

CROSS BORDER MERGERS IN CYPRUS

Law N.186(I)/2007 has inserted new provisions in the Cyprus Companies Law, Cap113 (the “**Law**”), bringing the same in line with the provisions of Directive 2005/56/EC on cross border mergers of limited liability companies (the “**Directive**”) and facilitating cross border mergers with Cyprus companies, transfers into Cyprus of the registered office of foreign companies and the formation of the Societas Europae (“**SE**”), the last two having controversially preceded the implementation provisions on cross border mergers. This report is intended to provide practical guidance on the stages involved in a cross border merger with emphasis on the Cyprus company involved in the procedure.

The steps outlined below are contained within the wider provisions of the Law on arrangements and reconstructions. Reference to a “**Company**” will mean the Cyprus Company involved in the procedure.

This report applies specifically to a merger by acquisition of one or more companies by another company¹, or merger by the formation of a new company². What is envisaged is a cross border merger of companies which have been incorporated in accordance to the laws of a member state and have their registered office within the EC under the condition that at least two of these companies are governed by the law of different member states³.

Under the Law, a cross border merger may only take place between companies for which merger is permitted in accordance to the provisions of the national law of the member state in which they are incorporated. In Cyprus any company may take part in a cross border merger, except companies with limited liability by guarantee and companies under dissolution.

Preliminary Matters

The first steps to be taken by the Company involve the drafting of the proposed terms of merger by the directors and the calling of a board of directors meeting to approve the proposed merger plan and to decide to call a general meeting of the shareholders (the “**GM**”) to approve the same [notice of the GM should be duly given to the shareholders]. The initial procedures to be followed by the Company will depend on the provisions of its articles of association.

Steps to be taken at least 30 days before the GM

1. Importantly, the date set for the GM must be such that the cross border merger plan (common to all merging Cyprus companies) is filed with the Registrar of Companies in Cyprus (the “**Registrar**”) and published (in accordance to s.365A of the Law⁴) at least one month before the date of the GM (s.201M of the Law⁵). Details as to what information the cross border merger plan should include may be found in Appendix A of this Memorandum;

2. A detailed written directors report must be prepared by the directors of each merging Company (s.201N(1) of the Law). An expert report may also be required. Both these reports are prepared for the members of each Company (and in the case of the directors report, for the representatives of the employees). Details as to what information the directors and expert report should include may be found in Appendix A of this Memorandum;

¹ According to s.201I of the Law this means either (i) where one or more limited liability companies (having a share capital) are wound up without going into liquidation and transfer to an existing company all their assets and liabilities in exchange for the issue of shares in the acquiring company to the shareholders and a settlement amount in cash payment not exceeding 10 % of the nominal value and where they have no nominal value, of their accounting par value (s.201I (a)) (ii) where a limited liability company (having a share capital) is wound up without going into liquidation and transfers all of its assets and liabilities to a liability company (having a share capital) which is the holder of all the shares or securities representing its share capital (s.201I (c)).

² According to s.201I of the Law this means the operation whereby two or more limited liability companies (having a share capital) are wound up without going into liquidation and transfer to a company that they set up -a new company- all their assets and liabilities in exchange for the issue to their shareholders of shares in the new company and a settlement amount in cash payment, if any, not exceeding 10% of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value (s.201I (b)).

³ S.201I of the Law.

⁴ The publication must be made in the Official Gazette of the Republic of Cyprus.

⁵ In accordance to s.201M(2) the directors of each merging Company must also file with the Registrar certain information which is published in accordance to s.365A of the Law. It appears that this information is required in addition to the cross border merger plan. A list of information required appears in s.201M(2). On a practical note, the Registrar of Companies in Cyprus has indicated that receipt by it of the proposed terms of merger is sufficient notice and information.

3. In addition to the publication requirements, the Company must keep at its registered office the following documents and have them available for inspection by the shareholders (who may obtain copies thereof free of charge) at least 30 days before the GM:

- A) The proposed merger plan;
- B) annual accounts and management reports for the last three financial years of the merging companies;
- C) interim accounts drawn up as at a date not earlier than the first day of the third month preceding the date of the merger plan (if the last annual accounts relate to a financial year that ended more than six months before that date);
- D) directors reports for each merging company;
- E) expert report for each merging company;

GM

4. The GM of each merging Company, following the taking into account of the director's report and expert report, decide on the approval of the common cross border merger plan. The resolution proposing the merger of the companies must be passed as a special resolution. A special resolution requires a majority of at least three-fourths of the members or class of members present and voting either in person or by proxy at the meeting to agree to the proposed merger⁶. The GM may make the realisation of the cross border merger subject to the express ratification by it of the arrangements decided on with respect to the participation of employees in the Company which arises from the cross border merger.

5. The GM must also state expressly, with the approval to the cross border merger, whether it accepts the possibility for the members of any other merging non Cypriot company to use the procedure envisaged by the national legislation of such other merging company, which permits the examination and amendment of the share exchange ratio or compensation to minority shareholders, without preventing the filing of the cross border merger. Any decision which results from this procedure is binding on the company that results from the cross border merger and all its members (s.201P(3) of the Law).

