Cross-border mergers into and out of France

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This memorandum describes the procedure and effects of a cross-border merger pursuant to Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (the "**Cross-Border Merger Directive**"), as transposed into French law. We focus on the French corporate law aspects of such a transaction but refer to analogous principles in other European jurisdictions (in particular, the Netherlands and the United Kingdom).[1]

1. INTRODUCTION

This year will mark the official tenth anniversary of the transposition of the Cross-Border Merger Directive into the national law of most if not all Member States.[2]

The Cross-Border Merger Directive has generally been regarded as a success,[3] facilitating corporate mobility and permitting enterprises to more fully benefit from the right of free establishment and free movement throughout the EU. This increased corporate mobility within Europe has promoted increased deal synergies, supporting regulatory competition among Member States and more generally reducing organizational costs.[4]

As we describe below, implementing a cross-border merger under the Cross-Border Merger Directive remains complex and cumbersome[5] even relative to other sophisticated transaction structures.

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1 This memorandum should not be relied on as an exhaustive discussion of all issues that may occur in the context of a cross-border merger. In particular, any cross-border merger will necessarily require consideration of the law and practice of the other constituent company in the merger.

2 *See* Document 32005L0056, National transposition measures communicated by the Member States concerning: Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. *But see* European Parliamentary Research Service, *Ex-post analysis of the EU framework in the area of cross-border mergers and divisions*, at 21 (Dec. 2016) (noting that the transposition of the Cross-Border Merger Directive was "slow" and "completed only after the transposition deadline … had expired").

3 Benoît Lecourt, *Fusions transfrontalières : rapport sur l'application de la directive*, Revue des sociétés 2014, p. 135 (« Pour l'ensemble des agents économiques et experts consultés, la directive sur les fusions transfrontalières a constitué une innovation majeure. »); Bech-Bruun and Lexidale, *Study on the application of the cross-border mergers directive*, Study for the Directorate General for the Internal Market and services, European Commission (2013).

4 *See generally* European Parliamentary Research Service *supra* note 2, at 27-28; Bech-Bruun and Lexidale, *supra* note 3, at 9; Didier Martin & Forrest Alogna, *A European Delaware: The Nascent Regulatory Market in Europe*, Revue Trimestrielle de Droit Financier, no. 4 (2007).

5 *See, e.g.*, European Parliamentary Research Service, *supra* note 2, at 13 (enumerating various difficulties and potential reforms of the Cross-Border Merger Directive); Commission des affaires juridiques (Rapporteur: Enrico Gasbarra), (2016/2065(INI)), Projet de rapport sur la conduite des fusions et scissions transfrontalières (Dec. 15, 2016) (« La Commission prévoit dans son programme de travail annuel pour 2017 une initiative de modification de la [Cross-Border Merger Directive].»); European Parliament, Directorate-General for Internal Policies, Policy Department, *Cross-border mergers and divisions, transfers of seat: Is there a need to legislate* (June 2016).

Reforms are currently under consideration to streamline the process, as well as to put in place a European regime for cross-border spin-offs, but remain at an early stage.[6]

Despite uncertainties within the European Union, cross-border deal activity remains strong, including transactions structured as cross-border mergers.[7] For example, the TechnipFMC transaction which completed in January 2017 under a UK incorporated holding company represents the largest arm's length cross-border merger under the Directive to date. A table of some of the more notable cross-border mergers is set forth in Annex A. It remains to be seen whether Brexit-driven transactions will be a significant (although perhaps circumscribed) additional source of cross-border mergers in Europe in the coming years.[8]

2. GENERAL

Under French law, a merger (whether domestic or cross-border) is defined as a transaction pursuant to which:

- by operation of law ("*transmission universelle de patrimoine*"), one or more companies transfers all of their assets and liabilities to another company, which may be an existing company or new company created out of the merger; and
- the shareholders of the transferring company(ies) receive shares of the acquiring company[9] in exchange for their existing shares and, if the terms of the merger so provide, cash boot (not exceeding 10% of the par value of the shares of the acquiring company issued in the merger).[10]

The Cross-Border Merger Directive was transposed into French law by the Law of July 3, 2008 (which was codified under articles L. 236-25 *et seq.* of the French commercial code).[11] Prior to the Cross-Border Merger Directive, mergers between EU companies were only possible in connection with the formation of a European company (*Societas Europaea* or *SE*) as provided under Council Regulation (EC) No. 2157/2011 (the "**SE Regulation**"). This alternative still exists but is used less

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6 *Id.* at 9-10.

7 Delphine Cuny, *Malgré le Brexit, encore des mega-deals à foison en 2016*, LA TRIBUNE, Jan. 2, 2017 (« L'année 2016 a été riche en grosses opérations de fusions acquisitions, en particulier transfrontalières. »).

8 Taking into account the increasing probability of a hard Brexit, it appears that barring some other agreement into the interim, the Cross-Border Merger Directive will no longer provide a basis for transactions into and out of the United Kingdom after the expiration of the two-year notification period under the Treaty on the European Union. Companies wishing to merge into or out of the United Kingdom will thus likely need to act within that time period.

9 "Triangular" or subsidiary mergers are not possible under French law: the stock consideration issued must be stock of the 'absorbing" constituent company to the merger.

10 The amount of this boot may, however, be higher than 10% in certain cross-border mergers (*see* below for further discussion). But all-cash mergers –as permitted under corporate laws of the states of the United States– are not possible.

11 The Cross-Border Merger Directive was in line with the trend in European case law which was beginning to acknowledge that general principles of freedom of establishment of companies – part of the general framework of the freedom of movement of persons, services and capital – should permit cross-border mergers between EU companies. *See, e.g.*, Case C-411/03, SEVIC Systems AG, Judgment of the Grand Chamber of the Court of Justice of Dec. 13, 2005, [2005] ECR I-10805.

frequently following the implementation of the Cross-Border Merger Directive, which provides a more flexible framework for cross-border mergers.

Any of the following forms of French limited liability company may undertake a cross-border merger with a limited liability company that has been incorporated under the law of another Member State of the European Economic Area (the "**EEA**"): [12]

- a corporation (*société anonyme* or *SA*);
- a limited liability company (*société par actions simplifiée* or *SAS*);
- a limited liability partnership (*société en commandite par actions* or *SCA*);
- a private company with limited liability (*société à responsabilité limitée* or *SARL*); and
- a European company (*Societas Europaea* or *SE*) that has its registered office in France.

In a cross-border merger, an SA, SAS, SCA, SARL and SE are largely subject to the same rules.[13]

3. PARTIES TO A CROSS-BORDER MERGER

In any merger, including a cross-border merger, there will be a single acquiring company, which may be either:

- one of the existing constituent companies in the merger; or
- a company that is newly formed out of the constituent companies as part of the merger.[14]

In the first scenario, there may be more than one company that is merged out of existence; in the second scenario, there is necessarily more than one company that is merged out of existence.

This memorandum will focus on a merger between two constituent companies, where one of the constituent companies merges with and into the other, which continues as the surviving company after the merger. This is by far the most common transaction structure.

4. « CROSS-BORDER » TRIANGULAR MERGER ; CASH MERGERS

Under French law, the only permissible consideration in a merger involving a French company is stock of the continuing corporation in the merger (subject to limited cash boot). Accordingly, "triangular" mergers[15] are not permitted under French law (including cross-border). Similarly, all-cash mergers, or mergers involving debt consideration, are not possible.

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[12] The EEA combines Iceland, Liechtenstein and Norway (among the members of the European Free Trade Association) with the 27 member states of the European Union.

[13] Accordingly, where this memorandum refers to a "company", this should be understood to be a reference to any of a SA, SAS, SCA, SARL or SE unless explicitly indicated otherwise.

[14] In U.S. and international parlance, such a "merger" would be described as a "consolidation" or an "amalgamation". The formation of an SE in this manner will (also) be subject to the rules stipulated by the SE Regulation.

[15] A "triangular" (or subsidiary) merger occurs when the "target" constituent company is merged with a newly-created subsidiary (the "**mergersub**") of the acquiring parent company, with either mergersub continuing as the surviving corporation (a "**forward triangular**" merger) or the target company continuing as the surviving corporation (a

While "triangular mergers" are not possible under French law, it may be possible for a French parent to acquire a target entity incorporated in one of the states of the United States[16] (or other jurisdiction allowing triangular mergers) through a triangular merger.[17] In order to do so, the French parent must incorporate a mergersub in the applicable foreign jurisdiction, and, in effect, the merger between this subsidiary and the foreign target entity will be governed entirely by the law of that foreign jurisdiction. In this respect, the foreign transaction is **not** a "cross-border merger"; it is simply a form of transaction structure permitting the acquisition of a foreign target, which becomes a subsidiary of the French parent. In such a triangular merger, the key question under French corporate law becomes how to fund the merger consideration to be used in the foreign subsidiary merger. A common solution is for the shares of French parent to be issued pursuant to article L. 225-148 of the French commercial code, which permits the issuance of new shares, without pre-emption rights in favour of existing shareholders, in the context of an exchange offer for the shares of a target company publicly listed in a member state of the EEA or the OECD.[18]

Because such triangular mergers are not strictly "cross-border mergers" as a formal matter of transaction structure,[19] they are not discussed further in this memorandum.

