



## PILLAR II PRACTICAL AND ADMINISTRATIVE CASES

### *Cross-border mergers of commercial companies*

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#### I. ABSTRACT

Commercial companies in Albania play an important role, but thanks to our considerable resources they can also play a role in the European market. For the purpose of the approximation of the Albanian legislation to the European one, Albania has passed the law on cross-border mergers of commercial companies, so that steps and procedures of mergers of Albanian and European commercial companies can be set. The mergers create the conditions for a more effective competitiveness and a more efficient common market, so this paper will cover some of the main concepts of the cross-border mergers, the forms of the mergers, legal consequences and their effects on the domestic and the European economy. Special attention will be paid on the interests of the employees who are the most effected party by this law.

**KEY WORDS:** European market, Albanian commercial companies, cross-border merger, employee.

#### ABBREVIATIONS:

EU

European Union

LMCC/Law No.9901

Law “On the Merchants and Commercial Companies”, amended.

LCBMCC / Law No.110/2012

Law “On the Cross-Border Mergers of Commercial Companies”.

NRC / NBC

National Registration Centre / National Business Centre

#### II. INTRODUCTION

The European trade is based on the principle of the development of a common market within an efficient and effective legal framework.<sup>1</sup> Commercial entities that engage in sales and commercial exchange, supply and production, operate in compliance with the domestic and European legislations. This way, in the framework of the European legislation, the countries in cooperation with the EU institutions have provided certain artificial solutions to increase the cooperation between member states, by creating new commercial structures such as European companies, economic groups of interests, European corporations etc.

<sup>1</sup> Zajmi,I., The European Law, OMBRA GVG,Tirana 2010, page 16.



The idea of drafting a directive that would approximate the legislation of the EU member states towards the cross-border mergers of commercial company's dates in 1984, but it was only finalized in 2005. It transposed to the member states in 2007 because of the divergences that existed between member states in relation to the involvement of employees in the governing bodies of the companies.

The need to harmonies the legislation of the EU member states aimed to facilitate and increase the commercial exchange, facilitate procedures of mergers of commercial companies, reduce costs and increase transparency. The European Court of Justice in its case law<sup>2</sup> had sanctioned that denying the right of the merger of commercial companies from various countries in a member state, when the merger agreement was in compliance with the domestic law, constituted violation of the right of foundation.

Directive 2005/56<sup>3</sup> of the European Union provides a solution for all commercial companies that wish to collaborate and extend their activity not only in the domestic market but also into the European one. The Directive has so provided a precise legal framework and a practical solution for this kind of commercial relation aiming at achieving the most effective functioning of the European market.<sup>4</sup>

In its long path towards becoming a member of the large European family, with the great hope of integration in the near future, Albania incorporated this directive in its domestic legislation with the Law No. 110/2012 "On the Cross-Border Mergers of Commercial Companies". This has opened the way to the creation of new forms of commercial collaboration by taking preliminary measures for preparing to enter as soon as possible this market, which is new, and unknown to us.

The purpose of the Law No. 110/2015 is to set the terms, procedures and legal consequences of cross-border mergers between Albanian and European companies, and to provide measures to protect the employees and creditors of these companies.<sup>5</sup> This law provides a greater protection for the creditors and employees, and can also redress potential consequences caused by the mergers. The special exception is that the law does not apply to mergers of companies with capital deriving from collective investment of the public, but only to mergers of private capital companies.<sup>6</sup>

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<sup>2</sup>Sevic Systems AG, Case C-411/03, European Court of Justice.

<sup>3</sup>Directive 2005/56/EC of the European Parliament and of the Council of 26<sup>th</sup> October 2005 "On Cross-border Mergers of Limited Liability Companies". CELEX Number: 32005L0056, Official Journal of the European Union, Series L, No. 310, 25<sup>th</sup> November 2005, pages 1 - 9.

<sup>4</sup>Study on the Application of the Cross-Border Mergers Directive, International Policy Studying, 2013, page 5.

<sup>5</sup>Article 1 of Law No. 110/2012 "On the Cross-Border Mergers of Commercial Companies".

<sup>6</sup>Article 2 of LCBMCC.



### III. CROSS-BORDER MERGERS OF COMMERCIAL COMPANIES

A commercial company can change its legal form through reorganization. For example, from a Limited Liability Company it can take the form of an anonymous / shareholding company, or it can be divided or merged. This paper focuses on the cross-border mergers of Albanian and European commercial companies, not only from the perspective of the Albanian legislation, but also from the European one.