Court Application 1- "Pre-Merger Certificate"

6. Provided that the members of the Company approve the cross border merger plan as mentioned above, the Company must make an application to court⁷ (the "**Court**") with a supporting affidavit ("**Court Application 1**") in order to obtain the issue by the Court of a certificate (in the form of a court order) which states indisputably that the pre-merger acts and formalities have taken place and are satisfied ("**Court Order 1**" or "**Pre-Merger Certificate**");⁸

7. Court Order 1 may be issued by the Court notwithstanding that the procedure is being undertaken pursuant to the national legislation of the non Cypriot company for the examination and modification of the share exchange ratio or compensation to minority shareholders, such procedure having being approved by the GM (see paragraph 5 above). In such case the Court must state in Court Order 1 that such procedure is pending;⁹

8. A similar pre-merger certificate must be obtained by each merging non Cypriot company in its own jurisdiction;

Court Application 1- "Pre-Merger Certificate"

9. If the registered office of the company which results from the cross border merger is in Cyprus, the district Court where its registered office is situated has jurisdiction over the legality of the cross border merger in relation to its completion and where the occasion arises, the incorporation of a new company as a result of the cross border merger.¹⁰

10. Within 6 months of the issue of the Pre-Merger Certificate (for the avoidance of doubt we refer to each Cyprus company) a second application must be made to Court ("**Court Application 2**") together with a supporting affidavit for further examination. The Court shall examine the following:

⁶S.198(2) applicable pursuant to the provisions of S.201K(2) of the Law.

⁷The Court that has jurisdiction is the district court of the place where the registered office of each merging company is situated s.201Q of the Law.

⁸S.201Q(3) and S.201Q(2) of the Law.

⁹S.201Q(4) of the Law.

¹⁰S.201R(1) of the Law.

- A) whether the merging companies approved the common cross border merger plan under the same conditions, and
- B) if the methods of participation of the employees in relation to each merging Cyprus Company have been followed in accordance to s.201W of the Law and in accordance to the national legislation for every merging non Cypriot company.

11. For the examination to be made by the Court pursuant to Court Application 2 the following must be submitted by each merging Cyprus company:

- Pre-Merger Certificate for each merging Cyprus Company;
- The equivalent of a pre-merger certificate issued for the non Cypriot merging company ("**Foreign Pre-Merger Certificate**");
- Common cross border merger plan approved in GM by each Cypriot merging company and non Cypriot merging company;

12. If the court is satisfied as to the legality of the procedures followed for the completion of the cross border merger, the Court shall issue a Court Order approving completion of the merger and setting a date on which the cross border merger shall be deemed to take effect ("**Court Order 2**");¹¹

Registration

13. Every merging Cyprus company must deliver an official copy of Court Order 2 to the Registrar for registration and publication in accordance to s.365A of the Law and the order must be attached to every copy of the memorandum of the new company which is incorporated with the finalisation of the cross border merger;¹²

14. On receipt of the copy of the Court Order above, the Registrar will inform, without delay, the relevant registrar¹³ for each non Cypriot merging company to which the non Cypriot merging company had a duty and should have filed the documents evidencing the coming into effect of the cross border merger;

15. On receipt by the Registrar of the consent and approval of the completion of the cross border merger by the authorised body of the other member state, the Registrar shall ensure, without delay, the registration and publication of the same in accordance to s.365A of the Law;¹⁴

Result of the Cross Border Merger

16. On the registration of the copy of the Court Order 2, the Registrar shall remove any Cyprus companies which have been absorbed in the merger from the Register of Companies and shall refer to the date of the commencement of the cross border merger;

17. The cross border merger by acquisition of one or more companies by another company¹⁵ takes effect from the date set by the Court in Court Order 2 for completion of the cross border merger and the following consequences arise:

- A) all the assets and liabilities of the company being acquired are transferred to the acquiring company. This takes effect vis a vi the transferor company, transferee company and third parties;
- B) shareholders of the company being acquired become shareholders of the acquiring company;
- C) the company being acquired (transferor) ceases to exist;

¹¹ S.201S of the Law.

¹² s.201T(1) of the Law.

¹³ The registrar which keeps a register by virtue of the national legislation of the member state of each non Cypriot merging company (pursuant to article 3 of Directive 68/151).

¹⁴ This is in addition to the registration and publication of Court Order 2.

¹⁵ Ibid fn 1.

18. A cross border merger by the formation of a new company¹⁶ takes effect from the date set by the Court in Court Order for completion of the cross border merger and the following consequences arise:

- A) all the assets and liabilities of the merging companies are transferred to the new company;
- B) shareholders of the merging companies become shareholders of the new company;
- C) the merging companies cease to exist;

Dissenting Shareholder

Importantly, the Law also contains a detailed procedure to be used in the case where a shareholder exists who dissents to the cross border merger and in respect of this, a procedure is envisaged by which the acquiring Company may buy out its shares (s.201 of the Law);

Simplification of Procedure

In the two situations outlined below certain simplifications apply whereby the procedures or requirements detailed below will be inapplicable.