"**reverse triangular**" merger). The shareholders of the target constituent company in the merger receive shares in the acquiring parent and not the constituent company in the merger.

16 Under the merger provisions of the corporate laws of the states of the United States, where mergers commonly take the form of a triangular merger, there is no requirement (for corporate law purposes) for the merger consideration to be the stock of the other constituent company in the merger or indeed that the merger consideration comprise stock at all. 100% cash mergers are possible and quite common and (unlike a cash tender offer) allow the acquiring company to acquire 100% of the target in a single step (because once the merger has been approved by the requisite majority of target shareholders it is binding on all target shareholders (subject to so-called "dissenters'" rights to contest the value of the merger consideration but not the validity of the merger transaction).

17 *See, e.g.*, the "reverse triangular" merger of a Delaware mergersub of Alcatel with and into Lucent, with Lucent continuing as the surviving corporation in the merger and a wholly-owned subsidiary of Alcatel in 2006. In this transaction, the former shareholders of Lucent received 0.1952 of a share of Alcatel for each share of Lucent (although the Alcatel shares were delivered in the form of an ADS). *See, also*, the "forward triangular" merger of Bcom3 with and into a mergersub of Publicis in 2002, with the mergersub continuing as the surviving corporation in the merger and Bcom3 (as part of that merged entity) becoming a wholly-owned subsidiary of Publicis. In this merger, the former A shareholders of Bcom3 received in exchange for each Bcom3 A share: (i) 1.666464 shares of Publicis; (ii) a usufruct interest in 0.548870 of a share of Publicis, together with the right to receive the *nue-propriété* interest after 2 years; (iii) 0.098108 of an ORANE bond; (iv) 1.765944 of a warrant to subscribe (BSA) a share of Publicis and (v) the net cash proceeds from the sale of 0.1765944 of a bond (originally issued as an OBSA with the warrant). Such complicated merger consideration shows the flexibility of consideration permissible under U.S. law.

18 This was the case in both the Alcatel-Lucent reverse triangular merger and the Publicis-Bcom3 forward triangular merger (*see* immediately preceding footnote), although it should be noted that Bcom3 was never a publicly listed company (although because its A shares were held by more than 300 holders, it was a reporting company under the U.S. Securities Exchange Act of 1934).

19 Any more than, for example, an *offre publique d'échange* (exchange offer) targeting a foreign target is a "cross-border merger".

5. EFFECTS OF A CROSS-BORDER MERGER

5.1. General effects

In general (and in common with a domestic merger), a cross-border merger will have the following effects:[20]

- the company that is merged out of existence will cease to exist without recourse to a liquidation procedure ("*dissolution sans liquidation*");
- the shareholder(s) of the company that is merged out of existence will become shareholder(s) of the acquiring company through an exchange of shares; and
- in principle, all the assets, liabilities and legal relationships of the company that is merged out of existence will transfer by operation of law ("*transmission universelle de patrimoine"*) and become vested in the surviving corporation in the merger.

5.2. Transfer of assets and liabilities

However, there are certain exceptions to this principle of a general transfer of assets and liabilities. The transfer of an asset or liability of the company being merged out of existence may be restricted (or even excluded). This may occur, for example, if that asset or liability is of a personal nature (such as a permit or license), or if the transferability has been excluded or limited by statute, contract or nature (for example, an agreement including an "*intuitu personae*" clause or containing an acceleration clause in case of merger).[21]

In addition, a cross-border merger and, more specifically, the general transfer of its assets and liabilities by operation of law, may trigger:

- regulatory approvals (*e.g.*, foreign investment approval), registration requirements or formalities required to effect and/or register the transfer;
- provisions in contracts entered into by the constituent companies (*e.g.*, change-of-control or termination clauses);
- provisions in the organizational documents of any subsidiaries of a constituent company in the merger, particularly those that are not wholly-owned (*e.g.*, change-of-control provisions or rights of first offer).

As in other transaction structures, a careful review of the contracts and other instruments to which the constituent companies (and their subsidiaries) in a merger are party is therefore essential to assess the potential adverse effects of any contemplated merger.

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20 Cross-Border Merger Directive, art. 14.

21 *See* Xavier Jaspar & Nathalie Métais, *Les limites de la transmission universelle du patrimoine : les contrats intuitu personae et les contraintes afférentes à certains biens*: BJS May 1998, p. 447, no. 156; Pierre Yves Bérard, *Les fusions à l'épreuve de l'intuitu personae*: RTD com. 2007, p. 279.

5.3. Legal proceedings

If the company being merged out of existence is a party to legal proceedings, the consequences of the merger upon the proceedings and the required actions, if any, must be reviewed before the merger is completed.[22]

If the company merged out of existence has been convicted by a definitive decision before the approval of the merger and has not yet paid the related fine or penalty, the amount of such fine or penalty is transferred to and shall be supported by the surviving company in the merger due to the effect of the *transmission universelle de patrimoine*.[23] However, due to the principles of the individual nature of penalties[24] and of the individual nature of charges and sanctions,[25] the surviving company in the merger cannot be criminally convicted or financially sanctioned for violations of French criminal law committed by the company merged out of existence, except if the merger was conducted to avoid legal proceedings.[26] However, the French *Cour de cassation* held that the surviving company can be sanctioned in the event of anticompetitive practice committed by the company merged out of existence before the merger,[27] thereby following a European jurisprudence.[28]

6. PLEDGES, USUFRUCT AND SPECIAL RIGHTS

If a security interest (*e.g.*, a pledge) has been granted over the shares of the company that is being merged out of existence, registration of the pledge made in respect of such company remains effective on the shares of the surviving company exchanged against the pledged shares. Therefore, the creditor is not required to perform a new registration after completion of the merger.[29]

Similarly, if the shares of the company that is being merged out of existence have been dismembered into usufruct and *nue-propriété* interests, the usufruct agreement remains effective *mutatis mutandis* on the shares issued by the surviving company in exchange for dismembered shares pursuant to the provisions governing the *subrogation réelle* (article 1250 of the French civil code), unless otherwise decided by the owners of the usufruct and *nue-propriété* interests.[30]

In addition, if certain parties have special rights with respect to the company to be merged out of existence, such as an entitlement to profit distributions or to subscribe for shares, certain additional rules or formalities may need to be observed.

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22 *See* Marie-Laure Coquelet, *Le sort des actions en justice en cas de transmission universelle de patrimoine*: BJS, July 2007, p. 783, no. 228; Cass. com., Oct. 21, 2008, no. 07-19102: BJS, Feb. 2009, p. 114, no. 24.

23 C. pénal, art. 133-1.

24 C. pénal, art. 121-1.

25 European Convention on Human Rights, art. 6.

26 Cass. crim., June 20, 2000 no. 4129: RJDA 12/00, no. 1096; Cass. crim., Oct. 10, 2003, no. 4992: RJDA 3/04 no. 307; and on petition Cass. com., June 15, 1999, no. 4129: RJDA 8-9/99 no. 949.

27 Cass. com., Nov. 20, 2001: JCP E 2002, p. 1146, note Linda Arcelin.

28 TPICE, Dec. 17, 1991 case 6/89: rec. P. II-1623; TPICE, May 14, 1998, case 327/94: rec. p. II-1373.

29 Cass. com., Dec. 2, 2008, no. 07-19.325.

30 Mémento Sociétés commerciales 2017, no. 82601.

7. DOUBLE VOTING RIGHTS AND PREFERRED SHARES

If the company to be merged out of existence is the French party to the cross-border merger and it has issued shares with double voting rights and/or preferred shares with special rights, it will be necessary to analyze whether the double voting rights or other privileges attaching to these shares may be replicated by the foreign entity that will survive the merger.[31] Otherwise, these shares will have to be exchanged for ordinary shares (at an exchange ratio that takes into account the special rights attached to these shares) or for a different class of preferred shares. The terms and conditions of the preferred shares must also be analyzed for special rights that holders of such shares may have in case of a merger (for example, can they vote as a separate class to approve the merger).[32] In the case of shares with double voting rights, if their replication by the foreign entity surviving the merger is not possible, they can also be exchanged for ordinary shares at the same exchange ratio as the shares not benefiting from double voting rights provided that a special meeting of the shareholders benefiting from double voting rights approve the removal of such double voting rights (subject as the case may be to the completion of the merger).[33] In effect, giving a "class" vote to holders of shares with respect to which double voting rights have accrued may significantly increase the veto power of a subgroup of shareholders.

