

The Brief

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Kyiv M&A Group

Restrictions over mixed mergers in Ukraine

A merger is one of the most common forms of reorganisation for companies, when one or several companies cease to exist and their rights and liabilities are transferred to another company. Where companies with different legal forms (e.g. limited liability companies, joint stock companies, partnerships, etc.) take part in a merger, such transactions are called a “mixed merger.”

The Law of Ukraine on Joint Stock Companies, adopted by the *Verkhovna Rada* (Parliament) of Ukraine on 17 September 2008, and entered into force on 30 April 2009 (the “JSC Law”), provides for new rules with regard to mixed mergers with joint stock companies in Ukraine.

This Brief presents our short analysis of the situation relating to mixed mergers in Ukraine following the promulgation of the JSCs Law.



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1. Legal background

Generally, the Civil Code of Ukraine No. 435-IV, dated 16 January 2003; the Commercial Code of Ukraine No. 436-IV, dated 16 January 2003; and the Law of Ukraine on Business Companies No. 1576-XII, dated 19 September 1991; provide companies with the right to merge or be merged with or into other companies. At the same time, these regulatory acts do not provide for any limitations with regard to mergers of companies with different legal forms. These laws leave companies in a position governed by the civil law principle of *nulla poena sine lege*, i.e. one cannot be punished for doing something that is not prohibited by law.

Moreover, the procedure for mergers with joint stock companies, including mixed mergers, is provided for by the Regulations of the State Commission for Securities and Stock Market No. 221 and No. 222, dated 30 December 1998.

2. Overview of restrictions

According to the second paragraph of Article 84 of the JSC Law, *“a joint stock company may be merged into another joint stock company only.”*

Therefore, the JSC Law prohibits joint stock companies from being merged into other companies (e.g., limited liability companies, partnerships), except for another joint stock company.

The new restriction of the JSC Law appears to be very strict and does not leave room for negotiations. However, the second paragraph of Article 84 relates only to cases when a joint stock company decides to cease to exist through a merger into another joint stock company. In other words, the said restriction does not prohibit a joint stock company from absorbing limited liability companies, partnerships or other companies.

In light of other provisions of the JSC Law, which prohibit joint stock companies from taking part in consolidations, splits or spin-offs with companies with legal forms other than a joint stock company, the one-sided prohibition of Article 84 appears to be a loophole in the law.

In order to clarify the situation, we addressed our lawyers' concerns on this issue to the State Commission for Securities and Stock Market. In its official Letter No. 11/03/10657 dated 6 July 2009, the State Commission for Securities and Stock Market made a very important conclusion, according to which, *“the JSC Law does not prohibit mergers of companies with other legal forms into joint stock companies.”*

Therefore, the JSC Law governs the issues of the reorganisation of joint stock companies, including by way of mergers, and does not prohibit a joint stock company from merging with other companies.

It is worth mentioning that due to the absence of established practice, there is a risk that local departments of the State Commission for Securities and Stock Market will refuse to register the additional share issue in the course of a mixed merger. However, as such decisions will not be based on legal grounds, they may be subsequently challenged in court.

3. Summary

Summarising the key points set out above, we can make the following conclusions on mixed mergers with joint stock companies in Ukraine:

1. It is strictly prohibited to merge a joint stock company into another type of company.
2. The Law on Joint Stock Companies does not prohibit mergers of companies with other legal forms into joint stock companies.
3. The procedure for merging a company with another legal form into a joint stock company is specified by Regulations No. 221.

We are of the opinion that this is not the end of the story concerning mixed mergers in Ukraine. The State Commission for Securities and Stock Market has vast discretionary powers at its disposal either to stop mixed mergers with joint stock companies or to do quite the opposite.



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