

Cross-border mergers of limited liability companies

On October 26, 2005, the European Parliament and the Council approved the Directive 2005/56/EC on cross-border mergers of limited liability companies. The Directive has introduced a uniform and simplified procedure in order to pursue cross-border mergers between limited liability companies incorporated under the laws of a Member State and having their registered office, central administration or principal place of business within the Community, provided that at least two of them are governed by the laws of different Member States.

In May 2004, Cyprus joined the European Union and is currently under the process of implementing all legislation to fully harmonize its laws and practices with EU Law. In 2007 Cyprus implemented in its national Companies Law Cap. 113 the European Directive 2005/56/EC.

The law sets that “cross-border merger of limited liability companies”, shall mean the merger of limited liability companies incorporated in accordance with the legislation of a member state and having their registered office, central administration or main place of establishment within the Community, on condition that at least two of these companies are regulated by the laws of different member states.

The law further lays down the procedure and conditions for the cross-border mergers of limited liability companies where at least one of the merging limited liability companies is a Cypriot company or where the limited liability company resulting from the cross-border merger is a Cypriot company.

The term “merger” is defined as whereby:

- (a) one or more limited liability companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company – the acquiring company – in exchange for the issue to their members of securities or shares representing the capital of that acquiring company and, if applicable, a cash payment not exceeding 10% of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares; or
- (b) two or more limited liability companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another limited liability company that they form – the new company – in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10% of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares; or
- (c) a limited liability company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the limited liability company holding all the securities or shares representing its capital.

It is clarified in the law that it also covers the case where a cross-border merger allowing for the cash payment referred to in the interpretation of the term “merger” exceeding 10% of the nominal value, or, in the absence of a nominal value, of the accounting par value of the securities or shares representing the capital of the company resulting from the cross-border merger; provided that this possibility is permitted by the legislation of the member state regulating at least one of the merging limited liability companies.

The law does not apply to cross-border mergers involving company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders’ request, repurchased or redeemed, directly or indirectly, out of the assets of that company. Action taken by such a company to ensure that the stock exchange value of its units does not vary significantly from its net asset value shall be regarded as equivalent to such repurchase or redemption.

We set out below in a summary form the general terms and provisions set out by law that will apply in a cross border merger involving a Cypriot limited liability company.

1. Conditions relating to cross border mergers

Cross-border mergers shall only be possible between types of companies which may merge under the provisions of national law of the relevant Member States. Provided that every Cypriot company may take part in a cross-border, except:

- (a) Limited liability companies by guarantee;
- (b) Companies subject to liquidation.

A Cypriot company taking part in a cross-border merger shall comply with the provisions and formalities of the law, including the decision- making process relating to the merger, the protection of creditors of the merging companies, debenture holders and the holders of securities or shares and the provisions to ensure appropriate protection for minority members who have opposed the cross-holder merger shall apply.

2. Common Plan -Draft terms of Cross-border Mergers

The Directors of each of the Cypriot companies taking part in the cross-border merger shall draw up common draft terms of the cross-border merger. The common draft terms shall include at least the following particulars:

- (a) the form, name and registered office of the merging companies, as well as that information proposed for the limited liability company resulting from the cross-border merger;
- (b) the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment, if applicable;
- (c) the terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger;
- (a) the likely repercussions of the cross-border merger on employment;

- (b) the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits, as well as any special conditions affecting that entitlement;
- (c) the date from which the transactions of the merging limited liability companies will be treated for accounting purposes as being those of the limited liability companies will be treated for accounting purposes as being those of the limited liability company resulting from the cross-border merger;
- (d) the rights conferred by the limited liability company resulting from the cross-border merger on members enjoying special rights or on holders of securities other than shares representing the company capital, or the measures proposed concerning them;
- (e) any special advantages granted to the experts who examine the draft terms of the cross-border merger or to members of the board of directors of the supervisory or controlling organs of the merging limited liability companies;
- (f) the memorandum and articles of association of the company resulting from the cross-border merger;
- (g) where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the limited liability company resulting from the cross-border merger are determined pursuant to section 201W of the Law (Participation of Employees);
- (h) information on the evaluation of the assets and liabilities which are transferred to the limited liability company resulting from the cross-border merger;
- (i) dates of the merging companies' accounts used to establish the conditions of the cross-border merger.

