

LEGAL ASPECTS OF MERGERS AND ACQUISITIONS IN SÃO TOME AND PRINCIPE

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GENERAL CONCEPT

A merger or acquisition is a commercial operation – usually made by a contract entered between two or more companies – and a legal process, by which the parties unify themselves under a single company.

APPLICABLE LAWS

Mergers of commercial companies are governed by Decree-law no. 598/73, of 8 November 1973 (enforceable in accordance to the Ordinance no. 575/74, of 6 September, 1974). The Commercial Code (approved by Real Decree, of 28 June, 1888) is also applicable.

In general, under the Decree-law no. 598/73 two or more companies, regardless of their types, can merge into a single company. However, cooperative companies may only merge with another company of their type.

TYPES OF MERGERS

Under paragraph 4 of Article 1 of Decree-law no. 598/73 there are two types of merger operations:

- (i) By the global transfer of the patrimony of one or more companies to another one, and the attribution to the shareholders of the former of parts or shares in the latter;
- (ii) By the creation of a new company, to which the patrimonies of the merged companies are globally transferred, the shareholders of the latter being given parts or shares in the new company.

Type (i) above is referred as merger-incorporation, which in Common Law literature is referred to as an acquisition. Under an acquisition, a company takes over another one and clearly becomes the new owner. Slightly different is type (ii), usually referred to as merger-concentration, or in Common Law literature is referred to as a merger. Under a merger, the assets of the participating companies are transferred into a third company which is created thereof.

M & A PROCEDURE

The merger procedure is comprised of the following steps:

[1] Merger project

The managers of the companies prepare a merger project as completed and clear as possible to the understanding of the planned operation. The merger project must mention at least the following information:

- (i) Type, reasons, conditions and objectives of the merger operation;
- (ii) Complete identification of the companies involved;
- (iii) Participation of one company in the share capital of the another (if any);
- (iv) Balance sheets of the intervening companies, mentioning the value of the elements of the assets and liabilities to be transferred to the absorbing company or to the new company;
- (v) The parts or shares to be allocated to shareholders of the company being absorbed (in case of a merger-incorporation operation) or of the companies being merged (when in a merger-concentration operation) and, if any, the amount in money to be paid to the same shareholders and the respective evaluation criteria;
- (vi) The draft amendment to be introduced in the AoA (Articles of Association) of the absorbing company (in case of a merger-incorporation operation);
- (vii) The measures to protect the rights of creditors;
- (viii) The measures to protect the rights of third parties (non-shareholders) on the profits of the companies.

[2] Supervision of project

After preparing the merger project, the managers of each of the participating companies must communicate the merger project and its attachments to the respective supervisory board or single supervisor, to have their opinion or, in their absence, to an accounting auditor or firm of auditors.

[3] General meeting

After appreciation of the supervisory body, the merger project is submitted for resolution to the shareholders, in a general meeting, of each of the participating

companies, which must take place no earlier than 30 days from the date of sending or publication of the call.

Unless otherwise provided in the AoA, the resolution is taken in accordance with the terms prescribed for the amendment of the articles of association, i.e., a majority vote of three quarters of the share capital (in Stock Corporations and Limited Liability Companies) or unanimity (in Unlimited Liability Companies and Limited Partnerships).

The minutes of the meetings must be executed before the public notary.

[4] Execution of the deed

Once the merger has been approved by resolution in the General Meeting of each of the participating companies, the respective administrations must execute the respective merger deed before the public notary.

[5] Provisory registration and publication

Following the deed, the administrations of each of the participating companies have to promote the registration and publication of the resolution that approves the merger project.

[6] Opposition of creditors

In this phase, the creditors of the participating companies can judicially oppose the merger within 30 days from the last publication done. This opposition may be based on the damage arising from it to the payment of their credits.

[7] Registry of the merger

After the 30 days period for consultation and opposition has elapsed without any opposition, the administration of any of the companies participating in the merger, or the new company, shall proceed with the commercial registration of the merger.

The registry is made with the following documents:

- (i) Certificate or legalized copy of the deed;
- (ii) Certificate or legalized copy of any special authorization required for the operation;
- (iii) Copy of the balance sheets of the participating companies.

PARTICIPATION OF A COMPANY IN THE CAPITAL OF ANOTHER

If any of the participating companies holds a participation in the capital of another, it cannot make use of a number of votes higher than the sum of those of all the other shareholders. For this purpose, the votes of the company is added to the votes of other companies controlled by the company, as well as the votes of persons acting in their own name but for the account of some of these companies.

RIGHT TO VOLUNTARY EXONERATION FROM A COMPANY

When the shareholder has voted against the merger, he may want to exonerate himself from the company. In these cases, if the shareholder has stated his vote in the minutes, and if the AoA does not prohibit, the shareholder can demand that the company acquires his company participation, evaluated under the terms of the Civil Code. In case the shareholder regards the evaluation as unjust, he may request the court to stipulate a value of his participation, within 20 days after receiving the offer.

LIABILITY ARISING FROM MERGERS

The managers/administrators, the members of the supervisory board or single supervisor of each of the participating companies are jointly and severally liable for damages caused by the merger to the company and to its shareholders and creditors, if they have not observed the diligence of a systematic and ordered manager in verifying the patrimonial situation of the companies and in concluding the merger.

The extinction of companies caused by a merger (regardless of the type of operation) does not affect the exercise of the right to compensation, nor of their rights and obligations arising from the merger. The extinct companies are deemed to be in existence for this purpose.

INVALIDITY OF THE MERGER

A merger can be declared null and void on the basis of violation of legal requirements regarding the merger process or any other violation of mandatory requirements of company laws.

EFFECTS OF THE MERGER

The registry of the merger is the last phase of the merger process. After the registry, the effects of the merger are as follows:

- (i) In case of a merger-incorporation, the absorbed company is extinguished and its rights and obligations are transferred to the absorbing company;
- (ii) In case of a merger-concentration all merged companies, are extinguished, and their rights and obligations are transferred to the a new company;
- (iii) The shareholders of the extinguished companies become shareholders of the absorbing company or of the new company.

TAXES AND COSTS

Merger operations are subject to Stamp Tax, notary and publication fees. In addition, the merger-concentration operations may also be subject to the Real Estate Transfer Tax (SISA) when there are transfers of real state. Capital gains arising from merger operations are subject to the Income Tax.

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