20 March 2019

LAW 4601/2019 (FEK A' 44/09.03.2019) "Corporate Transformations"

We briefly outline the main provisions introduced by Law 4601/2019 that improve and modernize the legislative framework on corporate transfomations. The new provisions pertain to corporate transformations to be implemented after 15 April 2019.

General Comments

— The new Law provides for three main categories of transformation: **Merger, Division** (common, partial division, spin off) and **Conversion**.

— General provisions govern each transformation category, irrespective of the legal form of the companies involved, while specific provisions introduce deviations based on the particularities of each company type involved.

— The scope of the new Law includes the following types of companies: sociétés anonymes (SA), limited liability companies (LLC), private companies (PC), general partnerships (OE), limited partnerships (EE), limited by shares partnerships, European companies (SE), civil associations and European cooperative companies (SCE) registered in Greece. These companies may become parties of a transformation regardless of the company type.

— Under specific provisions companies dissolved or declared bankrupt may also be transformed.

— The new Law does not include any tax provisions, thus the provisions of L.1297/1972, L.2166/1993 and L.4172/2013 remain effective. The permissibility, the procedure, the conditions and the results of the transformation will be regulated by the relevant corporate law provisions.

— The Court of First Instance (the territorial jurisdiction of which depends on the place of the registered office of any of the participating companies) has exclusive jurisdiction for the resolution of disputes arising from the implementation of the relevant provisions.

Merger and common Division

— The **merger** and the **common division** may be carried out by the acquisition or by the incorporation of a new company. Takeovers are also included in the new law and apply only in cases of SAs. Divisions in particular, may also be carried out by combining both acquisition and the formation of a new company.

— The procedure and conditions to be followed in mergers and common divisions are similar and include the following steps:

- drafting of a merger or division agreement (DMA) by the Board of Directors (BoD) or the administrators of the companies involved,
- registration and publication of the draft at the General Commercial Registry (GEMI), at least one (1) month before the resolution,
- drafting of a detailed explanatory report on the merger or division draft, which includes the proposed exchange ratio, and submission of the report for approval to the GM or the partners,
- review of the merger or division draft by independent experts,
- final resolution by the General Meeting (GM) of shareholders or partners on the merger or division (in case of an SA being involved, the GM's decision should be approved by each special category of shareholders in case they are affected by the merger/division),
- drafting of a merger or division agreement in the form of a private document or a notarial deed depending on the company type involved (a notarial deed is required for SAs, LLCs, PCs as well as in all other cases provided by law),
- legality check carried out by the Authorities and

registration of the merger or division with the General Commercial Registry (GEMI).

— The results of the merger and the division are effective following the registration of the relevant acts in GEMI. These results include the integration or division of the companies, the assets transfer (without the stage of liquidation and with the results of universal succession), the continuation of the pending trials in the name of the new company. In case of division, the company under division ceases to exist.

Partial Division and Spin Off

— The fact that partial division and spin off have been included in the new law is considered innovative, despite the fact that spin off was fragmentarily regulated by laws 1297/1972 and 2166/1993.

— Their main difference between partial division and spin off lies in that in cases of partial division the exchange for the transfer of the branch (i.e. the participation to the benefiting company plus cash if applicable) is granted to the shareholders/partners of the company from which the branch was divided off, whereas in cases of a spin off, it is granted to the company.

— The partial division or spin off procedure may be carried out by:

- the acquisition of the branch by the benefiting company,
- the incorporation/formation of a new company/companies to which the branch is transferred to (benefiting company/companies) or/and
- a combination of the aforementioned.

— The notion of “branch” is defined as the total of the assets and liabilities which, from an organizational point of view, constitute an independent business, that is to say an entity capable of functioning by its own means.

— When the partial division and spin off are carried out by acquisition, the provisions concerning the merger and division shall apply accordingly.

— In both cases, the company transferring the branch retains its legal personality and the branch is transferred by means of universal succession, thus resolving permanently the controversy regarding this matter.

Conversion

— The conversion constitutes a change of the company type and requires the resolution of the meeting of shareholders or the partners.

— The minimum mandatory content of such resolution consists, amongst others, of the quantitative and qualitative determination of the shareholdings of the company under its new legal form.

— Publicity requirements include the submission of the resolution of the shareholders/partners as well as the submission of the notarial deed of the conversion, where applicable. In such a case, the publicity is concluded only with legality check. The issuance of the authorization decision of the Regional Governor of the local authorities, in the region of whom the company under conversion is registered, is not required, with the exception of the conversion of an SA or a European Company (SE) into a different type of company.

— In the conversion, not all stages of the merger and division procedure are included, namely the drafting of and the review of the draft by independent experts. The following stages, however, are required for the conclusion of a conversion:

- drafting of a detailed explanatory report including a draft of the decision to convert the company by the BoD or administrators of the companies under conversion,
- resolution by the meeting of shareholders or the partners,
- legality check and publicity at General Commercial Registry (GEMI).

— The results of the conversion come into effect upon the registration of the resolution (or/and the notarial deed) in GEMI. The conversion is not affected by the 30 days period provided for the protection of the creditors.

— After the publicity requirements are fulfilled, the converted company keeps its legal personality (status) and continues its operation under its new legal form without any transfer of its property. The shareholders/partners become shareholders/partners of the company resulting from the conversion and the pending trials continue in the name of the company in its new legal form.

Deviations & Simplifications

General Comments

— Procedural simplifications for the transformation progress for each type of company come into force, such us:

- the right to publish the draft agreement exclusively to the company’s website,
- the right not to draft the BoD’s or administrator’s report or the experts’ report in cases of a unanimous decision of the shareholders or partners,
- the availability of the relevant documents uploaded to the website of each transforming company and
- the provision of copies upon a relevant request of a partner/shareholder via e-mail.

