

Trasformation, mergers and divisions

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Transformation

Transformation is an extraordinary operation involving a change in the type of partnership or company or a change from a limited liability company (s.p.a., s.a.p.a., s.r.l.) to another legal entity, and vice versa.

The main feature of this operation is the rule of continuity of legal relations: the transformed entity retains the rights and obligations and continues in the relations of the entity that carried out the transformation (art. 2498 c.c.).

The current legislation provides for two kind of transformation:

→ homogeneous transformations: transformations in which for-profit companies or partnerships transforme themselves into another for-profit companies or partnerships

→ heterogeneous transformation: transformation in which for-profit companies or partnerships transforme themselves into an entity with a different purpose, and vice versa

Homogeneous transformations

The law regulates the transformation of partnerships into limited liability companies (art. 2500-*ter* c.c. et seq.) and the transformation of limited liability companies into partnerships (art. 2500-*sexies* c.c.).

Procedure (quorum)

- approval following the rules provided for the amendments to the instrument of incorporation (partnership agreement)
- transformation from a partnership into a LLC: majority calculated according to the profit share, right to withdrawal
- transformation from a LLC into a partnership: resolution of the extraordinary shareholders' meeting with a higher majority, consent of those who will assume unlimited liability, right to withdrawal

Procedure: resolution of transformation

→ Form and content requirements for the instrument of incorporation (partnership agreement) of the type of company/partnership chosen and compliance with the rules provided for incorporation

From LLC to partnership

→ directors must draw up a report explaining the reasons and the effects of the transformation, which must remain deposited at the company's office during the thirty days before the meeting that will decide on the transformation

From partnership to LLC

- the resolution must be drawn up with the form of public deed and must contain the information required by the law for the instrument of incorporation of the type of company chosen
- check by the notary
- recording in the Business register

The assets of the partnership must be subject to valuation, in accordance with the rules established for the valuation of contributions in kind (art. 2500-*ter*, par. 2, c.c.).

The share capital will be established in an amount not exceeding the amount of the net assets resulting from the valuation.

After the recording in the Business register of the resolution the procedure has been completed, and the transformation take effect.

Once the resolution is recorded in the register, the invalidity of the transformation resolution can no longer be pronounced (art. 2500-*bis* c.c.).

(without prejudice to the right to compensation for damages by damaged shareholders or third parties)

Each members have the right to receive a number of shares or a quota in proportion to his/her participation
(art. 2500-*quater*, c.c. – art. 2500-*sexies*, par. 3, c.c.).

Member liability for the corporate obligations

- 1) Whether by the transformation the members assume unlimited liability:
 - is required the consent of the members who will assume an unlimited liability (art. 2500-*sexies*, par. 1, c.c.; this liability also covers the corporate obligations prior to the transformation: art. 2500-*sexies*, par. 4, c.c.)
- 2) Whether with the transformation the unlimited liability of the members is lost (art. 2500-*quinquies* c.c.)
 - members are not released from liability for corporate obligations prior to the registration of the resolution of transformation in the Business register
 - creditors' consent to transformation counts as consent to the release of all unlimited members; the consent is presumed if the resolution of transformation has been communicated to the creditors (individually, by appropriate means) and they have not expressly denied their consent to the transformation (within 60 days after the receipt of the communication)

Merger

Merger is an extraordinary operation that consist in the the unification of two or more companies/partnerships into one.

Main types of merger

→ merger in strict sense: two or more companies merging together to form a new company

→ merger through absorption: an existing company absorbs one or more other companies

→ homogeneous merger: is the merger between same type of companies

→ heterogeneous merger: is the merger between different type of for-profit companies or between for-profit companies and non-profit entities (in this case it must be applied the same limits provided in the case of heterogenous transformation, because it implies also the transformation of one or more companies or entities involved in the merger)

After this procedure «the company resulting from the merger or the absorbing company shall take on the merging companies' rights and obligations, continuing with all the relationships existing prior to the merger,...»
(art. 2504-*bis*, par. 1, c.c.)

Merger procedure:

- 1) Draft terms of merger
- 2) Merger decision
- 3) Deed of merger

1) Draft terms of merger (art. 2501-*ter* c.c.)

- competence: administrative bodies
- content
- filing in the Business register
- drawing up of the following documents: up-to-date balance sheet (art. 2501-*quater*, c.c.), report by the administrative body (art. 2501-*quiquies*, c.c.), experts' report (2501-*sexies*, c.c.)

- documents filing at the registered offices of the companies involved or publishing on their website (during the thirty days preceding the meeting) (art. 2501-*septies* c.c.)

2) Merger decision (art. 2502 c.c.)

→ competence

→ quorum (companies, partnerships)

→ recording in the Business register (art. 2502-*bis* c.c.)

→ merger implementation and opposition of the companies' creditors (art. 2503 c.c.)

3) Deed of merger (art. 2504 c.c.)

- drawing up of the merger deed by the legal representatives of all the companies involved
- public deed
- recording in the Business register
- effects of a merger (art. 2504-*bis* c.c.)
- invalidity of the merger deed (art. 2504-*quater* c.c.)

Division

Main types of division (art. 2506 c.c.)

→ total division: the entire assets of the company are transferred to more than one company, and the divided company is dissolved

→ partial division: only part of the company's assets are transferred to one or more companies, so that the divided company does not dissolve but continues its activity

→ division in strict sense: the beneficiaries of the division are new incorporated companies

→ division through absorption: the beneficiaries of the division are companies that have already been incorporated

Division procedure:

- 1) Draft terms of division (art. 2506-*bis* c.c.)
- 2) Division decision
- 3) Deed of division

→ unless otherwise provide by the law, it will apply the rules provided for mergers

→ effects of a division (art. 2506-*quater* c.c.)