3. Publication.

The Directors of the merging Cypriot companies shall file in a timely manner at the Registrar of Companies the common draft terms of the cross-border merger which shall be published by the Registrar of Companies in the Official Gazette of the Republic, for each of the merging companies, at least one month before the date of the general meeting which is to decide thereon.

In addition the Director of each of the merging Cypriot companies shall file in a timely manner at the Registrar of Companies the following particulars for each of the merging companies which shall be published in the Official Gazette of the Republic:

- (a) the type, name and registered office of every merging limited liability company;
- (b) the register in which the documents referred are filed (including date of such filing) in respect of each merging company, and in respect of each one of the remaining merging companies of another member state, the filed documents referred to in the

national legislation transposing the provisions of Article 3(2) of Directive 68/151/EEC, as well as the number of the entry in that register;

- (c) an indication, for each of the merging limited liability companies, of the arrangements made for the exercise of the rights of creditors and of any minority members of the merging companies as well as the address at which complete information on those arrangements may be obtained free of charge.

4. Report of the Directors

The Directors of each of the merging Cypriot companies shall draw up a report intended for the members thereof, explaining and justifying the legal and economic aspects of the cross-border merger and explaining the implications of the cross-border merger for members, creditors and employees. The report shall be made available to the members and to the representatives of the employees or, where there are no such representatives, to the employees themselves, not less than one month before the date of the general meeting.

In case the Directors receive, in good time, an opinion from the representatives of their employees that opinion shall be appended to the report.

5. Independent Expert report

For each of the Cypriot merging companies an independent expert report is drawn up, addressed to the members of each company and is made available not less than one month before the date of the general meeting. Such experts may be natural or legal persons appointed by the Court following an application filed by the merging Cypriot company.

As an alternative to experts operating on behalf of each of the merging limited liability companies, one or more independent experts, appointed for that purpose at the joint request of the merging limited liability companies by the competent judicial or administrative authority in the Member State of one of the merging companies or of the limited liability company resulting from the cross-border merger or approved by such an authority, may examine the common draft terms of cross-border merger and draw up a single written report to all the members of the merging limited liability companies.

The expert report shall include at least the following particulars:

- (a) indicate the method or methods used to arrive at the share exchange ratio proposed.
- (b) State whether such method or methods are adequate in the case in question, indicating the values arrived at using each such method and giving at the same time, an opinion on the relative importance attributed to such methods in arriving at the value decided on.
- (c) Describe any special valuation difficulties which have arisen.

The independent experts are entitled to secure from each of the merging companies all information they consider necessary for the discharge of their duties. However, if all the members of each of the companies involved in the cross-border merger have so agreed, neither an examination of the common draft terms of cross-border merger by independent experts nor an expert report shall be required.

6. Approval by the General meeting

The general meeting of each of the merging Cypriot companies shall decide on the approval of the common draft terms of cross-border merger after taking note of the reports referred to above.

The general meeting may reserve the right to make implementation of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the limited liability company resulting from the cross-border merger.

Upon the approval of the cross border merger, the general meeting shall explicitly state whether it accepts the possibility for the members of any of the other merging non-Cypriot limited liability companies to make use of the procedure prescribed by the national legislation to which a merging company is subject which allows for the scrutiny and amendment of the ration applicable to the exchange of securities of shares, or a procedure which allows for the compensation of minority members, without preventing the registration of the cross-border merger.

The decision resulting from the application of this procedure will be binding on the limited liability company resulting from the cross-border merger and all of its members.

7. Pre-merger Certificate

The District Court in the district where the registered office of each merging Cypriot company shall be competent to scrutinize the legality of the cross-border merger as regards that part of the procedure which concerns each merging Cypriot company.