According to the LMCC, in general, commercial companies can merge in two ways<sup>7</sup>:

- i. through merger by absorption, in which all active and passive assets of one more target companies are transferred to another existing company – the absorbing company, in exchange for shares in this company;

or

- ii. by establishing a new company to which all active and passive assets of the existing companies that will merge are transferred, in exchange for shares in the new company, and this is called “merger by formation of a new company”.<sup>8</sup> LMCC allows only two types of companies to change their legal form: Limited Liability Companies and Anonymous / Shareholding Companies.

On the other hand, the cross-border merger of commercial companies is the merger between one or more Albanian companies and one or more European companies.<sup>9</sup> A European company is considered a commercial company with registered office, headquarters or main place of activity in the territory of a European country, whose legal form is defined by the Directive 2005/56/EC "On Cross-Border Mergers of Limited Liability Companies". Cross-border Mergers of Commercial Companies can be accomplished in several ways, specifically when<sup>10</sup>:

- i. one or more commercial companies are dissolved without going through the process of liquidation in the state of solvency (the target company), by transferring all active and passive assets to another commercial company (the absorbing company), in exchange for the issuance in favour of the partners / shareholders of the Target Company of securities or capital shares of the Absorbing Company, and, if applicable, a monetary payment not greater than 10% of the nominal value, or, if the nominal value is not available, of the accounting value of these securities or capital shares; or

<sup>7</sup> Malltezi, A., Albanian Law on Commercial Companies, Mediaprint, Tirana, 2011, page 270.

<sup>8</sup> Article 215 of Law No.9901- “On the Merchants and Commercial Companies”, amended.

<sup>9</sup> Article 3/2 of LCBMCC.

<sup>10</sup> Article 3 of LCBMCC.



- ii. two or more companies are dissolved without going through the process of liquidation in the state of solvency (the target company), by transferring all active and passive assets to a commercial company recently founded (the new company), in exchange for the issuance in favour of the partners / shareholders of the Target Company of securities or capital shares of the New Company, and, if applicable, a monetary payment not greater than 10% of the nominal value, or, if the nominal value is not available, of the accounting value of these securities or capital shares;
- iii. a commercial company, after it is dissolved, without going through the process of liquidation in the state of solvency (the target company), transfers all active and passive assets to the commercial company that owns all securities or capital shares of the dissolved company (the Absorbing Company).

The Albanian law on CBMCC allows only two types of commercial companies to merge Shareholding Companies and Limited Liabilities Companies.<sup>11</sup> The aim of this legal provision is to approximate our legislation to the Directive 2005/56 "On Cross-Border Mergers of Limited Liability Companies".

The specific of cross-border mergers is the procedure, which is relatively new and very formal. The merger procedures start with the preparation of the written draft-agreement by the legal representatives of the companies that intend to merge. These agreements set the common conditions, such as the form of the company, name, headquarters, address, scope of activity, the applicable report on the exchange of securities or shares of the company and the value of the monetary payment, the statute of the absorbing company etc...<sup>12</sup>

Apart from the agreement, the representatives of the companies will have to prepare a detailed report as follows: The legal representatives of each participating Albanian company will prepare a detailed report explaining the merger agreement and its legal and economic bases, especially the report on the exchange of shares and special rights. This report must detail the difficulties that have been encountered in relation to the assessments conducted, and the consequences of the cross-border merger on the partners/shareholders, creditors and employees of the participating companies.<sup>13</sup>

Legal representatives of each participating Albanian company appoint one or more independent licensed experts to scrutinize the common terms of the draft-agreement on the cross-border merger. The experts in their declaration will describe and give their opinion on at least:

- i. the method/s used in preparing the proposed report on the exchange of shares;

<sup>11</sup> Articles 3-10 of Law No. 110/2012 "On the Cross-Border Mergers of Commercial Companies".

<sup>12</sup> Article 5, in the same place

<sup>13</sup> Article 6, in the same place.



- ii. if the method/s is/are appropriate in the case in question, they will report the values generated by using the method/s, and provide an opinion on the relative weight given to each method in order to arrive to the defined value;
- iii. specific difficulties encountered during the assessment.<sup>14</sup> This way, the bodies of the company pay to the economic consequences of the agreement (*mutatis mutandis*) the same attention they pay to the legal consequences.

Before the meeting of the General Assembly, the Administrators of the Albanian commercial companies publish the draft-agreements and the reports on the NRC/NBC website. The purpose of the publication is to make them known to third parties.<sup>15</sup>

The General Assembly is the body that has the main role in the procedure of cross-border mergers of commercial companies.<sup>16</sup> The approval of the draft-agreements cited above, the reports of the accounting experts and the merger's terms open the way to this new international structure. For this type of decisions, the Assembly needs  $\frac{3}{4}$  of the votes, i.e. a qualified majority, because of the effects of the decision. If the merger affects shareholders with special rights, they too have to approve the merger. This process is complete upon registration of this decision at the NRC/NBC.

