

Brief presentation of ordinance no. 2023/393 transposing directive 2019/2121 on cross-border mergers, divisions and conversions.

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Ordonnance no. 2023-393 of 24 May 2023 has just been adopted, as provided for by Law no. 2023-171 of 9 March 2023, article 13 of which authorised the government to adopt by ordinance, within three months of its promulgation (i.e. before 10 June 2023), all measures that are necessary to reform the regimes governing mergers, divisions and transborder conversions of commercial companies, in particular in order to transpose Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, and to take the measures to coordinate and adapt the legislation in connection with this transposition.

It is recalled that Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 reforms EU law applicable to cross-border mergers and divisions and introduces a regime for cross-border conversions. Firstly, the effect of these operations is affirmed or reaffirmed (active and passive transfer of the assets and liabilities of the absorbed, divided or transformed company, despite the severance of the link with the home state). Secondly, there are rules for the protection of shareholders, employees and creditors.

By leaving a wide margin of manoeuvre to the Member States, while introducing control instruments that could prove restrictive of freedom or even be dissuasive, and by refraining from giving precise definitions, the text of the directive raised a number of concerns. The ordinance clarifies the solutions in a way that favors an application of the directive in France in accordance with the case law of the Court of Justice of the European Union. At the same time, it significantly amends national law on divisions, importing into French law the mechanism used in cross-border division law.

We will concentrate here on a few notable aspects of the text relating to cross-border transactions.

Some of these concern all three cross-border transactions (I), while others are specific to one of the three transactions (II).

I - Rules common to the three cross-border transactions

A) Clarification of the scope of European law on cross-border transactions.

Whether in the case of mergers, divisions or conversions, the Ordinance confirms that European crossborder transaction law only applies if all the companies party to the transactions are capital companies within the meaning of Annex II to Directive 2017/1132 of 14 June 2017. In France, only joint stock companies and SARLs are affected. Transactions outside the scope will continue to be governed by private international law and French substantive law as regards transactions involving a company

whose registered office is in France, with the court having to interpret French law in the light of the right of establishment as derived from CJEU case law, where the border crossing remains internal to the Union.

B) Clarification of the right of withdrawal of certain members.

It should be remembered that the Directive compensates for the prohibition on Member States to make the cross-border operation subject to a decision by shareholders with a majority of more than 90% of the voting rights, by introducing a mandatory right of withdrawal for shareholders who vote against the operation.

On the one hand, the Ordinance takes advantage of the possibility opened up by the Directive to extend the right of withdrawal to shareholders other than those who voted against the proposed crossborder operation: under French law, holders of shares without voting rights and shareholders whose voting rights have been temporarily suspended will benefit from this right. Secondly, the ordinance specifies, through the requirements concerning the independent experts' report, the way in which it is logical to value the securities concerned: the market price must be considered, but before the announcement of the proposed transaction and without taking into account the effect of the proposed transaction. A decree by the Conseil d'Etat should further specify the terms and conditions of the buyback by the company concerned, which must in any event make a buyback offer.

C) Designation of a single authority responsible for monitoring the compliance and legality of cross-border transactions: the Registrar of the commercial court (greffier du tribunal de commerce)

It was up to the Member States to designate the authority or authorities competent to carry out both the so-called due diligence (leading to the issue of a prior certificate) and the so-called legality control (leading to the approval of the transaction, making it effective). Article 13 of the Enabling Act stipulated that the competent authority responsible for controlling the legality of the transaction (stage 2) would necessarily be the Registrar of the Commercial Court. The Ordinance completes the rule by stipulating that the registrar is responsible for checking compliance and issuing any certificate of compliance (stage 1).

In France, a single authority is therefore responsible for all controls, which is a guarantee of simplicity and efficiency. In particular, the Registrar will have the task of carrying out the new anti-abuse due diligence: verifying that the cross-border operation is not set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or French law, or for criminal purposes. To this end, it may request any information it deems necessary from the competent authorities and call in an independent expert it appoints, whose remuneration will be paid by the company. This last provision is original and we hope that the registrars will not abuse it. They have the difficult task of carrying out administrative controls in compliance with the law and also with the case law of the CJEU.

II - Transaction-specific rules

A) Mergers: relaxation of the concept of merger... when the merger is cross-border.

Even if the contribution is remunerated by a balancing payment of more than 10% of the nominal value of the securities allotted, the merger regime applies if at least one of the States involved in the merger allows it. In the case of mergers governed solely by French law, the classic definition is maintained.

B) Divisions : recognition of the direct allocation to the shareholder of the transferring company of shares in the company receiving a par al transfer of assets.... including purely internal transactions.

The ordinance enshrines for cross-border transactions, and extends to purely internal transactions, a very convenient and effective mechanism in the case of partial transfers of assets: the shares of the transferring company, those of the receiving company, or both, may be allocated directly to the shareholders of the transferring company. All under conditions to be specified by decree in the Conseil d'Etat. We can only welcome the introduction of this measure into French law and this indirect influence of EU law on national law.

C) Confirmation of the preservation of the legal personality of the converted company.

While Directive 2019-2121 secures the effects of the international conversion by clearly and precisely enshrining them, it did not expressly state that the legal personality of the converted company would be preserved. The Ordinance therefore goes further. Not only reiterating the effects enshrined in the Directive, the text expressly makes the retention of the legal personality of the converted company an element of the definition of cross-border conversion. Since the continuation of a person is a classic concept in French law, this clarification is a commendable effort to ensure that this mechanism, which is new in the international system, is properly understood.