— For partnerships (OEs and EEs), LLCs and PCs the administrator’s report is not required if all partners of the company under transformation are also the company’s administrators, while the preventive legality check may occur without an administrative

approval decision.

— For partnerships (OEs and EEs) and PCs the merger or division agreement is concluded in the form of a private document, unless a notarial deed is required pursuant to other legal provisions (e.g. transfer of property to the company)

Comments for General Partnerships

— The review of the draft agreement by an expert is required upon request of at least one partner.

— The merger and division draft agreement should also indicate the liable partners as well as the participating interest of the absorbing entity's partners to the acquiring company.

— A unanimous decision for the approval of the transformation is required, unless the articles of association of the company provide for a majority of at least three-quarters (3/4) of the partners.

— The period of limitation for claims against the partners of the transforming company, who are not liable for its debts, is five years and begins from the date of completion of the transformation, unless the claim is subject to a shorter period of limitation.

Comments for Limited Liability Companies

— A majority of at least ½ of the total number of partners, representing at least 65% of the total share capital is required for the approval of the transformation.

— The merger and division draft agreement must include the participating interest and the partnership parts acquired by each partner of the absorbed / divided in the acquiring / benefiting company.

Comments for Private Companies

— The merger and division draft agreement should also include a justification of the exchange ratio of the total contributions (capital, non-capital, guarantee) in order to be proved fair and reasonable.

— The period of limitation for claims against partners with guarantee contributions that are not liable for the debts of the company is three years and begins from the date of completion of the transformation unless the claim is subject to a shorter limitation period.

Provisions for the protection of the shareholders, creditors, bondholders and employees

— For the shareholders' protection, the law (inter alia) provides for:

- a minimum mandatory content for the drafts of the merger and division agreement and the conversion agreement;
- the availability of the relevant documents until the final resolution on the transformation and the exemption from such obligation, provided that the documents are available on the company's website;
- increased quorum and majority of the meeting of shareholders/partners for the approval of the transformation, accompanied with publicity formalities;
- the conclusion of the results of the transformation following the registration/ publicity formalities and legality check;
- the declaration of invalidity of the transformation for a limited number of reasons upon a relevant court decision.

— For the protection of creditors the law provides that: within 30 days following the completion of the transformation disclosure formalities, the creditors of the company (whose claims were issued prior to that date) have the right to request for appropriate guarantees. The above may occur provided that they prove that the financial statements of the companies due to the transformation require such guarantees and they have not yet received such.

— The same protection granted to creditors is also reserved for bond holders, provided that there has been no prior approval of the transformation (merger or division)

— Particularly in the case of division (common, partial and spin off), the joint and several liability for the divided and the beneficiary company is provided for those creditors' claims that were not satisfied, up to the amount of the net position of the contributed assets. The period of limitation in this case is 5 years.

— For the protection of employees, the provisions that apply in cases of change of employer apply as well (Presidential Decree 178/2002).

Liability of the members of the BoD and Administrators

— The members of the BoD or the administrators of the companies involved in the transformation (spin offs are exempted), as well as the experts, are liable towards the shareholders or partners for any fault of theirs.

— Liability for third party damages, is not excluded and is governed by the general legal provisions.

Invalidity of the Transformation

— The invalidity-annulment is regulated uniformly and requires a court decision, for its declaration. A transformation may be declared as invalid for reasons related to validity of its approval or for reasons related to invalidity/annulment of the decision of the competent body.

— Mechanisms that aim to resolve cases of invalidity or annulment of the transformation are provided aiming to eliminate the defect, removing it or evaluating it as disproportionate in relation to the size of the defect. In cases where the treatment of the defect leads to adverse results for the injured party, claims for damages could be raised.

— When the acquiring or benefiting company is listed, the invalidity is not declared due to reasons relating

to the invalidity or annulment of the decision. Claim for damages is however, granted.

— In the event of an unfair exchange ratio (merger and division) or an unfair way of determining the Company's shareholdings in the new company (conversion), the transformation is not declared invalid for this reason. Affected persons may claim damages.

— The validity of transactions that have taken place by the companies under transformation is not affected until the publication of the court decision in the General Commercial Registry (GEMI).

Comments

— The new Law demonstrates the transition in a new, simplified set of provisions, allowing all kinds of transformations between companies of different legal types.

— In addition, it integrates into a single legislation all provisions relating to transformations (in compliance with EU law), eliminates most conflicting issues and fills the gaps that existed for a long time.

— Issues will continue to arise due to the entanglement of corporate law provisions incorporated into a single system of rules, and the tax provisions in force (L.1297/1975, L. 2166/1993 and L. 4172/2013) not incorporated in the new Law. It has however, been announced that a new law including tax incentives related to mergers shall be submitted within the next few months.

— Additional issues may arise from the absence of an explicit reference to the obligation to evaluate the assets of the merging companies (or transferring branches), a process not covered by the experts' report on the fairness of the exchange ratio. In any case, the relevant provisions of L. 4548/2018 should be taken into account (indicatively art. 17 par. 3 on the obligation of a valuation report in cases of share capital increase).

— The level of protection of the creditors in cases of spin-offs is an area that may give rise to further complications due to the results related to universal succession and the creditors right to raise their claims exclusively towards the benefiting company (art. 479 CC does not apply).

— Finally, it can be noted that the spin-off of a branch can now be implemented by the establishment of a new company, while as a result the company’s branch may be converted into a 100% subsidiary, by transferring all its assets (branch) to the newly formed company.

— Overall, the new law is a very positive step towards the modernization and optimization of the business environment and facilitates the implementation of the relevant provisions.

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