A pre-merger certificate is required in cases of cross-border mergers of companies. The pre-merger certificate is prepared by a Notary Public in compliance with the requirements of the Albanian law at the request of legal representatives of the Albanian company's party in the merger, which confirms fulfilment of the cross-border pre-merger. This instrument, which in our legislation is the competency of the Notary Public, outlines whether all companies have met the conditions for the pre-merger.<sup>17</sup> There were debates during the approval stage of this disposition, on which the body responsible to issue the pre-merger certificate would be. Many European countries, such as France, have accepted the Court as the body, which will issue this certificate, while other countries are divided between the Notary Public and other bodies established for this purpose. In front of this dilemma, Albania decided to give a great role to the Notary Public, the same way some other countries, i.e. The Netherlands, had done<sup>18</sup>, thus becoming subject of criticism because the Notary Public would have broad competencies and could abuse them. The opinion of the author on this issue is that this right should belong to the Court, as the main body that can decide *ex-officio* on the validity of various legal conditions.<sup>19</sup>

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<sup>14</sup> Article 7, in the same place.

<sup>15</sup> Article 8, in the same place.

<sup>16</sup> Article 9 of LCBMCC.

<sup>17</sup> Article 10 of LCBMCC.

<sup>18</sup> <https://www.clearygottlieb.com/~media/cgsh/files/neës-pdfs/implementation-of-the-cross-border-merger-directive-in-the-netherlands.pdf>

<sup>19</sup> The right to which the institution is entitled to only by being such an institution.



Upon issuance of the certificate and registration of the company at the NRC / NBC, the company acquires its legal personality, and from that moment it is considered a subject of the law and can assume rights and responsibilities.

The merger via a simplified procedure is worth mentioning.<sup>20</sup> In this case, if the Absorbing Company is an Albanian company which owns 90% or more, but not all the shares that carry a vote in the General Assembly of the Target Company/ies, the report of the independent experts and the other documents necessary for the examination of the terms of the cross-border merger, are compulsory **only when these documents are required by the law applicable in the European country where the European target company is located.** So this legal provision eliminates some procedures and makes the cross-border merger simpler.

#### IV. LEGAL EFFECTS OF CROSS-BORDER MERGERS

As we have seen until now, the cross-border merger can happen in two ways: first, by transferring the assets to the existing company, second, by formation of a new company (New Co).

When assets are transferred to an absorbing company,<sup>21</sup> the cross-border merger produces the following legal effects:

- i. all active assets, the rights and obligations of the target company are transferred immediately to the absorbing company, notwithstanding the legal requirements for special formalities which in any case have a declarative effect;
- ii. partners or shareholders of the target company become partners or shareholders in the absorbing company;
- iii. the target company is considered dissolved. If the target company is an Albanian company, then it will immediately deregister from the NRC / NBC based on the provisions of the special law that regulates the organization and functioning of this institution, without going through the process of liquidation in the state of solvency

In cases of mergers by **formation of a new company**, the following are the legal effects:

- i. all active and passive assets of the target company are transferred immediately to the new company, notwithstanding the legal requirements for special formalities which in any case have a declarative effect;
- ii. partners or shareholders of the target company become partners or shareholders in the new company;

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<sup>20</sup> Article 15 of LCBMCC.

<sup>21</sup> Article 13 of LCBMCC.

- iii. the company is considered dissolved and if the target company is an Albanian company, then it will immediately deregister from the NRC / NBC based on the provisions of the law that regulates the organisation and functioning of this institution, without going through the process of liquidation in the state of solvency.<sup>22</sup>

## V. PROTECTION OF THE EMPLOYEES<sup>23</sup>

Employees are the ones who are most at risk from the cross-border mergers of commercial companies. A whole legal framework, domestic and foreign, has been established to protect their rights, and all efforts have been done to ensure that this legal framework is efficient and factual and not fictitious. The rights of the employees are exercised through their representatives in the governing bodies. The domestic and European law makes it mandatory to have these representatives.

The LMCC sanctions that when a company has more than 50 employees, they form the Council of Employees, which protects their rights. In a company with more than 20 but less than 50 employees, the assembly of the employees elects, by secret ballot, a representative for every 10 employees. The assembly of the employees elects a new representative for every 20 new employees. The Council of Employees cannot have more than 30 members at any given time.<sup>24</sup> This Council monitors the implementation of the law, of collective bargaining agreements and of provisions of the statute, so that the rights of the employees are protected as effectively as possible. It acquires information on the activity of the company, may appoint representatives in various levels of administration<sup>25</sup> and reports before the General Assembly of the commercial company on its activity. Despite such legal provisions, the implementation has not been satisfactory, and in most cases has been fictitious and formal, thus having no real function.