When the French company is the company that will survive the merger, preferred shares may be issued to reproduce the rights attaching to preferred shares issued by the foreign company that is being merged out of existence. In this case, the merger auditor (or in the absence of a merger auditor, a special appraiser ("*commissaire aux avantages particuliers*") appointed by the commercial court or by the shareholders in a unanimous decision) must prepare a special report for the extraordinary general meeting of the French company convened to approve the terms of the merger.[34]

8. EXCHANGE RATIO AND FRACTIONAL SHARES

The boards of directors of the merging companies must agree an exchange ratio which will determine the number (and, as the case may be, class(es)) of shares to be allotted by the surviving company in the merger to the shareholder(s) of the company to be merged out of existence. In determining the exchange ratio, the boards of directors should take into account:

- the relative number of shares outstanding in the constituent companies in the merger:

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31 C. com., art. L. 228-17.

32 Ministerial response no. 13316, Senate official bulletin, Sept. 30, 2004, p. 2236.

33 It should be noted that there is a doctrinal debate in France about whether shares benefiting from double voting rights constitute a "determined category of shares" (*catégorie d'actions déterminée*) within the meaning of C. com., art. L. 228-99. This is because, in general, double voting rights accrue to the holder of ordinary shares as a result of such holder having held the shares –in registered form– for a given length of time. The ordinary share held by any holder has the same right to accrue double voting rights provided the holding period is satisfied. In this respect, shares with double voting rights result from the conuct of their holders rather than having different rights and designations from other ordinary shares. A positive answer implies that shareholders benefiting from double voting rights must ratify the merger in a special meeting pursuant to C. com., art. L. 236-9, al. 2. Practitioners generally recommend a vote of a special meeting of the shareholders benefiting from double voting rights only if the double voting rights are not replicated in the entity surviving the merger. *See* ANSA Comité Juridique, meeting of Sept. 5, 2012, no. 12-056.

34 C. com., art. L. 236-10, II.

- the relative intrinsic value of the shares of the constituent companies in the merger;
- the structure of the equity of the company being merged out of existence compared to that of the surviving company (*e.g.*, a preference or priority share in the capital of the company being merged out of existence would ideally be exchanged for a preference or priority share with similar rights in the surviving company's capital; of course, this may require changes to the structure of the share capital of the surviving corporation in order to replicate the structure in place at the company being merged out of existence).

When the companies involved in the merger are listed on a stock exchange, the boards of directors will generally request fairness opinions from reputable investment banks on the proposed exchange ratio. The fairness of the exchange ratio will also be examined by the merger auditors (*see* section 12 below).

Except when the exchange ratio 1:1 or 1:*n* (with *n* being an integer), the question of fractional shares may arise, since former shareholders of the company being merged out of existence may be mathematically entitled to receive a fraction of a share in the surviving company in full consideration for the exchange of their existing shares. Fractional shares are rarely issued in a merger and the manner in which fractional shares are treated and shareholders compensated is governed by the law of the jurisdiction in which the surviving corporation is incorporated.

In France, when the shares of the surviving corporation in the merger are publicly listed on a regulated market, the aggregate number of fractional shares that would otherwise have been allotted to shareholders may be sold within 30 days of the attribution of the last of the whole shares to have been issued to shareholders in the merger. The net proceeds are then allocated to the shareholders, pro rata to the fractional shares they were otherwise entitled to receive in lieu of such fractional shares.[35] The extraordinary general meeting of shareholders that approves the merger must adopt an appropriate resolution authorizing this treatment of fractional shares.

9. BOOT

In connection with a merger, "boot" consists of any non-stock consideration paid by the surviving corporation to the shareholders of the company that is merged out of existence in exchange for their shares.

In France, under applicable corporate law and tax law, boot is permitted provided it does not exceed 10% of the par value of the shares of the surviving corporation allotted in the merger (*i.e.*, 10% of the amount of the capital increase resulting from the merger).[36] Accordingly this amount is usually very significantly less than 10% of the economic value of the shares allotted.

If the applicable law of the jurisdiction of incorporation of at least one of the parties to the merger permits, this 10% of aggregate nominal value may be exceeded.[37] However, in such case the consequences for the tax treatment of the merger and the receipt of the merger consideration under applicable French tax law must be carefully analyzed.

35 C. com., art. L. 228-6-1, R. 228-12 and R. 228-13.

36 C. com., art. L. 236-1.

37 C. com., art. L. 236-26.

According to EU case law,[38] a pre-merger dividend paid to its shareholders by the entity to be merged out of existence in the merger should not be viewed as boot, even if the amount of such dividend exceeds 10% of the par value of the shares to be issued by the surviving corporation in the merger), unless this pre-merger dividend has the "characteristics of binding consideration" for the merger. Accordingly, the modalities for the payment of such a pre-merger dividend must be carefully considered from a tax perspective to avoid adverse tax consequences for the parties to the merger and their shareholders.

10. TREATMENT OF TREASURY SHARES

In general, treasury shares of the company being merged out of existence are not exchanged for the merger consideration and are simply cancelled on completion of the merger.[39]

Under French law, a company that has outstanding vested purchase stock options ("*options d'achat d'actions*") has an obligation to hold in treasury sufficient shares to satisfy the exercise of such options.[40] When such a company is to be merged out of existence, French practitioners generally consider that it is possible for such treasury shares to "survive" the merger and to be exchanged for shares of the surviving corporation, to be held against exercise of the purchase stock options which will be exercisable for shares of the surviving corporation as a result of the merger (as discussed below).

However, in connection with a cross-border merger, the law of the jurisdiction of incorporation of the surviving corporation must be analyzed whether such practice is permissible or an alternative response is required. For example, it is not permissible to proceed in this manner where the surviving corporation is incorporated in the Netherlands or in the United Kingdom.

11. RIGHTS AND SECURITIES GIVING ACCESS TO SHARES

In a cross-border merger, the merger agreement will specify that, as a result of the merger, the obligations under the stock-option plans (or any incentive plan based on the delivery of shares) of the company that is merged out of existence are transferred to the surviving corporation. As a result, the surviving corporation will be obligated to issue its own shares to the holders of stock options in an amount and at an exercise price consistent with the exchange ratio, at the time and under the conditions set forth in the relevant stock option plans.[41]

If the company being merged out of existence is French and has issued purchase stock options to its employees ("*options d'achat d'actions*"), the surviving corporation will either have to acquire a sufficient number of its own shares to satisfy these options, or amend the option terms to convert them into subscription stock options ("*options de souscription d'actions*"). The consequences of such a change must be carefully reviewed, notably from a tax perspective.

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38 Case C-321/05, Judgment of the EU Court (First Chamber), July 5, 2007.

39 C. com., art. L. 236-3, II.

40 C. com., art. L. 225-177 *et seq*.

41 Mémento Sociétés commerciales 2017, no. 69702.

If the surviving corporation is the French entity, the extraordinary general meeting of shareholders convened to approve the merger must adopt a resolution acknowledging the obligations resulting from the transfer of the stock option plans of the company merged out of existence and waive subscription rights to the underlying shares. Its board and statutory auditors are required to issue a report on the conditions of calculation of the new subscription price.[42]

A detailed analysis of each stock option plan is required in order to determine whether (i) such plan provides for any specific requirements or procedure in the event of a merger and (ii) there are any legal or practical obstacles under French or foreign law to the acquiring entity becoming the obligor under the stock-option plans of the company that is being merged out of existence.

Although the Merger Directive does not provide any indication as to the consequences of a cross-border merger on securities giving access to the share capital (such as convertible bonds, warrants, etc.), it appears that the same principles that apply to stock options should also apply with respect to any such security issued by the entity being merged out of existence. Under this approach, the relevant securities would continue to be governed by the law under which they were issued (*e.g.*, a Dutch company absorbing a French entity that had issued convertible bonds regulated by the French commercial code would apply French law to issues relating to these bonds, such as the convening of the holders to authorize any amendment to the terms of the bonds). Thus, if the disappearing entity has issued securities giving access to its share capital that have been listed on a stock exchange, it would appear that no new prospectus with respect to such securities would be required as a result of the merger.

