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A LOOK AT THE NEWLY PASSED LAW 5055/2023 ON CROSS-BORDER MERGERS, DIVISIONS AND CONVERSIONS

Law 5055/2023 has recently been approved by the Greek Parliament transposing into national legislation the Directive 2019/2121 (the “New Directive”) regarding cross-border mergers conversions and divisions. The New Directive -also known as the EU Mobility Directive- introduced critical amendments to Directive 2017/1132 (the “2017 Directive”), in an attempt to eliminate unjustified barriers to the freedom of establishment of EU companies with a view to enhance the development of the Single Market.

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Before going into specifics of the newly passed Law 5055/2023 it is worth describing some key aspects of the New Directive.

A. The New Directive

Quite surprisingly, prior to the New Directive, only the sphere of cross-border mergers of limited liability companies was regulated by the 2017 Directive. This perceived regulatory gap created by the absence of a sufficient legal framework regarding cross-border conversions and divisions was pinpointed by multiple stakeholders leading up to the enactment of the New Directive. The aforementioned need of a more harmonized regulatory environment regarding all types of corporate transformations was also highlighted in a series of important decisions issued by the Court of Justice of the European Union (the “CJEU”), such as for instance the Polbud case.

In a nutshell, the New Directive introduced the following key modifications:

i. The amendment of the existing framework governing cross-border mergers, with a clear aim on the one hand to align them with the respective amendments introduced for cross-border divisions and on the other to establish a more straightforward merger procedure within the Single Market.

ii. The establishment of a harmonized regulatory framework governing cross-border conversions. This addition was deemed necessary as to address an everlasting concern of almost every business today, that of moving their registered offices cross-border. Before the New Directive, companies should rely solely on Member States' laws -which either didn't exist at all or were often incompatible with each other- and CJEU rulings, since there was no uniform regulatory approach.

iii. The establishment of a uniform regulatory framework concerning cross-border divisions, although only with regards to the ones undertaken by formation of new companies.

B. The Greek Law 5055/2023

Prior to Law 5055/2023 (the “New Law”) there was no regulatory framework in Greece governing cross-border corporate transformations, with the exception of cross-border mergers- regulated by Law 3777/2009. Through the transposition of the New Directive into national legislation, the New Law rectified this inconsistency by creating a uniform regime governing cross-border mergers, conversions and divisions of capital companies.

C. Key Provisions

With respect to the specific procedural provisions introduced by the new Law, they apply by analogy to all three (3) types of cross-border corporate transformations without significant derogations. In particular:

1. The new regime covers every kind of capital companies which may be involved in a cross-border transformation, namely societies anonymes (SAs), limited liability companies (LLCs), private companies (PCs), limited partnerships by shares (LPs) and European Companies (SEs).

2. A plan of the imminent transformation needs to be drawn up by the management of the company, containing specific -distinct for each type of corporate transformation- information set out in detail by the law.

3. The shareholders, creditors and representatives of the employees, or, where there are no such representatives, the employees themselves of a company involved in a cross-border corporate transformation are entitled to submit comments to the common draft terms of the aforementioned plan, no later than five (5) business days before the date of the General Meeting approving the transaction.

4. The administrative or management body of each of the companies under transformation shall draft a report for shareholders and employees, explaining and justifying the legal and economic aspects of the cross-border transformation, as well as explaining the implications of the latter for employees. This report shall also include two distinct sections, one for shareholders and one for employees. Nonetheless, under specific circumstances provided by law the abovementioned obligation of conducting the report could be waived.

5. An independent expert report shall be drawn up for each company involved in a cross-border transformation.

6. The specific provisions regarding the protection of both shareholders and creditors, namely:

i. Shareholders of the companies involved in a cross-border corporate transformation who voted against the approval of the said transformation have the right to dispose of their shares for adequate cash compensation, with the specific prerequisites required by law.

ii. Creditors who are dissatisfied with the safeguards offered in the plan of the cross-border transformation may apply, within three (3) months of the disclosure of the said plan to the appropriate administrative or judicial authority for adequate safeguards, provided that such creditors can credibly demonstrate that due to the cross-border transformation, the satisfaction of their claims is at stake and that they have not obtained adequate guarantees from the companies involved in the transaction.

With an aim to protect their creditors, the administrative or management body of each of the companies involved in a cross-border transformation shall provide a declaration that accurately reflects its current financial status. The declaration shall state that after having made reasonable enquiries, the abovementioned administrative or management body is unaware of any reason why the company resulting from the cross-border transformation -i.e. the absorbing company in a merger, the recipient company in a common division or the converted company in a conversion- will be unable to meet its liabilities as these fall due.

7. Prior to completion of the cross-border transformation, the companies involved in the transaction shall have obtained a certificate from the competent authorities of their Member States that attests to compliance with all relevant conditions and to the proper completion of all procedures and formalities set out by law.

8. Provisions regarding employee participation in the company resulting from the cross-border transformation are also applicable to each type of cross-border transformation.

Thereupon, it could be argued that such harmonization of the legal framework around cross-border corporate transformations accomplished by the new regime represents a yet another significant milestone in improving the functioning of the internal market for companies and firms as well as their exercise of the freedom of establishment.