The LCBMCC sanctions that if the company that will be created by the merger will be an Albanian company, the dispositions that will protect the employees will be the dispositions of the LMCC. Apart from legal provisions, if the Albanian or the European company has more than 500 employees, the employees have the right to participate in various levels of administration or propose members of these bodies.<sup>26</sup>

Apart from the representation, the directive<sup>27</sup> gives the employees the right to negotiate with the company on the consequences the merger might have on them, so that they find a common language for the protection of the rights of the employees. After the draft-agreement on the conditions of the merger has been published, the legal representatives of the commercial

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<sup>22</sup>Article 13 of LCBMCC.

<sup>23</sup>Articles 16-22 of LCBMCC.

<sup>24</sup>Article 19 of LMCC.

<sup>25</sup>Articles 19-21 of LMCC.

<sup>26</sup>Article 16 / 2 of LCBMCC.

<sup>27</sup>Directive 2005/56/EC of the European Parliament and of the Council of 26<sup>th</sup> October 2005 "On Cross-border Mergers of Limited Liability Companies". CELEX Number: 32005L0056, Official Journal of the European Union, Series L, No. 310, 25<sup>th</sup> November 2005.



companies have the obligation to create the conditions for the creation of a special negotiations body. The special negotiations body is an *ad hoc* body with rights limited to the solutions of these issues only.<sup>28</sup>

The special negotiations body comprises at least ten members elected amongst the employees of the companies affected by the cross-border merger. In agreement with the legal representatives of the company, they negotiate on the degree of participation of the employees in the organizing and functioning of the company created by the merger. This body makes decisions with the votes of the majority of members, but to reduce the rights of the employees 2/3 of the votes are required. This body can be assisted by experts and costs will be covered by the participating companies. The objective of this body is to ensure an agreement on how to overcome problematic issues, allocate the mandates in the bodies of the company or decide on how officials are appointed in these bodies. After it is created, the special negotiations body has the right to be informed and consulted, and the right to convene. It is provided with the agenda of the meetings of administrative and supervisory bodies, and with copies of documents submitted to the assembly of the partners or shareholders.<sup>29</sup>

All parties have the right to access information on the company.<sup>30</sup> This information is accessible to employees, shareholders who request it, and creditors. If this information is secret, then the parties have the obligation to protect the confidentiality of such information.

## VI. CONCLUSIONS AND RECOMMENDATIONS

If Albania will manage to integrate in the European Union, it will for sure have advantages in the development of commerce, because the European companies will no longer have to follow long and bureaucratic procedures for their investments in Albania. This law opens the way for many countries to cooperate to overcome the shortages caused by lack of resources or technological production and development.<sup>31</sup>

One of the greatest benefits of this law is the reduction of operational and organizational costs, thus generating more revenue and financing for these companies<sup>32</sup>. Thanks to the implementation of this law, mergers in the form of temporary joint ventures created in Albania because of the concessions or master franchising<sup>33</sup>, will be replaced by new well-structured companies.

Law No.110/2012 is in general an approximation of the directive of the European Union, aiming to guarantee the common market and competition. Although it is a law that is not being

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<sup>28</sup> Article 19 of LCBMCC.

<sup>29</sup> Article 22 of LCBMCC.

<sup>30</sup> Article 32 of LCBMCC.

<sup>31</sup> <https://www.out-law.com/topics/corporate/reorganisations/using-cross-border-mergers-within-groups-of-companies-in-the-eea/>

<sup>32</sup> Study on the Application of the Cross-Border Mergers Directive, International Policy Studying, 2013, page 8.

<sup>33</sup> Companies created based on franchising contracts to disseminate the know-how.



implemented yet, it is of interest to monitor its implementation in the future as a result of the European integration of Albania. Delegation of a part of the sovereignty opens the way to the approval of a series of new sub-legal acts and implementation of the case law of the European Court of Justice.<sup>34</sup>

The future European and Albanian market will be one single market, so a more detailed harmonization of this directive is needed, instead of just a simple approximation deriving from the Stabilization & Association Agreement. The future issues related to this law will be *ipso facto*, but the necessary protection and preparation right now would make the work easier for the legislative bodies and the judicial system. Also, the common market needs a deep cooperation, and the role of the active companies will create more cooperation opportunities and exchange of know-how<sup>35</sup> so that Albania does not remain a producer just for its own needs, but it becomes a country with an impact on the European trade with the products from its large and endless natural resources.<sup>36</sup>

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<sup>34</sup>Zajmi, I., *The Common European Market*, OMBRA GVG, Tirana 2010, page 38.

<sup>35</sup>The entirety of experiences gained by a person during their business activity.

<sup>36</sup><https://jci.cc/ourevents/eukht2017>