

Cross-border mergers after Brexit with Portugal

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BREXIT: CROSS-BORDER MERGERS

1. Do you think UK companies would still be able to carry out cross-border mergers with companies in your jurisdiction after the UK leaves the EU?

So far there has been no indication as to whether Portugal is planning to keep any of the benefits under Directive 2005/56/EC on cross-border mergers of limited liability companies (Cross-border Mergers Directive) in place for mergers with UK companies after the UK leaves the EU. Also, no consultation papers or official documents have been published in this respect. Accordingly, mergers with UK companies will most likely be subject to the same regime which would apply to a merger of a Portuguese company with a company registered in a non-EEA jurisdiction.

2. Does your jurisdiction allow for cross-border mergers with non-EEA companies?

There are no Portuguese laws or regulations which specifically allow cross-border mergers with non-EEA companies. Therefore, the admissibility of a cross-border merger with a non-EEA company, under Portuguese law, is debated.

However, Portuguese private law is generally governed by a freedom principle, according to which anything the law does not prohibit is permitted. Therefore, as a cross-border merger between a non-EEA company and an EEA company established in Portugal is not specifically prohibited under Portuguese law, in theory it should be deemed permitted.

In fact, according to the general provisions of the Portuguese Civil Code, mergers between entities subject to different personal laws (that is, entities established in different jurisdictions) must be assessed in relation to the laws of the two jurisdictions in which the merging entities are incorporated (*Article 33(4)*). Consequently, the possibility of implementing such a merger will ultimately depend on:

- The applicable provisions of Portuguese law.
- The applicable provisions of the law under which the non-EEA entity was set up (which may even preclude the application of Portuguese law even if the EEA company is established in Portugal).
- The companies' registration services of both jurisdictions.

Assuming, based on the above, that the merger of a Portuguese company with a non-EEA company would be allowed in Portugal, it is then necessary to assess which provisions/framework would govern such a merger. Although Portuguese law does not specifically foresee such a cross-border merger, the general provisions of the Portuguese Companies Code stipulates that situations not foreseen in the Portuguese Companies Code will be

governed by the provisions applicable to similar cases (that is, convening the application of the same legal provisions and principles by virtue of their particular characteristics to cases not specifically or expressly foreseen. This is not necessarily case law and such similarity should be assessed on a case-by-case basis) and, in their absence, by the Portuguese Civil Code provisions regarding the companies' articles of association, in everything that is either not contrary to the general principles of the Portuguese Companies Code or the principles conforming the companies' type (*Article 2*).

It has been argued that, given they are subject to a specific legal framework directly emerging from the implementation of the Cross-border Mergers Directive, which assumes a similarity of regimes among EEA member states, the provisions of the Portuguese Companies Code regarding cross-border mergers with EEA companies cannot be deemed as applicable by analogy (see *Sofia Carreiro, "A fusão" in Aquisição de Empresas, Coimbra Editora, 2011, pp. 146 ff*). Therefore, the only possible way to implement such a merger with a non-EEA company would be to apply the framework used for domestic mergers (with the necessary adaptations).

Considering the above, it is probable that, if permitted, the merger of a Portuguese company with a non-EEA company would be governed in Portugal by the provisions applicable to Portuguese domestic mergers, with the necessary adaptations, without prejudice to the application (where relevant) of the provisions of the non-EEA company's jurisdiction (notably for aspects that exclusively relate to the non-EEA company).

When comparing the Cross-border Mergers Directive and the relevant Portuguese Companies Code provisions implementing such Directive with the provisions of the Portuguese Companies Code governing domestic mergers, the main differences concern:

- The necessary co-operation in cross-border mergers between the corresponding competent authorities and the mediation between the effects of the merger registration in one jurisdiction and another, which are not immediate and depend on the communication between those authorities.
- The fact that, while Portugal's domestic provisions establish that the merger can be declared null and void under certain conditions, the cross-border merger provisions determine that a merger cannot be declared null and void if the merger has already begun to take effect.

However, given that the most relevant differences relate to the transnational feature of the merger (whether or not between two EEA companies), they are most likely not very material for this purpose.

In light of the above, most notably the uncertainty regarding the applicable framework, a cross-border merger between a non-EEA company and an EEA company established in Portugal will need to be assessed on a case-by-case basis and the process for its implementation will need to be thoroughly discussed, considering the specific circumstances of the case, with the companies' registration services of both jurisdictions involved.

In any case, it is noteworthy that recently, a pioneer merger by incorporation of a non-EEA company into a Portuguese company (which owned the entire share capital of the former) was registered in Portugal, having followed the rules applicable to simplified internal mergers under the Portuguese Companies Code.

3. If a cross-border merger is structured using the usual rules applicable in your jurisdiction to mergers with non-EEA companies, what would the likely effect be on the merger timetable?

Considering there are currently no specific Portuguese provisions regarding cross-border mergers with non-EEA companies, and that most probably any potential cross-border merger with a non-EEA company would be expected to generally follow the provisions regarding domestic mergers (in what concerns the EEA company established in Portugal), albeit implying consideration of, and contacts with, another jurisdiction, it is not possible to anticipate with any certainty what the impact would be to the merger timetable (if any).

Any likely impact will ultimately depend on the corresponding provisions of the non-EEA company's jurisdiction, especially regarding:

- The necessary co-operation between the competent authorities and each of the relevant jurisdiction's commercial registry offices (if any).
- How similar the applicable legal framework of the relevant non-EEA jurisdiction is to the Portuguese legal framework.

Consequently, this will need to be assessed on a case-by-case basis.

4. If a cross-border merger is structured using the usual rules applicable in your jurisdiction to mergers with non-EEA companies, are there any other considerations that may be relevant?

Apart from the differences referred to in *Question 2*, there presently seems to be no other material considerations, since the main legal requirements and formalities relating to the mergers will generally apply to domestic mergers, EEA cross-border mergers and (by analogy) non-EEA cross-border mergers.

5. Has there been any indication in your jurisdiction as to whether cross-border mergers involving a UK company that commence prior to the Brexit deadline of 29 March 2019 would be unable to complete if the deadline for completion is due to fall after the UK leaves the EU?

There has been no indication from the Portuguese authorities as to whether cross-border mergers involving a UK company that commence prior to the Brexit deadline of 29 March 2019 would be unable to be completed if the deadline for completion falls due after the UK leaves the EU.

Furthermore, there has been no indication from any national regulator, courts or competent authorities (in this case the Portuguese Commercial Registry Office), as to whether it would not be willing to issue pre-merger certificates, promote the registration of the merger, or strike off the transferring companies from the registry.

Finally, no system of transitional arrangement is likely to apply to mergers between UK companies and companies established in Portugal, given that there are currently no Portuguese-specific provisions regarding cross-border mergers with non-EEA companies, except if something is decided in this respect at EU level.

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