
**Droit commercial: Express Form Mergers between Affiliates under French Law**
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**A new French Act, which has entered into force this summer, aims to simplify, clarify and adjust existing company law. It has extended the scope of express form mergers to affiliates in a group of companies, which should reduce time and cost in internal restructuring of group companies. A few legal questions and potential issues remain but their impact will be limited to marginal cases.**

On 19 July 2019, the French Parliament passed a new bill numbered 2019-744 and entitled "Act of simplification, clarification and adjustment of company law" which reforms and makes several amendments to existing statutes relating to French company law.

Among others, the new law extends the scope of so-called express form mergers (fusions simplifiées).Express form mergers are mergers of limited liability companies (sociétés par actions and sociétés à responsabilité limitée),[i] which are not required to comply with all legal formalities and requirements usually applying to ordinary mergers, such as obtaining the authorisation from the shareholder's absorbed company and issuing reports from the boards of the companies involved in the merger.

Before the new law was adopted in July 2019, express form mergers were restricted to companies with direct shareholding and control links. Specifically, one company had to hold at least 90% of the voting rights (or 100% of the share capital) of another company to take over and merge with it under the conditions of express form mergers. This was according to former French law, which itself implemented the European Directive on the mergers of public limited liability companies[ii].

Under the new law, which entered into force on 21 July 2019, a holding company may merge and amalgamate two of its direct subsidiaries in accordance with the legal conditions of the express form merger provided that the holding company holds at least 90% of the voting rights (or 100% of the share capital) of the two other companies.

Further, the new law specifies that the merger between affiliates does not require an exchange of shares where the holding company owns 100% of the share capital of the companies involved in the merger.

The entry into force of the new law may raise some practical questions, as only some areas of company law are covered by the Act.

First, how express form mergers between affiliates will be treated from a tax perspective?

[i] Articles L. 236-11, L. 236-2, L. 227-1 and L. 226-1 of the French Commerce Code.
[ii] Articles 24 et seq. of the Council Directive 78/855/CEE of 9 October 1978 as amended by the European Parliament and Council Directive 2009/109/EC

Indeed, mergers are encouraged by French lawmakers, who have granted them a favourable tax environment. Deferred taxation on gain capital and exemptions on stamp duties for transferred assets apply when a merger occurs between a holding company and its direct subsidiary.

The existing tax exemptions should be applicable to express form mergers between affiliates, provided that they comply with the conditions applying to mergers under the French Tax Code.

Second, will express form mergers apply to cross-border mergers of affiliates within the European Union? European law [iii] provides simplified formalities in the scenario where a "cross-border merger by acquisition is carried out by a company which holds" at least 90% of the voting rights. The French regulatory body in charge of coordinating legal formalities, the "Comité de coordination du registre du commerce et des sociétés" ("CCRCS"), ruled, prior to the enactment of the new law, that French company law had to be read in light of such a Directive, and that legal conditions of express form mergers should therefore apply to European cross-border mergers of a holding company with its subsidiary[iv] . There is no reason that the legal conditions of express form mergers do not apply to cross-between mergers between affiliates of two different EU member States, but the CCRCS will probably need to clarify its doctrine.

Third, specific regulations regarding competition and anti-trust law, foreign investments and acquisitions in specific sectors (such as press, medias, energy, banks, insurances and investment services), which may require authorisation or approval from authorities for mergers under certain circumstances, remain unchanged and will therefore continue to apply to express form mergers between affiliates.

For instance, where banks, insurance companies and investment firms are concerned, the French financial authority, the "Autorité de contrôle prudentiel et de resolution", must be informed of any change in share capital. Its authorisation (or in respect of banks, the authorisation from the European Central Bank) must be obtained where the merger results in a direct/indirect acquisition or increase in shareholding.

However, it is competition law where the trickiest rules applying to mergers may be found.

A merger may fall within the turnover thresholds that trigger a required notification to the EU Commission pursuant to the EU Merger Control Regulation 139/2004 (the "Merger Regulation") and even though it would not be subject to a notification to the EU Commission, it may need to be notified to the French Competition Authority (Autorité de la concurrence) if the following thresholds are met:

- the combined worldwide turnover of all the companies involved in the merger exceeds EUR 150 million; and
- the turnover for the activities achieved in France by each of at least two of the companies involved in the merger exceeds EUR 50 million.

These thresholds are lower when the merger comprises two or more companies carrying out retail activities.

However, these competition and anti-trust rules apply to mergers involving "previously independent undertakings"[v] .

As the European Commission noted: "a merger within the meaning of Article 3(1)(a) of the Merger Regulation occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities".[vi] Accordingly, these rules should not apply to a mere intragroup restructuring between affiliates which are not independent by definition, unless the merger results in a change in their ultimate controlling shareholders or in a joint-venture agreement with a third independent party.

[iii] Article 15 of the European Parliament and Council Directive 2005/56/EC.
[iv] Advice No 2015-022
[v] Article 3.1 (a) of the Merger Regulation and Article L. 430-1 I of the French Commercial Code.
[vi] Jurisdictional Notice 2008/C 95/01 of the European Commission.