

Reorganisation of a Ukrainian LLC by way of merger

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1. General provisions

Reorganisation of an enterprise by means of a merger is a process in which the assets of 2 (or more) companies are merged. One legal entity (or more) ceases to exist, while the other one continues to operate. All property, monetary and non-monetary assets are transferred to the successor company, which is responsible for the obligations of the reorganised company.

Prior to the merger procedure, it is advisable to check whether the current contractual obligations of the predecessor company include an obligation to notify and/or agree with creditors on reorganisation or other changes in the corporate structure. In practice, there are contractual provisions requiring the debtor to obtain creditors' written consent to the reorganisation, and in case of failure to do so, the debtor may be subject to penalties (often in significant amounts).

It is also necessary to make sure that the companies involved in the reorganisation are not listed in the registers of debtors, of enforcement proceedings and other registers and lists (as the state registrar may refuse to complete the reorganisation procedure).

Furthermore, it is worth considering the provisions of the Law of Ukraine 'On Protection of Economic Competition', according to which a merger of one business entity with another is recognised as a concentration if certain criteria are met. In case of doubt as to whether a particular case constitutes concentration, the law

provides for the possibility of obtaining a preliminary opinion of the Antimonopoly Committee of Ukraine, but only before the reorganisation procedure is initiated.

2. Stages of LLC reorganisation by way of merger

2.1. Decision on an LLC's merger

In the event of a merger of legal entities, state registration of the termination of the legal entities as a result of the merger and state registration of changes to the information contained in the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organisations regarding the legal succession of the legal entity to which the merger takes place is carried out.

A legal entity's merger shall be initiated and carried out by a decision of its shareholders.

A decision to terminate the predecessor LLC as a result of its reorganisation by way of a merger shall be made by 3/4 of the votes of all members of the LLC entitled to vote on such issues, unless otherwise provided by the charter of the predecessor LLC.

The decision to terminate a legal entity must contain information on the personnel composition of the termination commission (reorganisation commission, liquidation commission), its chairman or liquidator, and registration numbers of taxpayer registration cards.

Participants of a legal entity that have made a decision to terminate the legal entity are obliged to notify the state registrar in writing within 3 business days from the date of the decision.

2.2. Termination (reorganisation) commission, liquidator

After the termination commission (reorganisation commission, liquidator) is appointed, it will be responsible for managing the affairs of the predecessor LLC, complying with the requirements of employment and tax laws, fulfilling obligations to creditors, taking inventory and valuation of property and performing all other actions to terminate the predecessor LLC, which must be observed throughout the LLC reorganisation procedure.

2.3. Notifying LLC's creditors

Pursuant to the provisions of the Law of Ukraine 'On Limited Liability Companies and Additional Liability Companies', within 30 days from the date of the decision to incorporate the last of the companies participating in the merger, each company participating in the termination, respectively, is obliged to notify all creditors known to it (them) in writing.

A creditor of a company whose claims are not secured by a security agreement shall, within 30 days from the date of sending the notice or from the date of its publication, have the right to file a written request for one of the following actions at the company's discretion:

- providing security for the fulfilment of the obligation;

- early termination or fulfilment of the obligation(s) to the creditor and reimbursement of losses, unless otherwise provided by the agreement between the company and the creditor.

If the creditor does not submit a written request to the company that will merge with another company within the prescribed period, it is deemed that the creditor does not require the company to take any additional actions with respect to the obligation(s) towards it.

Therefore, from the date of the merger decision, the predecessor LLC must notify all creditors known to it on the decision in writing.

Further issues related to the fulfilment of creditors' claims, if any, are assigned to the termination commission (reorganisation commission) and the liquidator.

2.4. Taking an inventory

After the creditors' claims are satisfied, an inventory of the property must be taken. This will help to collect reliable data on the state of the company's assets, receivables and payables, cash, documents, and settlements.

According to Ukrainian law, in order to conduct an inventory at an enterprise, an inventory commission is created by an executive order of the enterprise's head, consisting of representatives of the enterprise's management, accounting department (representatives of an audit firm, a centralised accounting department, an individual entrepreneur performing accounting at the enterprise on a contractual basis) and experienced employees of the enterprise who are familiar with the object of the inventory, prices, and primary accounting (engineers, technologists, mechanics, workmen, commodity experts, economists, accountants).