Situation 1: When the cross border merger by acquisition takes place by a Cyprus company which holds all the shares and securities granting a voting right in the general meeting of the company being acquired (and dissolved without going into liquidation), or

Situation 2: When the cross border merger by acquisition takes place by a non Cypriot company of another member state, which holds all the shares and securities granting a voting right in the general meeting of the company being acquired (and dissolved without going into liquidation),

the following procedures will not be applicable.

- A) On the Cross Border Merger Plan the following information does not have to be included¹⁷:
 - (i) the share exchange ratio of the share capital, and if relevant, the amount of any cash payment in settlement;
 - (ii) the terms of allotment of shares or securities of the share capital of the company which results from the cross border merger;
 - (iii) the date from which the holding of such securities or shares representing the capital of the company will entitle the holders to share in profits and any special conditions affecting the entitlement;
- B) An independent expert report will not be required¹⁸.
- C) The members of the company being acquired shall not become members of the acquiring company¹⁹.
- D) There is no need for a general meeting to be held by the company which is being absorbed (and on finalization dissolved without going into liquidation)²⁰.

The above should serve as a starting point on the procedures involved in effecting the realisation of a cross border merger with a Cyprus company but is by no means exhaustive. The time span envisaged for the full completion of a cross border merger involving a Cyprus company cannot be verified with certainty as much will depend on the efficiency and work load of public authorities and the Court system both of Cyprus and the relevant authorities of other jurisdictions. Despite this, our experience with cross border mergers in Cyprus has proven to be successful, with delays and obstacles having been kept at, most satisfactory, minimum levels.

¹⁶ Ibid fn 2.

¹⁷ Regarding situation 1, s.201L(b), (c), and (e) will be inapplicable and regarding situation 2, Article 5 (b), (c) and (e) of the Directive is inapplicable.

¹⁸ Regarding situation 1, s.201O shall not apply and regarding situation 2, Article 8 of the Directive is inapplicable.

¹⁹ Regarding situation 1, s.201U(b) shall be inapplicable and regarding situation 2, Article 14 paragraph 1 (b) of the Directive is inapplicable.

²⁰ The reason for this appears to be that the sole shareholder of the company being absorbed is, in the situation envisaged, the acquiring company and the company that will remain following finalisation of the cross border merger. This company must approve the merger in general meeting in accordance to s.201P. Regarding situation 1, s.201P(1) is inapplicable and regarding situation 2, Article 9, paragraph 1 of the Directive is inapplicable.

APPENDIX A

Cross Border Merger Plan

The directors of each merging Company which take part in the cross border merger must compile a common cross border merger plan. This plan must contain at least the following information:

- (i) the form, name and registered office of the merging companies and the relevant information on the company that results from the cross border merger;
- (ii) the share exchange ratio of the share capital, and if relevant, the amount of any cash payment in settlement;
- (iii) the terms of allotment of shares or securities of the share capital of the company which results from the cross border merger;
- (iv) the potential consequences of the cross border merger on employment;
- (v) the date from which the shares or securities in the share capital will have a right to a dividend and every special term regarding this right;
- (vi) the date from which the transactions of the merging companies are regarded for accounting purposes as being those of the company that results from the cross border merger;
- (vii) the rights that are conferred by the company that results from the cross border merger on the holders of shares to which special rights are attached or for the holders of securities, other than shares, or the measures proposed concerning them;
- (viii) any special advantages granted to the experts who have examined the cross border merger plan or members of the board of directors of the management or supervisory organs of the merged companies;
- (viii) the memorandum and articles of association of the company which results from the cross border merger;
- (x) where necessary, information on the procedures in accordance to which the rules on the role of the employees and the determination of their right of participation in the company which results from the cross border merger ;
- (xi) information on the allocation of the assets and liabilities to be transferred to the company which results from the cross border merger;
- (xii) the dates of the accounts of the merged companies which were used for the determination of the terms of the cross border merger;

Directors Report

A report written up by the directors of each merging Company must be prepared. The directors' report must contain the following information:

- (i) Explanation of the legal and economic grounds for the merger;
- (ii) Set out the share exchange ratio;
- (iii) Refer to valuation difficulties (if any);

This report is laid before the members and the representatives of the employees (or the employees themselves if there is no such representative) at least one month before the GM. If the directors receive the employees' opinion on the directors report in due time, the directors may attach the said opinion to the report.

Expert Report

The cross border merger plan and the directors' report must be examined by an independent expert. The independent expert is appointed by the Court following a request by the parties. Cyprus has opted to allow the companies to make a joint request for the appointment of such an expert and under the Cyprus law provisions such an expert may be either a natural or legal person.

The expert may request information and documentation from the companies in order to carry out the investigations. The expert must write up a report addressed to the shareholders which will state the experts opinion as to whether they think the exchange ratio is fair and reasonable. The report must include the following information:

- (1) method adopted to arrive at the exchange ratio proposed;
- (2) whether such method is adequate;
- (3) any special valuation difficulties encountered;

No such examination shall be required and an expert report need not be drawn up where all the members of each company involved in the cross border merger agree to the same (s.201JE(5) of the Law).

For further information or advice please contact us

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