In general, unless the terms of such securities expressly provide otherwise, holders of securities giving access to the share capital issued by French companies under French law have no right to object to the merger.[43]

12. INVOLVEMENT OF MERGER AUDITORS ("*COMMISSAIRES A LA FUSION*")

One or more merger auditors must examine the merger agreement to be entered into in connection with the cross-border merger (*see* below). The auditors must certify in two separate reports:

- in a report on the "terms" (*modalités*) of the merger, that they consider the exchange ratio, as determined by the boards of the merging entities, to be fair and reasonable;[44] and
- in a report on the value of the contributions made by the company being merged out of existence to the surviving company, that such contributions are not overvalued and that the aggregate equity value of the shares of the company being merged out of existence is at least equal to the aggregate nominal value of the shares in the surviving corporation that are to be allotted to the shareholder(s) of the disappearing company, plus any boot

[42] C. com., art. L. 225-177 and R. 225-144.

[43] *See* section 21 below.

[44] C. com., art. L. 236-10, I-al. 2.

or other compensation paid to the disappearing entity's shareholders (the "full payment" of the share capital issued).[45]

If the company surviving in the merger is not a French entity, the second report, which is required under French law to protect the shareholders of this surviving entity (the company receiving the contributions) but not under the Cross-Border Merger Directive may appear less relevant. Indeed, shareholders of the surviving entity may not expect this report as it has no equivalent under their home legislation and the merger auditors (whether French or non-French) will generally not be able to opine on the "full payment" of the share capital issued, as it is a French legal concept which may not translate for a non-French company. In that case, to comply with French law requirements this second report must still be issued by the merger auditor and made available to the shareholders of each constituent company in the merger.[46] The merger auditors will generally in such case only certify that the contributions made by the company merged out of existence are not overvalued.

It is possible to appoint a joint merger auditor for all the entities (for instance, one or several French merger auditors could be appointed to deliver a report to the shareholders of both the U.K. and French companies which are parties to a Franco-U.K. cross-border merger: this or these French auditors would address both the terms of the merger and the value of the contributions).[47] The conditions of appointment of this joint merger auditor must comply with the laws applicable to all the entities involved.

However, when the exchange ratio is a sensitive issue for any of the entities (notably when both entities are listed on a stock exchange), it may be advisable for each constituent company to appoint one or more merger auditors of its home country to deliver the relevant report to each extraordinary general meeting of shareholders. For example, in the case of a French listed entity merged with and into a Dutch entity, one or several French merger auditors would be appointed by the competent French commercial court and would only address the terms of the merger. The Dutch entity, on its side, would designate one or several Dutch merger auditors to address both the terms of the merger and the value of the contributions.

Under French law, the merger auditors must be appointed by the president of the commercial court of the jurisdiction in which the registered office of the French merging entity is located, upon request of the French company participating in the merger (the request can also be submitted jointly with the foreign company).[48] Although names can be suggested in the request, the president of the competent commercial court has full discretion to designate the merger auditors (provided the designees are on a specific expert list). Unless there are specific circumstances justifying the designation of only one merger auditor, two or even three merger auditors are usually designated by French courts.

The equity value of the company being merged out of existence is generally determined as of the balance sheet date of its most recent annual accounts or, if these must be drawn up in the course of the

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45 C. com., art. L. 225-147, al. 2, cross-referenced by art. L. 236-10, III and art. R. 236-7, al. 1.

46 C. com., art. L. 236-10, al. 3.

47 C. com., art. R. 236-6, al. 2; Dutch civil code, art. 2:328.

48 C. com., art. L. 236-10, I, R. 225-7 and R. 236-6.

merger procedure, the interim accounts (*see* section 17 below), on the basis of the appropriate valuation methodology.[49]

No report regarding the terms of the merger as referred above is required if all shareholders of the merging companies consent thereto.[50] However, the report on the value of the contributions will still be required.[51]

As for the French merged entity, the merger auditors' reports must be filed with the relevant commercial court's registrar at least eight days prior to the entity's EGM deciding upon the merger.[52] The merger auditors' reports must also be made available to the shareholders of each constituent company in the merger at least 30 days before each extraordinary general meeting voting on the merger.[53]

In practice, the merger auditors will generally prepare their reports based on a draft version of the merger agreement and their reports will be in draft final form by the date the boards of directors of the constituent companies in the merger meet to approve the merger agreement. The reports will be signed by the merger auditors shortly after the boards of directors have approved the merger agreement and the merger agreement has been signed.

13. FRENCH TAX TREATMENT OF THE MERGER

For French resident shareholders (corporates and individuals), the exchange of shares of the company being merged out of existence for shares of the surviving company is generally tax free (subject to roll-over of tax basis, and upon election for corporates) provided that any form of consideration other than shares of the surviving company (boot) does not exceed 10% of the nominal value of the received shares.[54]

Latent capital gains on the assets of the company being merged out of existence may also be deferred with roll-over of tax basis pursuant to article 210 A of the French tax code. Where the surviving company is a foreign entity, relief is however conditional upon a prior ruling being granted by the French tax authorities.[55] Such ruling is not discretionary and shall normally be granted provided that the following conditions are met:[56]

- the merger has a valid business purpose;

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49 Determined pursuant to CRC Regulation 2004-01 relating to the accounting treatment of mergers and similar transactions (integrated into title VII of the *Plan Comptable Général* (PCG)) if the company surviving in the merger is French and pursuant to the accounting rules of the relevant country if the company surviving in the merger is not French.

50 C. com., art. L. 236-10, II.

51 C. com., art. L. 236-10, II and L. 225-147.

52 C. com., art. R. 123-107.

53 C. com., art. L. 236-10, al. 3 and R. 236-3, 2°.

54 FTC, art. 210-0 A.

55 FTC, art. 210 C.

56 FTC, art. 210 B, 3 and 1649 *nonies*.

- the transaction does not have tax fraud or tax evasion as one of its main purposes;
- France retains the right to tax in the future the deferred gains recognized on the assets of the company being merged out of existence.

As a result of this last condition, the French tax authorities will only grant the ruling if all the assets of the French company being merged out of existence are, after the merger, allocated for tax purposes to a French permanent establishment of the foreign surviving company which will be subject to regular taxation in France. When the entity being merged out of existence is a French holding company, they will ensure that such company has, before the merger, the necessary substance (activities of its own, staffing, offices, resources, etc.) so that the foreign surviving company, after "inheriting" such substance as a result of the merger, will be considered to operate a permanent establishment in France within the meaning of the tax treaty between France and its country of incorporation, to which the shares of its subsidiaries will be allocated for tax purposes.

Specific rules may apply if the surviving company is the parent of a French consolidated tax group for the French permanent establishment of the foreign surviving company to take over that role post-merger and to form a new tax group with the former subsidiaries of the company merged out of existence.

Tax losses carried forward (and interest expenses whose tax deduction was deferred pursuant to thin capitalization rules) of the French company merged out of existence may be transferred to the French permanent establishment of the foreign surviving company, subject to a specific tax ruling.[57] Such ruling is granted provided that:

- the merger has a valid business purpose and is not mainly tax driven;
- the company merged out of existence has not experienced significant/material changes of its operations (customer base, headcount, operating means, etc.) during the period in which the tax losses were incurred;
- the surviving company commits to maintain unchanged the operation of the business of the company merged out of existence for 3 years from the merger; and
- the losses to be transferred do not result from a mere holding activity or from the ownership and management of a real estate portfolio.

A cross-border merger is generally neutral with respect to VAT, the foreign surviving company being viewed as the successor of the French company merged out of existence for purposes of any VAT adjustment obligations.[58]

A cross-border merger also does not give rise to any material transfer or registration duty, except for a 0.1% fee payable upon registration of the change of ownership of any French real property transferred in the merger, together with notary fees (at ca. 0.42%) on the same.

[57] FTC, art.209, II and 1649 *nonies*.

[58] FTC, art. 257 *bis*.

14. INFORMATION / CONSULTATION OF WORKS COUNCILS

The management of a French merging entity is required to inform and consult the works council(s) of the company (and/or in certain cases of certain subsidiaries) prior to the board meeting approving the merger agreement.[59]

The works council must be provided with precise written information about the contemplated merger, sufficient time and answers from the management of the company to any of its observations on the proposed merger.

The final opinion of the works council must be provided to the shareholders of both constituent companies in the merger.[60] If the opinion is available at the time of approval of the explanatory report established by the board of directors (*see* section 17.2 below), the opinion must be annexed to that report.[61]

If the works council does not issue its opinion within one month (or two months if the works council decides to appoint an expert) from the date it has been provided with all the required information, it will be deemed to have been consulted and to have issued a negative opinion.[62] A negative opinion does not prevent the merger from being implemented.[63]

15. EMPLOYEE PARTICIPATION

Article 16 of the Cross-Border Merger Directive governs employee participation in the management of a company in the event of a European cross-border merger. Such participation contemplates the appointment of employee representatives at the level of the board of directors or the supervisory board, etc. This is in addition to employee representative bodies (such as a works council) provided under existing labor law.