Each merging Cypriot company shall apply to the Court and shall request the issuing of a certificate conclusively attesting to the proper completion of the pre-merger acts and formalities.

The District Court, on becoming satisfied that the procedures referred in points 2-6 above have been complied with shall issue without delay the certificate to each merging Cypriot company.

The District Court may issue such certificate irrespective if a procedure has commenced from any other merging limited liability non-Cypriot company. Provided that in this case, the Court shall indicate on the certificate issued that this procedure is pending.

8. Scrutiny of the Legality of the Cross-border Merger

In case where the limited liability company created by the cross-border merger is subject to the provisions of the Cyprus Companies Law Cap. 113, the District Court within the district where the registered office of the said company is situated, shall be competent to scrutinize the legality of the cross-border merger as regards that part of the procedure which concerns the completion of the cross-border merger and, where appropriate, the formation of a new company resulting from the cross-border merger.

In exercising such control the District Court shall in particular monitor whether the merging limited liability companies have approved the common draft terms of cross-border merger in the same terms and, as the case may be, that arrangements for employee participation have been determined in respect of each merging Cypriot company in accordance with the provisions of the law in respect to every other merging limited liability non-Cypriot company, in accordance with the provisions of the national legislation transposing the provisions of Article 16 of Directive 2005/56/EC.

For the purposes of exercising such control each merging Cypriot company shall submit to the District Court the Pre-merger Certificate (point 7) and every other non-Cypriot merging company shall submit the certificate issued by the competent authority in accordance with

the provisions of the national legislation transposing the provisions of Article 10(2) of Directive 2005/56/EC, within six months of the said certificate's issue date, together with the common draft terms of cross-border merger approved by the general meeting where Cypriot merging companies are concerned and in accordance with the provisions of Article of Directive 2005/56/EC where all other non-Cypriot merging companies are concerned.

9. Entry into Effect of the Cross-border

The cross-border merger shall commence to take effect on the date prescribed to enter into effect on the basis of the decision issued by the District Court or, where the authority competent to approve the completion of the cross-border merger is an authority of another member state in accordance with the provisions of Article 11 of Directive 2005/56/EC, the cross-border merger shall commence to take effect on the date determined by the national legislation for the purposes of Article 12 of Directive 2005/56/EC.

10. Registration

Upon issuance of the approval noted above each merging Cypriot Companies shall submit an official copy of the decision to the Registrar of Companies for the purpose of registration and publication in the Official Gazette of the Republic and a copy of that decision shall be attached to every copy of the memorandum of the new company that is incorporate on completion of the cross border merger.

The Registrar of Companies upon receipt of the decision shall notify in respect of each merging company of another member state, the registry kept on the basis of the national legislation in the member state in accordance with Article 3 of the Directive 68/151/EEC and in which registry each of the said merging companies was requires to file the documents demonstrating that the cross- oared merger has taken effect.

In case where the decision to approve the completion of the cross-border merger is issued by the competent authority of another member state in accordance with Article 11 of Directive 2005/56/EC , once the Registrar of Companies receive notice shall effect the registration and publication of this decision in its records and the Official Gazette of the Republic.

On registration of the copy of the decision in the Companies Register with respect to each one of the merging Cypriot Companies , the Registrar of Companies shall delete the Cypriot Companies being acquired from the Companies Register, making reference to the date of entry into effect of the consequences of the cross- border merger.

11. Consequences of the cross-border merger

A cross-border merger carried out as laid down in paragraphs(a) and (c) of the 'merger' definition set out above, *shall* have the following consequences from the date of the final approval decision

- (a) all the assets and liabilities of the company being acquired shall be transferred to the acquiring company;
- (b) the members of the company being acquired shall become members of the acquired shall become members of the acquiring company;
- (c) the company being acquired shall cease to exist.

A cross – border merger carried out as laid down in point (b) of the definition of the term 'merger' in shall have the following consequences from the date of the final approval decision:

- (a) All the assets and liabilities of the merging companies shall be transferred to the new company;
- (b) The members of the merging companies shall become members of the new company;
- (c) The merging companies shall cease to exist.

