries (if any) **Waiver**: This section is not required for a company participating in the merger that, together with its subsidiaries (if any), does not have more employees than the members of its management body.

The report(s) must be made available electronically, together with the crossborder merger proposal, to the shareholders and employee representatives or, in their absence, to the respective participating company's employees, at least six weeks before the date set for the general shareholders meeting.

If, by the date set for the general shareholders meeting, the company's management bodies have received an opinion from the employee representatives or, in their absence, the respective participating company's employees, the respective management bodies must:

- inform the shareholders of this fact and attach the opinion to the report; and
- send a reasoned response to the opinion.

Oversight of the joint crossborder merger proposal

The management body of each company participating in the merger must arrange for an analysis of the joint merger proposal by a statutory auditor or statutory audit firm that is independent of all the companies involved. This obligation is waived only if all of the shareholders and holders of other voting securities of all the companies participating in the merger waive it.

Approval of crossborder merger proposal

The resolution of the general shareholders meeting of each of the participating companies must not only approve the joint merger proposal but also the draft amendments to be made to the memorandum of association and, where appropriate, the bylaws of the acquiring company, or the memorandum of association and, where appropriate, the bylaws of the new company.

The general shareholders meeting of each of the participating companies cannot approve a resolution without acknowledging (i) the management report for the shareholders and employees; (ii) the auditor or auditors' report and any comments made by the shareholders, company creditors and employees about the merger proposal; and (iii) comments on any merger proposal put forward by the shareholders, company creditors, employee representatives or, in their absence, the employees of the same participating company within five business days before the date set for the general shareholders meeting.

The following do not constitute independent grounds for challenging the approval of the joint crossborder merger proposal:

- Setting an insufficient exchange ratio for the shares
- Setting insufficient consideration for the acquisition of the shares
- The information provided regarding the exchange ratio of the shares or the consideration for the acquisition of the shares does not meet the legal requirements.

Shareholders' rights

Judicial application for adequate consideration: Any shareholder of a participating company with its registered office in Portugal that considers the consideration offered in the joint crossborder merger proposal for the acquisition of its stake to be inadequate is entitled to ask the court, within six months of the merger resolution date, to set an adequate consideration amount.

Right of withdrawal: Any shareholder of a participating company with its registered office in Portugal that has voted against the crossborder merger proposal is also entitled to demand, within one month of the merger resolution date, that the company acquire or arrange for the acquisition of its stake for an adequate consideration amount, provided that, due to the merger, the shares allocated to that shareholder in the company resulting from the merger are governed by the laws of another European Union ("EU") Member State.

A shareholder that has requested withdrawal and considers that the consideration offered by the company participating in the merger for the acquisition of its stake has not been set at an adequate amount is entitled to apply to the court for additional consideration within six months of the resolution date.

The exercise of these rights by the shareholders does not prevent the definitive registration of the merger in the commercial register.

Prior certification and registration of the merger

Companies participating in a crossborder merger must obtain a pre-merger certificate issued by the commercial registry of the Member State where they have their registered office, certifying that the pre-merger acts and formalities have been complied with in accordance with the law and the joint merger proposal.

Within three months from the date the commercial registry receives the respective application, it must verify (i) compliance with the legal requirements; (ii) the publication and registration of the joint proposal; (iii) the reports of the company bodies and experts, if any; and (iv) any other required documents. If necessary, it may consult other competent authorities and an independent expert. If more information has to be obtained, further investigation measures have to be implemented, or the merger is particularly complex, the three-month period for verifying legality can be extended for a further three months. The commercial registry must inform the participating companies of the reasons for the extension.

Merger of a company wholly owned by another company

Decree-Law 114-D/2023 clarifies that this regime covers the merger in one company of another company or other companies in which the first is the sole owner of all the shares, and not only of one company, as established in the previous regime. It also clarifies that sole ownership can be direct or indirect—that is, through people who hold the shares on behalf of the incorporating company but in their own name—and that the condition for applying this regime is that the acquiring company does not allocate new shares as part of the merger.

If the approval of the joint merger proposal is waived by the general shareholders meetings of all the participating companies, the following documents must be made available at least one month before the decision on the merger is made: (i) the joint merger proposal; (ii) a notice for shareholders, creditors and employee representatives or, in their absence, the employees themselves, to comment on the joint merger proposal; (iii) the management report; and (iv) the report of the statutory auditor or statutory audit firm.

Crossborder demerger

Concept and scope of crossborder demerger: It consists of the demerger of one or more companies when one of them has its registered office in Portugal and another of the companies participating in the demerger was incorporated under the laws of a Member State and has its registered office, central administration or principal place of business in the EU. A demerger can be full, partial or by separation.

The **crossborder demerger proposal** drawn up by (i) the management body of the company being divided, or (ii) jointly by the management bodies of all the participating companies must contain the following:

a) Legal form, name and registered office of the company being divided, as well as the proposed legal form, name and registered office of the recipient company or companies

b) Rules governing the exchange of securities or shares representing the share capital of the company being divided and the recipient companies, as well as the amount of any cash payments—does not apply to crossborder demergers by separation

c) Proposed indicative timetable for the crossborder demerger

d) Likely repercussions of the crossborder transformation on employment relations

e) Date from which the securities or shares representing the share capital of the companies grant the holders the right to participate in the profits, as well as any special conditions relating to that right

f) The date from which the transactions of the company being divided will be considered, for accounting purposes, to have been carried out on behalf of the recipient companies—does not apply to crossborder demergers by separation

g) Special advantages granted to members of the management, supervisory or controlling bodies of the company being divided

h) Shareholders' rights and rules for exercising them

i) Memorandum of association and bylaws of the recipient companies, as well as any changes in the company being divided, in the case of a partial demerger or demerger by separation

j) Employees' participation rights in the recipient companies

k) Evaluation and information on the distribution or preservation of the assets allocated to each company involved in the crossborder demerger

l) Date of the accounts of the company being divided used to establish the conditions of the crossborder demerger

m) The guarantees offered to creditors.