2.5. Termination of labour relations with LLC employees

Ukrainian law stipulates that reorganisation of an enterprise is not a ground for termination of an employment contract. If an employer changes, including in the event of reorganisation (merger, accession, division, spin-off, transformation), the employee's employment contract remains in force.

As a rule, reorganisation does not require mass dismissal of employees, as the company continues to operate in a modified form, and only the legal entity ceases to exist. The owner of a company undergoing a reorganisation procedure is only allowed to dismiss redundant employees. It is not possible to dismiss all employees altogether, as in the case of liquidation.

Often, reorganisation requires transferring employees to another company or position. Such a procedure can only be carried out with the employee's consent. It is also worth remembering that such an employee must be granted special guarantees:

- no probationary period;
- preserved length of service for which the leave is accrued (i.e., granting leave at the appropriate time);
- preserved social and domestic benefits envisaged by the collective agreement.

2.6. Audit by regulatory authorities

In the course of a company reorganisation, in particular through a merger, there is a high probability of a documentary audit by a tax authority.

Pursuant to the provisions of the Tax Code of Ukraine, an unscheduled documentary audit may be conducted in the event of a taxpayer's reorganisation or liquidation, regardless of the time and subject matter of the previous audit.

The period for an unscheduled audit may not exceed 3 years or 1,095 days.

During the audit, tax authorities pay attention inter alia to contracts with suppliers, buyers (customers); acceptance certificates; primary accounting documents; bank statements; payroll records, etc.

2.7. Filing documents with an archival institution

The termination (reorganisation) commission or liquidator of the predecessor LLC is obliged to submit documents subject to long-term storage as per Ukrainian law to the archival institution at the location of the company and to obtain a relevant certificate.

In particular, the following documents are subject to long-term storage and submission to an archival institution:

- constituent documents (incorporation deed, memorandum of association (charter), regulations) and amendments thereto, extracts from the Unified State Register;
- minutes of general meetings, congresses, conferences of the supreme body (personnel, participants, founders, shareholders, stockholders) of the LLC;
- orders, instructions on the main activity and orders, instructions on staffing issues (personnel) of the LLC;
- employment agreements (contracts, agreements, civil law agreements with individuals (to perform work, provide services, etc.));
- payroll records (personal accounts) of the LLC's employees;
- statements for payment (advance payment, salary, etc.);
- documents (protocols, applications, questionnaires, acts) on the establishment of individual salaries, allowances, surcharges;
- reports on investigation of occupational diseases and poisonings (if any);
- collective agreements, contracts, amendments and supplements thereto.

2.8. Drawing up a handover certificate

Upon expiry of the deadline for submission of creditors' claims and satisfaction or rejection of these claims by the termination (reorganisation) commission of the predecessor LLC, the liquidator shall draw up a transfer deed, which shall contain provisions on succession to all obligations (property and non-property rights and obligations) of the LLC being terminated in respect of all its creditors and debtors, including obligations disputed by the respective parties.

The transfer deed shall be approved by the members of the predecessor LLC.

2.9. State registration of the predecessor LLC's termination,

amendments to the Unified State Register

In the case of a legal entity merger, state registration of the termination of the legal entities as a result of the merger and state registration of changes to the information contained in the Unified State Register (USR) regarding the legal entity being absorbed is carried out.

A merger is deemed to be completed from the date of state registration of changes to the information contained in the USR regarding the succession of the legal entity resulting from the merger.

Prior to submitting documents for state registration of termination, it is necessary to ensure submission of reports to the tax authorities for the last reporting period, cancellation of the seal, and closure of bank accounts.

2.10. Re-registration of property rights to movable and immovable property

Upon an LLC's termination, it is necessary to transfer ownership of its property, which is subject to state registration.

To transfer ownership of real estate to a successor LLC, the following must be submitted to the state registrar:

- a document certifying the ownership of the predecessor LLC to the property transferred to the successor LLC (unless the ownership of such property has already been registered in the State Register of Rights);
- a transfer deed approved by the members of the predecessor LLC.

If the predecessor LLC owns vehicles, after the merger procedure, it is also necessary to re-register them.