In general, the surviving corporation will be subject to the national laws of its country of incorporation (*i.e.,* where it has its registered office) regarding employee participation in company management.

However, by exception, the rules in force in the jurisdiction where the surviving entity has its registered office shall **not** apply, and a "Special Negotiation Group" shall be set up to negotiate the level and modalities of employee participation in the management of the surviving entity, where any of the following apply:

- at least one of the constituent companies in the merger has, within six months before the publication of the merger agreement, an average number of employees that exceeds 500 and is operating under an employee participation system; or

59 C. travail, art. L. 2323-19.

60 C. com., art. L. 225-105, al. 5.

61 C. com., art. L. 226-37, al. 3.

62 C. travail, art. L. 2323-3, R. 2323-1 and R. 2323-1-1. The consultation period may be extended to 3 or 4 months in the case one or more *comités d'hygiène, de sécurité et des conditions de travail* are required to be consulted in connection with the merger.

63 FTC, art. 878 to 881 O.

- the national law applicable to the surviving entity does not provide for at least the same level of employee participation as operated in the relevant merging companies, measured by reference to the proportion of employee representatives amongst the members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company, subject to employee representation; <u>or</u>
- the national law applicable to the surviving entity does not provide for employees of establishments of the company resulting from the cross-border merger that are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the Member State where the company resulting from the cross-border merger has its registered office.

The formation of a Special Negotiation Group and the negotiation process can be long and is often a decision driver when the feasibility of a cross-border merger is contemplated. In particular, a Special Negotiation Group will be composed of representatives of the employees of the participating companies and their branches and subsidiaries in each relevant European country. The appointment of the Special Negotiation Group's members may require the prior election of employee representatives in each such company, branch or subsidiary, which has proven to be time-consuming and burdensome.

Large French companies are much more likely to be obligated to appoint employee representatives on their board of directors since Law of Aug. 17, 2015 relating to social dialogue and employment has been enacted (so-called "Rebsamen Law"). As a result, a Special Negotiation Group is also more likely to be required when a large French company is involved in the contemplated cross-border merger.

16. MERGER AGREEMENT AND EXPLANATORY REPORTS

16.1. Merger Agreement

In connection with the cross-border merger, the constituent companies in the merger will be required to enter into a merger agreement which must contain the specific items listed below.[64] In the case of a French SA with a management board (*directoire*) and a supervisory board (*conseil de surveillance*), it is the management board that is competent to enter into the merger agreement unless the law of the other country requires that the merger agreement be executed by the supervisory board as well[27] (*e.g.*, in the Netherlands, it is common practice that all management board and supervisory board members sign the merger agreement).

Specific items required by the French commercial code to be included in the merger agreement are the following:[65]

- the corporate form, name and address of each of the acquiring and disappearing entities;
- the rationale, goals and conditions of the merger;
- the description and valuation of the assets and liabilities to be transferred to the acquiring entity;

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[64] C. com., art. L. 236-6.

[65] C. com., art. R. 236-1.

- the conditions in which the acquiring entity's shares will be remitted to the shareholders of the disappearing entity, the date from which such shares will give the right to receive dividends, any specific right in connection with the right to receive dividends, the date from which the operations of the disappearing entity will, from an accounting standpoint, be considered as being accomplished by the acquiring entity;
- the date the decision approving the financial statements of each of the acquiring and disappearing entities used to determine the terms of the merger;
- the exchange ratio and the amount of cash to be paid, if any;
- the contemplated amount of the merger premium;
- the rights attributed to the holders of securities other than shares and any holders of specific rights in either of the against either of the acquiring or disappearing entity.

The merger agreement must also state the conditions precedent to the completion of the merger, such as receipt of the applicable regulatory authorizations (antitrust approvals, certain other governmental authorizations, opinion of certain works councils (in countries other than France), etc.).

The merger agreement is usually drafted in the national languages of each of the different parties to the cross-border merger, with several columns, in order to have the text in each language next to the corresponding text in the other language(s). It should be noted that a French company cannot file a merger agreement relating to a cross-border merger with the relevant commercial court in the English language only.[66]

16.2. Explanatory reports

The merging companies' boards of directors are also required to draw up detailed reports explaining and justifying the merger agreement from an economic and legal perspective, including with respect to the exchange ratio, the methodologies used to determine the valuation of each of the merging entities (which must be identical for each entity[67]), and any issues that have arisen in connection with the valuation.[68]

The explanatory report must also disclose any significant variation that has occurred since the execution of the merger agreement.

French law allows for the shareholders of the merging companies to waive the preparation of the explanatory report.[69]

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66 This is also theoretically the case for all annexes to the merger agreement, although the flexibility of the various registrars (or absence thereof) vary in that respect.

67 Noting that each board of directors can of course retain different valuation methodologies.

68 C. com., art. L. 236-9.

69 C. com., art. L. 236-9, al.4.

17. INTERIM ACCOUNTS

If the financial year of any constituent company in the merger in respect of which its annual accounts have been adopted ended more than six months prior to the entry into the merger agreement, the board of directors of that company must also cause interim accounts to be prepared[70] (generally on a standalone basis, although merger auditors, to the extent they deem it useful and possible under the timetable of the transaction, may request the preparation of consolidated interim accounts in the case of a group of companies[71]). Those interim financial statements must be prepared as of a date which is no earlier than three months prior to the date the merger agreement was entered into.[72] The preparation and presentation of these financial statements must be consistent with the format and accounting principles (including valuation methods) used in the last annual financial statements.[73]

Under French law, when the merging entity is a listed company and has established and published a half-year financial report (which in practice applies to all listed companies), this report can replace the interim financial statements referred to above.[74]

As it is advisable that the accounts of all merging entities be established at the same date and provided to the shareholders of each merging entity, the date of such interim accounts has to be determined in view of the law applicable to each merging entity in order to ensure compliance with all applicable laws.

Although there is no legal or technical restriction, it may be difficult in practice for the signing of the merger agreement to take place immediately following the end of the financial year of the constituent companies in the merger, before the financial statements for such financial year are available. The parties involved may indeed be reluctant to prepare interim accounts when the financial statements for the full financial year are going to be released very soon.

18. FILING AND ANNOUNCEMENT

Each constituent entity in the merger must comply with the filing and public announcement procedures applicable to it under its applicable national law.

When the shares (or other securities) of any of these companies are publicly listed, special attention should be given to the equivalence of public disclosures: the investors of any such entity must be immediately given access to information equivalent to any information given by any other entity party to the merger with respect to such merger.

The rules described below apply to French parties to a cross-border merger.

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70 C. com., art. R. 236-3.

71 Mémento Fusions & Acquisitions 2016, no. 13125.

72 C. com., art. R. 236-3.

73 *Id*.

74 Mémento Sociétés commerciales 2017, no. 83192 ; Mémento Fusions & Acquisitions 2016, no. 13125.

18.1. Filing of merger agreement with the competent commercial court

The executed merger agreement must be filed with the commercial court of the jurisdiction in which the registered office of the French merging entity is located.[75]

This filing has to be made at least **30 days** prior to the first EGM of any of the constituent entities convened to vote on the merger. However, as mentioned below, the filing must in practice be made approximately 10 days before that deadline as the filing is to be published in the *Bulletin officiel des annonces civiles et commerciales (BODACC).*

18.2. Publication of common draft terms in the official bulletin or on the company's website

The filing of the merger agreement must also be published in the BODACC.[76] The publication at BODACC is made by the commercial court when the merger agreement is filed (the text of the notice may nonetheless be prepared by the company). The notice must also be made at least **30 days** prior to the first EGM of this entity. The timeline must be discussed and agreed with the commercial court: in several cases, it has not been possible to guarantee the publication in the BODACC less than 10 days after the filing of the draft common terms with the commercial court, which means that the 30-day deadline for filing the draft common terms may, in practice, be longer.

The legal publication in the BODACC must contain the following information:[77]

- the corporate name, commercial name, corporate form, registered office, amount of share capital, registration number with the Registry of Commerce and national identification number of all the parties to the merger;
- the amount of the share capital increase of the acquiring entity (if any);
- the valuation of the assets and liabilities to be transferred to the acquiring entity;
- the exchange ratio;
- the contemplated amount of the merger premium (this may be a significant issue since the notion of premium is not always relevant in other jurisdictions and that the amount of premium is not always known when the common draft terms are executed: in this case, an estimated premium may be mentioned);
- the date of entry into the merger agreement, the date of filing with the courts and the name of such courts.

If the relevant French entity has its own website, French law exempts the French entity from the BODACC notice mentioned above provided that the notice and the merger agreement itself are published on such website continuously for at least **30 days** before the first EGM of this entity. The

[75] C. com., art. L. 236-6 and R. 236-2.