Crossborder transformation

Concept and scope of crossborder transformation: Crossborder transformation occurs through transactions whereby a company, without being dissolved or liquidated or going into liquidation, while maintaining its legal personality, converts:

a) the legal form under which it is registered in Portugal to a legal form established in the Member State to which it is transferring its registered office; or

b) the legal form under which it is registered in another Member State to a form established in Portuguese law, transferring its registered office to Portugal.

The management body of the company being converted prepares a crossborder transformation proposal, which must include the following:

a) Legal form, name and registered office of the company in the departure Member State

b) Proposed legal form, name and registered office for the converted company in the destination Member State and the proposed location of its registered office

c) Memorandum of association of the company in the destination Member State, where applicable, and the bylaws, if they are contained in a separate instrument

d) Proposed indicative timetable for the crossborder transformation

e) Rights conferred by the converted company on shareholders that enjoy special rights and on holders of securities other than those representing the company's share capital, or the measures proposed in relation to them

f) Any guarantees offered to creditors

g) Any special advantages granted to members of the management or supervisory bodies

h) Any incentives or subsidies received by the company in the departure Member State in the previous five years

i) Information on the cash compensation to be allocated to members that voted against the approval of the transformation proposal, under article 140-I of the Portuguese Commercial Companies Code

j) Likely repercussions of the crossborder transformation on employment relationships

k) Information on the procedures for determining employee participation schemes when defining their participation rights in the converted company, where applicable.

Provisions applicable to crossborder demerger, transformation and merger regimes

- **Affected entities**: Only private limited companies, public limited companies, and limited partnerships are affected by these types of corporate restructuring transactions.

- **Non-application of the regime**: These regimes do not apply to (i) transactions involving an undertaking for collective investment in transferable securities in corporate form; (ii) companies that are in liquidation and have started distributing assets to their shareholders; (iii) companies that are subject to resolution tools, powers and mechanisms; or (iv) companies subject to insolvency proceedings or preventive restructuring regimes (only for crossborder transformations).

- **Report for shareholders and employees**: The duty of the management body to prepare the above report on crossborder mergers for shareholders and employees also applies to crossborder demergers and transformations. This report must explain the legal and economic grounds for the crossborder demerger or transformation, as well as its implications for the employees and for the future activity of the companies resulting from these transactions. This also applies to the opinion of the employee representatives or, in their absence, the employees, and the resulting rights and obligations.

- **Expert review of the proposal**: Similar to the provisions on internal and crossborder mergers, the review must be conducted by an independent statutory auditor or a statutory audit firm, which prepares a report containing its opinion on the appropriacy and reasonableness of the transactions in question, considering (i) the market price of the exchange ratio of the shares and the consideration for the acquisition in crossborder demergers, and (ii) the cash compensation in the case of crossborder transformations. Decree-Law 114-D/2023 establishes the requirements and content of the report, as well as the possibility of waiving the expert examination in certain cases. The expert review of the proposal can be excluded in cases of crossborder demerger by separation or crossborder transformation of a sole shareholder company.

- **Shareholder consideration**: Decree-Law 114-D/2023 establishes a period of two months after the final registration of the crossborder reorganization transaction in the commercial register for paying all the consideration for the acquisition of the shares to the shareholders of the participating companies.

- **Shareholder protection**: The above rights to apply for adequate consideration and withdrawal in crossborder mergers also applies to crossborder demergers and transformations.

- **Creditor objections and protection**: Creditors that can reasonably demonstrate that the transaction affects the settlement of their previous claims and that the company has not offered them adequate guarantees can apply to the courts to obtain adequate guarantees within three months from the date the crossborder transformation or demerger proposal is published. The guarantees offered to creditors are subject to the condition that the crossborder transformation or demerger actually takes place.

- **Prior certificate**: Similar to the situation with crossborder mergers, the competent authorities for checking the legality of crossborder demergers or transformations are the commercial registries.

Non-application of resolution tools, powers and mechanisms

Decree-Law 114-D/2023 also partially implements Regulation (EU) 2021/23 on a framework for the recovery and resolution of central counterparties, establishing the non-applicability of the following legal provisions to resolution tools, powers and mechanisms under that regulation:

- Verification of contributions in kind (article 28 of the Portuguese Commerical Companies Code)
- Loss of half the capital (article 35 of the Portuguese Commercial Companies Code)
- Share capital increase resolution (article 87 of the Portuguese Commercial Companies Code)
- Capital reduction and creditor protection (articles 94, 95, 96, and the newly added 96-A of the Portuguese Commercial Companies Code)
- Amortization of shares with capital reduction (article 347 of the Portuguese Commerical Companies Code)
- Capital increase and reduction (articles 456 to 463-A of the Portuguese Commercial Companies Code)
- (Internal) merger: The (internal) merger regime does not apply to resolution tools, powers and mechanisms.
- Crossborder demerger and transformation: The crossborder demerger and transformation regimes do not apply to companies that are the subject of resolution tools, powers and mechanisms, or that are in liquidation and have started distributing assets to their shareholders.

During a pending company restructuring process established in the Company Insolvency and Recovery Code, the legal provisions regarding (i) loss of half the capital (article 35 of the Portuguese Commercial Companies Code); (ii) capital increase resolutions (article 87 of the Portuguese Commercial Companies Code); or (iii) capital reduction and creditor protection (articles 94 and 96 of the Portuguese Commercial Companies Code) do not apply.

For more information about the contents of this document, please contact *Cuatrecasas*.