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Bulgarian Legal Framework on Cross-border Transformations with Participation of a Company Established Outside the EU and EEA

In the modern globalised business environment, issues of corporate cross-border transformations increase in significance. Such processes entail a complex range of problems, including corporate, tax, employment, regulatory, etc. which need to be analysed and considered accordingly. The present text is focused on one of the main aspects of cross-border transformations, in particular: **Does the Bulgarian legislation in general allow any transformations with participation of a company established outside the European Union and the European Economic Area?**

The procedure for transformation of commercial companies is regulated in Chapter XVI of the Bulgarian Commercial Act (CA). With a view to Bulgaria's EU accession in 2007 and the related transposing of the EU legislation, amendments in the Commercial Act were promulgated in connection with Directive 2005/56/EC of the European Parliament and of the Council on cross-border mergers of limited liability companies, which regulates the said procedure for companies having their registered office in the EU. To this end, Section V of Chapter XVI of the CA regulates the transformation with participation of companies having their registered office in an EU Member State or in a state which is party to the Agreement on the European Economic Area (EEA). Art. 265d of the CA defines the scope of the stipulated regime which refers only to transformation by acquisition or merger where at least one of the participating companies has its registered office in another EU Member State or in a state – party to the EEA Agreement and is of a type specified in Art. 1 of Council Directive 68/151/EEC.

CA does not provide explicit regulation on transformations which involve companies having their registered office outside the EU, and this causes ambiguities in practice. Furthermore, Para 2 of Art. 265d says: *"No transformation under Para 1 may be carried out where any of the participating companies has its registered office outside the European Union..."*. **However, this does not mean that such transformation is inadmissible, but rather that it would not be carried out in compliance with the procedure stipulated in Chapter XVI, Section V of the Commercial Act.**

In this sense, if a transformation procedure which includes not only a Bulgarian company but also a foreign company established outside the EU/EEA is to be initiated, the provisions of the Bulgarian Private International Law Code (PILC) shall be regarded. According to Art. 59 of the PILC, for the transformation of

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legal entities having their registered offices in different states to take effect, the transformation shall be in compliance with the legislation applicable in these countries. The said provision leads to the conclusion that the Bulgarian law allows transformation which includes companies established outside the EU/EEA, and **it shall comply with the rules under the respective national legislations in order to achieve the necessary legal effect.**

The delicate controversial question concerning such transformation has already been referred to the Bulgarian court. In this regard, for example, Decision No. 28 of January 30, 2014 of District Court Bourgas, as well as Decision No. 83 of March 12, 2014 of Appellate Court Bourgas were issued, reaffirming the above conclusions.

The Decisions were issued in connection with a refusal by a registry official at the Commercial Register with the Registry Agency to register the merger into a Bulgarian company of a company registered in the District of Columbia, USA. In order to issue its refusal, the registry official sets out reasons related exactly to the fact that one of the participating companies is registered outside the EU/EEA, and therefore this merger is a circumstance which is not subject to registration with the Bulgarian Commercial Register. The reasons are based, inter alia, on the prohibition contained in Art. 265d, Para 2 of the CA quoted above (*"No transformation under Para 1 may be carried out where any of the participating companies has its registered office outside the European Union..."*). The quoted prohibition was interpreted by the registry official too literally and out of the context of the regulation under Chapter XVI, Section V of the Commercial Act.

The assumed stand of the registry official that the Bulgarian legislation allows cross-border transformation only in cases where the participating companies have their registered offices in the EU/EEA was **firmly rejected by the court in the issued decisions on the appeal of the refusal. The court instructed the Registry Agency to register the requested merger of a company having its registered office in the District of Columbia, USA, into a Bulgarian limited liability company.** According to Decision No. 28 of January 30, 2014 of District Court Bourgas, as well as Decision No. 83 of March 12, 2014 of Appellate Court Bourgas, the registry official's conclusion is unlawful. **The view that the Bulgarian legislation provides an opportunity for participation in transformations only to companies from the EU and the EEA, but not to companies from the rest of the world, is deemed discriminatory.** The court also states that according to Art. 59 of the PILC there is no obstacle to the transformation of legal entities having their registered offices in different countries, provided that the transformation is carried out in compliance with the legislation of each of these countries.

As set forth in the quoted Decision of Appellate Court Bourgas, in order to fulfill the condition, the company having its registered office in the District of Columbia, USA, presented a certificate issued by a registry official from the Corporations Division in the respective District, evidencing the compliance with the local legislation with regard to the merger of the company into a foreign legal entity.

The transatlantic element in this case, though being rare for the Bulgarian judicial system, did not represent any challenge for other judicial systems. Therefore, though involving certain specificities, cross-border transformations with participation of a company established outside the EU/EEA shall not be *a priori* excluded. The same are allowed if they are performed in compliance with the applicable legislative norms – a conclusion that has been confirmed in the Bulgarian case law as well.

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