

Mergers between Cyprus companies and EE/EU companies

This article intends to outline the procedure leading to a cross border merger between a company registered under the laws of Cyprus and a company registered under the laws of another EU or EEA member state.

Company Law and Procedure

The provisions of the Cyprus Companies Law, Cap 113 (the “Law”) on reconstruction and amalgamation has until recently only included provisions which allowed two or more companies registered in Cyprus to merge. Law N.186(I)/2007 has inserted new provisions in 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”) facilitating cross border mergers with Cyprus companies and the formation of the Societas Europaea (“SE”), the latter having controversially preceded the implementation provisions on cross border mergers.

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 company,¹ or merger by the formation of a new company.² 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, central administration or main place of establishment within the Community 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

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.

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 (that is to say without share capital) and companies under liquidation.

Preliminary Matters

The first steps to be taken by the Company involve the drafting of the proposed terms of merger (common to all merging companies) by the directors and the approval by the board of the proposed merger plan. The cross border merger plan, its publication and filing and the various reports mentioned below must be made available at least 30 days before the general meeting of the shareholders of the Company (the “General Meeting”). A General Meeting of the shareholders to approve the cross border merger must follow. The initial procedures to be followed by the Company will ultimately depend on the provisions of its articles of association.

Cross Border Merger Plan

The directors of each merging Company which takes 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 result 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 result 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;
- (ix) the memorandum and articles of association of the company which result 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.

Filing and Publication in Cyprus

The date set for the General Meeting must be such that the cross border merger plan is filed with the Registrar of Companies in Cyprus (the “Registrar”) and published ⁴ at least one month before the date of the General Meeting.

Directors Report

A detailed written directors’ report must be prepared by the directors of each merging Company. The directors’ report must (i) contain an explanation of the legal and economic grounds for the merger (ii) set out the share exchange ratio and (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 General Meeting. 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 District Court of Cyprus following an application by the Company. Cyprus has opted to allow the companies to make a joint request for the appointment of such an expert either under the Cyprus Law or the law of the non Cypriot company. An expert may be either a natural or a 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 expert’s opinion as to whether they think the exchange ratio is fair and reasonable. The report must include (i) the method adopted to arrive at the exchange ratio proposed (ii) whether such method is adequate and (iii) any special valuation difficulties encountered.

⁴ The publication must be made in the Official Gazette of the Republic of Cyprus in accordance to s.365A of the Law.

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.

Both reports are prepared for the members of each Company (and in the case of the directors' report, for the representatives of the employees).

General Meeting

The General Meeting of each merging Company, decides on the approval of the common cross border merger plan once they have taken into account the director's report and expert report. 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 merger. Pursuant to the provisions of the Law, the shareholders may make the realisation of the cross border merger subject to the express ratification by them of the arrangements decided on with respect to the participation of employees in the Company which arises from the cross border merger.

The General Meeting must also state expressly, 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.⁵

Pre-Merger Certificate

Provided that the members of the Company approve the cross border merger plan as mentioned above, the Company must make an application to court with a supporting affidavit 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 ("Pre-Merger Certificate").⁶ The Court that has jurisdiction is the district court of the place where the registered office of each merging company is situated (the "Court").

The Pre-Merger Certificate 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

⁵ S.201P(3) of the Law.

⁶ S.201Q(3) and S.201Q(2) of the Law.

the General Meeting. In such case the Court must state in the Pre-Merger Certificate issued that such procedure is pending.⁷A similar pre-merger certificate must be obtained by each merging non Cypriot company in its own jurisdiction.

Completion of the cross border merger

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.⁸

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 together with a supporting affidavit for further examination. The Court examines the following:

(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 the Law and in accordance to the national legislation for every merging non Cypriot company.

For the examination of the completion of the merger to be made by the Court 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”); and
- common cross border merger plan approved in General Meeting by each Cypriot merging company and non Cypriot merging company.

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 (“Completion Certificate”).⁹

⁷ S.201Q of the Law.

⁸ S.201R(1) of the Law.

⁹ S.201S of the Law.

Registration

Every merging Cyprus company must deliver an official copy of the Completion Certificate 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.¹⁰

On receipt of the copy of the Completion Certificate, the Registrar will inform, without delay, the relevant registrar¹¹ 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.

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 ensures, without delay, the registration and publication of the same in accordance to s.365A of the Law.¹²

Result of the Cross Border Merger

On the registration of the copy of the Completion Certificate, 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.

The cross border merger by acquisition of one or more companies by another company¹³ takes effect from the date set by the Court in the Completion Certificate for completion of the cross border merger and the following consequences arise:

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

¹⁰ S.201T(1) of the Law.

¹¹ 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).

¹² This is in addition to the registration and publication of the Completion Certificate.

¹³ Ibid fn 1.

A cross border merger by the formation of a new company¹⁴ takes effect from the date set by the Court in the Completion Certificate for completion of the cross border merger and the following consequences arise:

- (i) all the assets and liabilities of the merging companies are transferred to the new company;
- (ii) shareholders of the merging companies become shareholders of the new company; and
- (iii) the merging companies cease to exist.

Dissenting Shareholder

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.

Simplification of Procedure

In the two situations outlined below certain simplifications apply whereby the procedures or requirements of the Law as 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 included¹⁵:

¹⁴ Ibid fn 2.

¹⁵ 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.

- (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 required.¹⁶
 - (c) The members of the company being acquired shall not become members of the acquiring company.¹⁷
 - (d) There is no need for a general meeting to be held by the company which is being absorbed (and on finalisation dissolved without going into liquidation).¹⁸

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 Regarding situation 1, s.2010 shall not apply and regarding situation 2, Article 8 of the Directive is inapplicable.

¹⁷ Regarding situation 1, s.201U(b) shall be inapplicable and regarding situation 2, Article 14 paragraph 1 (b) of the Directive is inapplicable.

¹⁸ 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.

FURTHER INFORMATION

Please contact any of the following lawyers if you require additional information on the above topic.

Cyprus

Pavlos Aristodemou

Partner

pavlos.aristodemou@harneys.com

+1 357 25820020

Cyprus

Nancy Charalambous

Associate

nancy.charalambous@harneys.com

+1 357 25820020

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