The limited liability company resulting from the cross-border merger shall carry out the formalities that may be required under the law or on the basis of legislation governing any of the merging limited liability non-Cypriot companies with respect to the right to object against third parties before the transfer of certain assets, rights and obligations offered by the merging limited liability companies.

The rights and obligations of the merging limited liability companies arising from contracts of employment or from employment relationships and existing at the date on which the cross-border merger takes effect shall, by reason of that cross-border merger taking effect, be transferred to the limited liability company resulting from the cross-border merger on the date on which the cross-border merger takes effect.

It is noted that no shares in the acquiring company shall be exchanged for shares in the company being acquired , which are held either:

- (a) by the acquiring company itself or through a person acting in his or her own name but on the company's behalf; or
- (b) by the company being acquired itself or through a person acting in his or her own name but on its behalf.

A cross-border which has taken effect as provided in the law may not be declared null and void.

The law provides for simplified formalities where a cross-border merger by acquisition is carried out by a Cypriot company which holds all the shares and all other securities conferring the right to vote at general meetings of the company or companies being acquired

or where a cross- border merger by acquisition is carried out by a limited liability company of another member state which holds all of the shares and all other securities conferring the right to vote at general meetings of the company or companies being acquired.

In both cases part of the conditions for the “Common draft plan” and “Independent Report” shall not apply.

12. Employee participation

It is noted that the limited liability company resulting from the cross-border merger will be subject to the legislation in force concerning employee participation, if any, in the Member state where it has its registered office.

However, the legislation in force concerning employee participation, if any, in the Member State where the limited liability company resulting from the cross-border merger has its registered office, shall not apply where at least one of the merging limited liability companies has, in the six months before the publication of the draft terms of the cross-border merger an average number of employees that exceeds 500 and is operating under an employee participation system, where Cypriot merging companies are concerned within the meaning of the term "participation" referred to in section 2 of the Law Supplementing the Statute of a European Company with regard to the Involvement of Employees, and where merging companies from another member state are concerned within the meaning of Article 2(k) of Directive 2001/861EC, or where the national law applicable to the limited liability company resulting from the cross-border merger:

- (a) does not provide for at least the same level of employee participation as that applicable in the relevant merging limited liability companies, measured by reference to the proportion of employee representatives amongst the members of the board of directors or their committees or of the management group which manages the profit units of the company, where such employee representation is foreseen, or
- (b) does not provide for employees of establishments of the limited liability company resulting from the cross-border merger that are situated in other Member States, they shall be entitled to exercise the same participation rights as those enjoyed by those

employees employed in the Member State where the limited liability company resulting from the cross-border merger has its registered office.

The law lays down further provisions as to the employee participation which merely depends on the number of employees and their rights under their current status. This matter should always be considered on the merits of each case of a cross border merger.

Competition Law/ Control of Concentrations

It is important to note that in procedures for a cross border merger the companies should always take into consideration the applicable competition laws and regulations.

With Cyprus accession in May 2004, Council Regulation (EC) 139/2004 on the control of concentration between undertakings (henceforth «Regulation 139/2004») is also applied. The scope of Regulation 139/2004 is the effective control of concentration that falls within its scope and is exclusively examined at a community level by the European Commission (with close and constant liaison of the National Competition Authorities. Thus, concentration with community dimension, as principle, are exclusively examined at a community level by the European Commission according to the provisions of the Regulation.

Regulation 139/2004 contains provisions for the control of concentrations with community dimension and specifically Article 1(2) provides that a concentration has a community dimension where:

- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5,billion; and
- (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

A concentration that does not meet the threshold laid down in paragraph (b) has a Community dimension where:

- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2,5 billion;
- (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
- (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
- (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

The concentration that fall within the scope of application of the Regulation must be notified to the European Commission within the time limit set in the Regulation no 802/2004, 7th April 2004 on the enforcement of Regulation (EC) no 139/2004 of the Council for the Control of Concentrations.