[76] C. com., art. R. 236-2.

[77] *Id.*

website must be the website of the merging entity itself (and not, for example, the website of a parent company).[78]

18.3. BALO filing

If the French entity is a listed company, it must publish an official notice (in the same form as the notice published in the BODACC) in the *Bulletin des annonces légales obligatoires* (BALO) at least **30 days** prior to the first EGM called to vote on the merger. An exemption may be obtained if the merger agreement is published on the company's website during this period.[79]

18.4. Filing at the merging companies' offices

Additionally, the following documents must be made available to the shareholders at the offices of the French merging entity, or electronically on its website, at least **one month** prior to the first EGM:[80]

- the merger agreement;
- the explanatory report of the board of each company to its respective EGM;
- the reports of the merger auditors;
- assuming the merger agreement is signed in the first semester of year N, the years N-2 and N-1 annual financial statements of each of the merging companies approved by their respective EGM, the management reports of each of the merging companies for the years N-1 and N-2, as well as the board-approved financial statements for year N of each company, certified by the statutory auditors;
- in addition, if the merger agreement is signed in the second semester of year N, interim-accounts relating to a date which is no earlier than the three month prior to the date of execution of the common draft terms, prepared with due observance of the layout and valuation methods used in the last annual accounts (*see* section 17 above).

19. PROSPECTUS (LISTED ACQUIRING COMPANY)

If the merger results in the issuance by a French surviving entity of more than 10% of the number of securities of the same category already admitted to trading on any stock exchange, this entity is required to prepare a so-called "document E", which is a substitute for a prospectus, and which will (i) incorporate by reference the most recent registration documents of the French surviving entity, (ii) contain detailed information on the entity being merged out of existence and (iii) contain pro forma financial information for the combined entities.[81]

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78 C. com., art. R. 236-2-1.

79 C. com., art. R. 236-2.

80 C. com., art. R. 236-3: here again, the convening notice is greater than for a normal EGM (*i.e.*, 1 month vs. 15 days). The fact that the merger is a cross-border one does not affect this rule.

81 *Règlement général de l'AMF*, art. 212-4, 3°, 212-5, 4° and 212-24.

If the merger results in the issuance by a French surviving entity of less than (i) 10% of the number of its shares already admitted to trading on any stock exchange and (ii) 10% of the number of its shares already admitted to the same stock exchange, over a 12-month period, the French acquiring entity is exempted from issuing a "document E",[82] but is required to publish on its website and on the website of the *Autorité des Marchés Financiers* (AMF), prior to the EGM, a press release containing the number and type of securities to be issued, the objective of the merger and the financial terms of the merger. This alternative permitting the filing of a press release instead of a "document E" results from the manner in which the Prospectus Directive[83] was transposed in France, *i.e.*, the AMF's interpretation that a press release is deemed "equivalent to a prospectus" if the number of shares to be issued represents less than 10% of the number of shares already admitted to the same stock exchange.

If the surviving entity is not the French constituent company in the merger, and if this surviving entity is already listed or will apply for listing on a European (including French) regulated market upon completion of the merger, this entity will have to establish a prospectus reviewed and approved by its national financial market supervisory authority. In this case, the AMF will have **no** authority on the merger, except with respect to the quality of the financial information disclosed by the French entity being merged out of existence in the course of the merger process. However, note that the non-French surviving entity may also request to its national financial market supervisory authority the transfer of the review of the prospectus to the AMF in particular circumstances (*e.g.*, if the French entity participating in the merger is the only constituent company in the merger listed prior to the merger).[84] The competent authority has full discretion to grant the transfer and such transfer also needs to be accepted by the AMF.

20. MANDATORY BUYOUT OFFER

In the event one of the constituent companies in the merger (i) is listed on Euronext Paris and (ii) is merging with its controlling shareholder or with an entity controlled by its controlling shareholder,[85] the controlling shareholder may be required to file a buyout offer on 100% of the share capital of the listed controlled company prior to the merger.[86] The consideration offered as part of the buyout offer may be cash, shares (provided such shares are listed on a regulated market of a EU Member State with adequate liquidity) or a mix of both. In such a buyout offer, the AMF will review the price or the exchange ratio.

The AMF may waive in advance its right to request that a buyout offer be filed by the controlling shareholder. The main criteria that the AMF will consider in connection with its decision on the waiver are (i) whether or not the rights of the shareholders of the listed company merged out of existence will be materially affected by the merger and (ii) whether or not the activities, the bylaws, the dividend distribution policy and the liquidity of the shares of the surviving company are likely to

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82 Prospectus exemptions apply pursuant to *Règlement général de l'AMF*, art. 212-4, 212-5, 212-34. "Document E" exemptions apply pursuant to Instruction no. 2005-11 of Dec. 13, 2005, art. 12.

83 European Directive 2003/71/EC.

84 Pursuant to art. 13.5 of the Prospectus Directive.

85 In each case, "control" within the meaning of C. com., art. L. 233-3.

86 *Règlement général de l'AMF*, art. 236-6.

differ materially from those of the company merged out of existence. The AMF also takes into account the fairness of the proposed exchange ratio. The AMF has granted such a waiver in two cases involving a cross-border merger (Italcementi/Ciments Français and Stallergenes/Greer)[87] and in numerous cases involving domestic mergers (*e.g.*, ICADE/SILIC).[88]

21. CREDITOR OPPOSITION

21.1. Ordinary Creditors

Ordinary creditors of any French entity party to the merger have a 30-day period as from the filing of the merger agreement to file with the relevant commercial court a notice of opposition to the merger.[89] The court may either reject such opposition or grant relief to the creditors by ordering the immediate reimbursement of the applicable claim or the grant of security over certain assets of the French entity in favor of the opposing creditors.[90]

The filing by a creditor of a notice of opposition does not suspend the merger proceedings.[91] In the event where the French entity does not comply with the court's order, the merger would be deemed not to be effective with respect to the relevant creditor.[92]

21.2. Bondholders

If the surviving entity is French, the merger agreement does not have to be submitted to its bondholders.

If the French entity is the entity merging out of existence in the merger, French law requires the merger agreement to be submitted to a special meeting of the bondholders, **unless full and immediate reimbursement of their bonds is offered** by the combined entity.[93] Based on article L. 236-13 of the French commercial code, arguments have been made to the effect that French law would offer the same protection to the holders of bonds issued by a foreign disappearing entity when the surviving entity is French, especially if the foreign law does not provide for equivalent protection.

The bondholders' meeting must be convened on **15 days** prior notice and bondholders must be provided with the same information as shareholders.[94]

The quorum at the bondholders' meeting requires bondholders holding 1/5th of the voting rights to be present or represented (on first call only; on a reconvened meeting, there is no quorum requirement).

87 AMF decisions 209C0678 (May 15, 2009) and 215C0798 (June 11, 2015).

88 AMF decision 213C1819 dated Nov. 28, 2013.

89 C. com., art. R. 236-8.

90 C. com., art. L. 236-14, al.2.

91 C. com., art. L. 236-14, al.4.

92 C. com., art. L. 236-14, al.3.

93 C. com., art. L. 236-13 and L. 236-15. Bondholders of a French company have the right to grant a proxy to their representatives in order to allow them to oppose the merger in the same conditions as the ordinary creditors.

94 C. com., art. L. 236-13, R. 228-76.

Decisions are adopted if approved by 2/3rd of the votes of the bondholders who are present or represented.[95]

The decision of the bondholders may **not** stop the merger:

- If the merger agreement is approved by the bondholders at the bondholders' meeting, all bondholders of the relevant category automatically become bondholders of the surviving entity and are entitled to enforce their rights against it;[96]
- If the merger agreement is not approved, the merger may still be effected. However, representatives of the bondholders may, if granted a proxy by the bondholders in bondholders' meeting (*i.e.*, at the same conditions of quorum and majority), oppose the merger under the conditions provided for ordinary creditors (*see* above). The decision of the board of directors to proceed with the merger[97] must be published in the relevant legal gazette (*journal d'annonces légales*) or in the BALO, as the case may be, and the representatives of the bondholders have a 30-day period to file a notice of opposition with the competent commercial court.[98]

The above principles only apply to straight, non-convertible bonds; holders of convertible bonds or other equity-linked bonds do not have the same rights unless the terms and conditions of those securities specifically provide.

The creditor opposition rules under the laws governing the disappearing company must also be observed.

22. OPPOSITION TO A CROSS-BORDER MERGER ON GROUNDS OF PUBLIC INTEREST

The French national authorities do not have the right to oppose a cross-border merger on the grounds of public interest as referred to in article 4(1)(b) of the Cross-Border Merger Directive. Attention must, however, be given to the French rules governing specific activities,[99] which may effectively confer to the French State a veto right, and to the rules applicable in other relevant jurisdictions.

23. DECISION TO ENTER INTO THE CROSS-BORDER MERGER

23.1. Resolution to enter into the cross-border merger

Once the creditor opposition period has expired, the cross-border merger can be implemented and the relevant corporate bodies of the merging companies will be able to resolve on the cross-border merger.

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95 C. com., art. L. 228-65.

96 Mémento Sociétés commerciales 2017, no. 83981; JurisClasseur Commercial, Fasc. 1109, no. 99.

97 Note that the decision of the board to proceed with the merger is sometimes made "preventively" prior to the vote of the bondholders, at the time of the decision to convene the bondholders for a vote on the merger.

98 C. com., art. R. 228-79, R. 228-79 and R. 236-9.

99 For example, the acquisition by a foreign investor of the control of a French company involved in certain activities considered as "strategic" requires the prior approval of the French Minister of Economy. That would be the case if the French entity merged out of existence has subsidiaries involved in such activities.

23.2. Material changes in the assets and liabilities

Prior to the shareholders' meeting to approve the transaction, the merging companies' boards of directors will be asked to confirm whether any material changes in the assets and liabilities have occurred, affecting the terms of the merger agreement and/or the explanatory reports.[100] If such changes have occurred in respect of a merging company, the general meeting of that company, as well as the other merging company, must be informed thereof.[101]

These requirements may be waived by unanimous decisions of the shareholders of the merging companies.[102]

23.3. Decision to enter into the cross-border merger by the extraordinary general meeting

Unless the surviving company's articles of association provide otherwise, the decision to enter into the cross-border merger must be adopted in an extraordinary general meeting or by extraordinary shareholders' resolutions with due observance to the requirements that apply to an amendment of the surviving company's articles of association.[103] In a *société anonyme*, the majority requirement is 2/3 of the quorum, and the quorum requirement is 25% of all voting shares (not voting rights) upon first call of the EGM and 20% on second call.[104]

If the surviving company has issued classes of preferred shares, the decision of the general meeting to enter into the cross-border merger will require the consent of each group of holders of shares of the same class.[105]

Specifically for cross-border mergers, the shareholders may decide to condition the completion of the merger on their further approval of the modalities that will be decided in relation to the participation rights of employees in the management surviving corporation (*see* section 15 above).[106] However, such modalities are often decided before the merger agreement is entered into (and therefore before the decision of the shareholders on the cross-border merger).

In addition, the shareholders will also vote, in a separate resolution, on possible adjustment to the exchange ratio provided by the merger agreement or any provision to indemnify minority interests of the entity being merged out of existence (cash exit right), when such possibility is allowed under the law of incorporation of that party.

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[100] C. com., art. L. 236-9, al.5.

[101] C. com., art. L. 236-9, al.6.

[102] C. com., art. R. 236-5-1.

[103] C. com., art. L. 225-96.

[104] C. com., art. L. 236-9, al. 1 and L. 225-96.

[105] *See* section 7 above regarding shares benefiting from double voting rights.

[106] C. com., art. L. 236-28, al. 1.

24. *DÉCLARATION DE CONFORMITÉ* AND PRE-MERGER CERTIFICATE

Once the decision(s) referred to above have been adopted, all the conditions of the merger have been fulfilled and a *déclaration de conformité (DRC)*, which is a document explaining the various steps of the merger and stating that the merger has been realized in compliance with applicable laws and regulations, must be prepared.[107]

The DRC must be signed by a representative of each constituent entity in the merger (including non-French entities), and filed with the commercial court of jurisdiction where the registered offices of the French entity is located.

In the eight days following the filing of the DRC, the court's clerk ("*greffier*") will issue a pre-merger certificate ("*attestation de conformité*") attesting:[108]

- the satisfaction of all procedural formalities in respect of the resolutions of the French merging company that are stipulated by law or under its articles of association in order to participate in the cross-border merger, and
- the compliance with all other requirements stipulated by French laws governing mergers.

This certificate will mention if there is any procedure pertaining to the adjustment of the exchange parity, or to the indemnification of minority shareholders.[109]

Note that the registrars of certain commercial courts (including the Paris commercial court) allow the DRC to be filed and issue the pre-merger certificate prior to the extraordinary general meetings having decided on the merger.

A similar procedure is to be followed in the other relevant jurisdictions in order for a pre-merger certificate to be issued. In some jurisdictions, a notary (*e.g.*, in the Netherlands) or a court (*e.g.*, in the United Kingdom) may be in charge of establishing this certificate.

25. IMPLEMENTATION OF THE CROSS-BORDER MERGER

25.1. Principles

Once the pre-merger certificates have been issued with respect to all merging entities, a review of the legality of the cross-border merger will be performed by the relevant competent court, court's clerk, or notary, in the jurisdiction of the surviving entity only.[110]

The merger will be finally implemented once this legal control has been performed.

It must be observed that, while in certain foreign jurisdictions it is common for notaries to confirm the legality of the merger, in practice French notaries are often reluctant to perform this review, which can be compared to the issuance of a legal opinion. Accordingly, if the merging entities contemplate

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107 C. com., art. L. 236-6 and R. 236-4.

108 C. com., art. L. 236-29, al. 1.

109 C. com., art. L. 236-29, al. 2.

110 C. com., art. L. 236-30.

reliance on a French notary to perform the legality analysis, such notary should be involved in the transaction at an early stage.

Section 25.2 below only applies to cross-border mergers where the surviving entity is French.

25.2. French legality control

After the court's clerk has issued the French pre-merger certificate, and after receipt of the equivalent pre-merger certificate to be issued in respect of the disappearing company, the cross-border merger can be effected once the court's clerk (or notary) issues a certificate of legality control. To this purpose, each merging entity must provide the court's clerk (or notary) with a file containing:[111]

- the pre-merger certificate (dated no more than six months ago);
- the merger agreement;
- the by-laws of the surviving entity;
- a copy of all notices made pursuant to the French commercial code;
- a copy of the minutes of the shareholders' and bondholders' resolutions of all participating entities;
- a document certifying that the shareholders of each merging entities have approved the merger agreement in the same terms and that the modalities for employee management participation have been decided in compliance with French law.

The court's clerk (or notary) must complete the legality control no later than 15 days after the file has been filed.[112]

26. EFFECTIVE DATE OF THE MERGER

Specific to cross-border mergers, the cross-border merger becomes effective by operation of law, when the surviving entity is an existing entity, on the date set forth in the merger agreement, provided that this date may not be earlier than the date of completion of legality control nor later than the end of the surviving entity's current fiscal year.[113] The applicable rules of the other jurisdiction involved must also be taken into account (*e.g.*, in the United Kingdom, the legal effective date of the merger is set in the order issued by the court controlling the legality of the merger and such date can be no less than 21 days after the date on which the court order is made[114], noting that this rule is more flexible than in French national mergers, where the merger cannot become effective earlier than the beginning, or later than the end of the current fiscal year of all companies involved[115]).

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111 C. com., art. R. 236-19.

112 C. com., art. L. 236-30 and R. 236-20.

113 C. com., art. L. 236-31.

114 Regulation 16 of the U.K. Companies (Cross-border Mergers) Regulations 2007.

115 C. com., art. L. 236-4.

The drafting of article L. 236-31 of the French commercial code should not prohibit the merger from being effective, retrospectively for tax and accounting purposes, earlier than the date of completion of the legality control (typically at the beginning of the current financial year).

27. REGISTRATION

27.1. Registration with the French Trade Registry (French acquiring company)

The surviving company must register the cross-border merger with the relevant commercial court within one month after the effective date of the merger. In practice, the legality control will cause the merger to enter into force immediately, such registration thus being made at the same time as the court's clerk issued its certificate.[116]

27.2. Registration with other public registries

The surviving company must also register the merger in all other public registries that can keep record of transfers or mergers (*e.g.*, land registries) within one month after the cross-border merger became effective. In particular, if the French entity merged out of existence owns buildings, the transfer of the building to the acquiring entity must be registered with a notary.[117]

28. NULLITY OF THE CROSS-BORDER MERGER

Once effected, a cross-border merger cannot be rescinded.

29. SIMPLIFIED MERGER PROCEDURE

A simplified regime is available where the company that will be the surviving company in the merger holds at least 90% of the voting rights in the company to be merged out of existence.

29.1. Cross-border merger with a wholly-owned subsidiary

Under French law, exemptions exist from a number of formalities described in this memorandum in the case of a cross-border merger where, immediately before the merger, the company that will be the surviving company in the merger holds all of the shares in the company to be merged out of existence (and other securities giving the right to vote at general meetings) from the date of the filing of the merger agreement[118] with the commercial court (*see* section 18.1 above) until the completion of the merger.[119] Under such circumstances, no new shares are allotted by the acquiring company and there

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[116] C. com., art. L. 236-31 and Cross-Border Merger Directive, art. 12.

[117] Cass. com., June 29, 1993: no. 91-17.183; JurisClasseur Commercial, Fasc. 1109, no. 81.

[118] The English version of the Cross-Border Merger Directive uses the term "common draft terms of the cross-border merger"; the French version uses the term "*le projet commun de fusion transfrontalière*". The applicable provisions of the French commercial code uses the term "*traité de fusion*" in the section addressed specifically to cross-border mergers; elsewhere the term "*projet de fusion*" is used. For convenience, as well as style, we use the term "**merger agreement**" through this memorandum to refer to these largely interchangeable terms.

[119] C. com., art. L. 236-11.

is therefore no exchange ratio. Specifically, the constituent companies in the merger are exempted from:[120]

- obtaining a decision of their shareholders on the merger (however, one or more shareholders of the surviving company in the merger holding an aggregate percentage of at least 5% of the share capital of such company may petition the court for the designation of an authorized agent responsible for convening the surviving company's shareholders to decide whether or not to approve the merger);[121]
- appointing merger auditors;[122]
- preparing explanatory reports on the merger (*see* section 16.2 above).

Furthermore, it is not necessary to indicate in the merger agreement (i) the conditions in which the acquiring entity's shares will be remitted to the shareholders of the disappearing entity; (ii) the date from which such shares will give the right to receive dividends; (iii) the exchange ratio and the amount of cash to be paid, if any; and (iv) the contemplated amount of the merger premium.

Of course, it will remain to be checked whether the foreign law of the jurisdiction of the non-French constituent company in the merger offers similar exemptions.

29.2. Cross-border merger with a subsidiary held at more than 90%

Under French law, if, from the date of the filing of the merger agreement with the commercial court until the completion of the merger, the company that will be the surviving company in the merger holds 90% or more of the shares (and other securities conferring the right to vote at general meetings) in the company to be merged out of existence, then the constituent companies in the merger are exempted from:[123]

- obtaining a decision of the shareholders of the constituent companies; and
- appointing merger auditors and preparing explanatory reports, provided the minority shareholders of the company that is merged out of existence were offered, prior to the merger, the buyback of their shares by the surviving company in the merger for a price equal to their fair value.[124]

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120 C. com., art. L. 236-9 to L. 236-11.

121 C. com., art. L. 236-11, al. 2.

122 Except if the company that is merged out of existence in the merger issued securities giving access to its capital since in this case, a report is needed to determine to how many securities giving access to the capital of the surviving company in the merger the holders of the securities giving access to the capital of the company being merged out of existence are entitled; C. com., art. L. 228-101, al. 2.

123 C. com., art. L. 236-11-1.

124 As determined, (i) if the shares of the company being merged out of existence in the merger are not listed on a regulated market, in accordance with C. civil, art. 1843-4 (expert selected by the parties, or, if there is no agreement between the parties, by an order of the president of the commercial court); and (ii) if the shares of the company being merged out of existence in the merger are listed on a regulated market, as part of a public offering in compliance with the *Règlement général de l'AMF*.

The minority shareholders of the company being merged out of existence in the merger who do not tender their shares to the repurchase offer mentioned in the paragraph above must receive shares of the surviving company in the merger in exchange for their shares of the company merged out of existence.[125]

30. ESTIMATED TIME FRAME

The table below gives a tentative and high-level indication of the timing of a cross-border merger (in the normal regime) where no Special Negotiation Group is necessary to determine the ongoing modalities for the participation of employees in management. This timetable can be impacted by various factors, such as creditors opposing the merger agreement, the creditor opposition period ending on a Saturday, a Sunday or a public holiday, regulatory requirements that need to be obtained, an uncooperative works council, disgruntled shareholders, etc. Also, this timetable does not take into account the formalities and procedures stipulated by the laws governing foreign merging entities.

This timetable does not take into account merger control or other specific regulatory constraints (banking and insurance industry, other administrative authorizations needed, etc.).

[125] C. com., art. L. 236-3, I.

	Step	*Approximate timing*
1.	Due diligence on restrictions/difficulties in connection with the cross-border merger Preparation of tax ruling request, merger agreement, explanatory reports and accompanying documents (including interim financial statements, if required) Involvement of merger auditors	T - 100 days
2.	Filing of tax ruling request	T - 90 days
3.	Requesting opinion of works council and other employee consultation (assuming no expert will be appointed and CHSCT will not be involved)	T - 80 days
4.	Execution of merger agreement and accompanying documents (after works council consultation process has been completed)	T - 45 days
5.	Issuance of merger auditors' reports	T - 45 days
6.	Convening of shareholders' meetings	
7.	Filing of merger documents	T - 40 days
8.	Registration of "document E" with the AMF (listed French surviving entity only)	
9.	Announcement of filing in BODACC (and BALO for a French listed entity)	T - 35 days
10.	Creditors opposition period	T - 35 days through T - 4 days
11.	Granting of tax ruling request	Before T day
12.	Shareholders' meetings / execution of shareholders' resolutions	T day
13.	Pre-merger certificates issued in all jurisdictions	T + 7 days
14.	Execution of merger completion deed Legality control in the jurisdiction of the surviving entity: merger becomes effective	T + 10 days

ANNEX A – NOTABLE CROSS-BORDER MERGERS

There have been hundreds of cross-border mergers pursuant to the cross-border merger directive; the below is a selective list of some of the most notable combinations involving (i) French listed companies and (ii) non-French European listed companies.

* **bold text: Part of a larger transaction also involving a significant non-European component**

Ann. Date	Compl. Date	Party A	Nationality	Listed or not	Party B	Nationality	Listed or not	Name of final holding entity	Country of final holding entity
May 19, 2016	**Jan. 16, 2017**	**Technip S.A.**	**French**	**Listed**	**FMC Technologies, Inc.**	**U.S.**	**Listed**	**TechnipFMC plc**	**UK**
Mar. 3, 2015	**Sept. 8, 2015**	**Stallergenes S.A.**	**French**	**Listed**	**Greer Laboratories, Inc.**	**U.S.**	**Not listed**	**Ares Allergy Holding plc (renamed Stallergenes Greer plc)**	**UK**
July 29, 2014	Mar. 31, 2015	Klépierre S.A.	France	Listed	Corio N.V.	Netherlands	Listed	Klépierre S.A.	France
Apr. 16, 2014	July 28, 2014	BioAlliance Pharma S.A.	French	Listed	TopoTarget A/S	Danish	Listed	BioAlliance Pharma S.A. (renamed Onxeo S.A.)	France
Dec. 16, 2012	May 28, 2013	Vivalis SA	French	Listed	Intercell AG	Austrian	Listed	Valneva SE	France

Ann. Date	Compl. Date	Party A	Nationality	Listed or not	Party B	Nationality	Listed or not	Name of final holding entity	Country of final holding entity
Feb. 26, 2015	**Oct. 19, 2015**	**Sorin S.p.A.**	**Italian**	**Listed**	**Cyberonics, Inc.**	**U.S.**	**Listed**	**LivaNova plc**	**UK**
July 16, 2014	**Apr. 7, 2015**	**GTECH S.p.A.**	**Italian**	**Listed**	**International Game Technology Corp.**	**U.S.**	**Listed**	**Georgia Worldwide plc (renamed International Game Technology plc)**	**UK**
Jan. 29, 2014	**Oct. 12, 2014**	**Fiat S.p.A.**	**Italian**	**Listed**	**Chrysler Group LLC**	**US**	**Not listed**	**Fiat Investments N.V. (renamed Fiat Chrysler Automobiles N.V.)**	**Netherlands (UK tax domicile)**
May 30, 2012	**Sept. 29, 2013**	**Fiat Industrial S.p.A.**	**Italian**	**Listed**	**CNH Global N.V.**	**US**	**Listed**	**CNH Industrial N.V.**	**Netherlands (UK tax domicile)**
Apr. 8, 2010	Jan. 21, 2011	British Airways plc	UK	Listed	Iberia, Líneas Aéreas de España S.A.	Spanish	Listed	International Consolidated Airlines Group, S.A	Spain

Ann. Date	**Compl. Date**	**Party A**	**Nationality**	**Listed or not**	**Party B**	**Nationality**	**Listed or not**	**Name of final holding entity**	**Country of final holding entity**
Apr. 16, 2008	Aug. 26, 2008	CashGuard AB	Swedish	Listed	PSI Group ASA	Norwegian	Listed	PSI Group ASA (renamed StrongPoint ASA)	Norway