

EU Cross-Border Mergers under Cypriot law



1 Introduction

Cross-border mergers in Cyprus are regulated by the Cypriot Companies Law, Cap 113 which was amended to incorporate the relevant provisions of the EU Directive 2005/56/EC on cross-border mergers of limited liability companies. This memorandum is intended to provide practical guidance on the process, documentation and actions involved with a cross-border merger of EU-incorporated companies where the resulting merged company (the “ **Resulting Company**”) is a company registered in Cyprus.

2 Scope, meaning and consequences of a Cross-Border Merger

2.1 Cypriot Companies Law defines a cross-border merger (the “**Cross-Border Merger**”) as:

2.1.1 the merger of limited liability companies (the “ **Merging Companies**”) which have been : (i) incorporated in accordance with the legislation of a EU member state; and (ii) have their registered office, their central administration or their principal place of business within the EU; and

2.1.2 at least two of such companies are governed by the law of different EU member states.

Moreover, a Cross-Border Merger is only possible between types of companies which may merge under the national law applicable to them. With respect to Cyprus, any company may merge, except: (a) companies limited by guarantee (i.e. without share capital); and (b) companies in liquidation.

2.2 A Cross-Border Merger can occur in three different ways:

A. Transfer of assets and liabilities to an existing company

The first way is when one or more limited liability companies (the “ **Acquired Companies**”), on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing limited liability company (the “ **Acquiring Company**”), in exchange for:

- (i) the issue to the members of the Acquired Companies of securities or shares representing the capital of the Acquiring Company; and
- (ii) 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 such securities or shares (although a higher cash amount is possible if the national law of any of the Merging Companies allows this).

The result of such a Merger is that: (i) all the assets and liabilities of the Acquired Companies are transferred to the Acquiring company; (ii) the members of the Acquired Companies become members of the Acquiring company (unless simplified formalities apply (see paragraph 7 below)); and (iii) the Acquired Companies cease to exist.

B. Transfer of assets and liabilities to sole parent entity (group merger)

The second way is when an Acquired Company, on being dissolved without going into liquidation, transfers all its assets and liabilities to an Acquiring Company which holds all the securities or shares representing the Acquired Company's capital. The consequences of such a Merger are the same as in paragraph 2.2A above.

C. Transfer of assets and liabilities to a new company

The third way is when two or more Acquired Companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a limited liability company that they form (the "**New Company**") in exchange for:

- (iii) the issue to the members of the Acquired Companies of securities or shares representing the capital of the New Company; and
- (iv) 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 such securities or shares (although a higher cash amount is possible if the national law of any of the Merging Companies allows this).

The result of such a Merger is that: (i) all the assets and liabilities of the Merging Companies are transferred to the New Company; (ii) the members of the Merging Companies become members of the New Company; and (iii) the Merging Companies cease to exist.

2.3 Regardless of which of the above methods is used, no shares in the Acquiring Company can be exchanged for shares in the Acquired Companies held either:

2.3.1 by the Acquiring Company itself or through a person acting in his own name but on behalf of the Acquiring Company; or

2.3.2 by the Acquired Company itself or through a person acting in his own name but on behalf of the Acquired Company.

3 Key documents and timing requirements

3.1 There are three main documents that need to be prepared in the context of a Cross-Border Merger:

3.1.1 the Common Draft Terms of the merger;

3.1.2 the report of the directors; and

3.1.3 the independent expert's report.

3.2 Common Draft Terms of the Cross-Border Merger

The directors of each of the Cypriot Merging Companies have a duty to draw up the common draft terms of the Cross-Border Merger, which shall include at a minimum the particulars set out in Schedule 1 to this memorandum. Note that in case a simplified process for the Cross-Border Merger is followed (see paragraph 7 below), some items in the common draft terms can be omitted. The common draft terms shall be delivered to the Cyprus Registrar of Companies (the "**ROC**") at least one month prior to the date of the general meeting of each the Cypriot Merging Companies deciding

on the approval of the Cross-Border Merger. The requirement for filing with the ROC may not apply if a Cypriot Merging Company instead publishes the common draft terms on its website.

3.3 Directors' Report

The Directors of each of the Cypriot Merging Companies are required to draw up a report for their members explaining: (i) the legal and economic aspects of the Cross-Border Merger; and (ii) the implications of the Cross-Border Merger for members, creditors and employees.

The report shall be available to: (i) the members; and (ii) 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 of each the Cypriot Merging Companies deciding on the approval of the Cross-Border Merger.

In addition, if the directors receive within a reasonable time an opinion from the representatives of the employees of the Cypriot Merging Company, such opinion shall be appended to the report of the directors.

3.4 Independent Expert's Report

An independent expert report for members of the Cypriot Merging Companies must be drawn up and made available not less than one month before the date of the general meeting of each the Cypriot Merging Companies deciding on the approval of the Cross-Border Merger. Independent experts may be natural or legal persons and are appointed by the court, following an application by the relevant Cypriot Merging Company.

The requirement for an independent expert's report can be waived, if all the members of the Merging Companies agree to.

It is also possible to draw up a single joint report for all Merging Companies (rather than one for each) and this be available to all the members of the Merging Companies.

If drafted, the independent expert report shall include at least the particulars set out in schedule 2 of this memorandum. The independent experts shall also be entitled to secure from each of the Merging Companies all information they consider necessary for drafting their report.

3.5 General timing

The timetable for completion of a Cross-Border Mergers varies from case to case and as such is difficult to ascertain as much depends on: (i) the complexity of the Cross-Border Merger and the type, class, volume of assets and liabilities that are being transferred; and (ii) the general workload of public authorities involved in the Cross-Border Merger (both in Cyprus and the EU member state where other Merging Companies are registered).

4 Approval by the General Meeting

The members of the Cypriot Merging Companies have the authority to decide on the terms of the Cross-Border Merger. The resolution proposing the Cross-Border Merger must be passed with at least 75% majority of the members and any decision of the general meeting which results from this procedure is binding on the Resulting Company and all its members.

The Court also has the power to convene a creditors' meeting (or meeting of a particular class of creditor) on the application of a Cypriot Merging Company or any creditor, and if so, the draft terms of Cross-Border Merger must then be approved by a majority in number, representing 75% or more in value of the creditors or each class of creditors.

5 Scrutiny of the Process and Completion of the Cross-Border Merger

The district court of the district where the registered office of each of the Cypriot Merging Companies is situated (the “ **District Court**”) is competent to scrutinise the legality of the process of the Cross - Border Merger (as regards the part of the procedure relating to each of the Cypriot Merging Companies).

Once the Cross-Border Merger is approved by the general meetings of the members of the Merging Companies, each of the Cypriot Merging Companies applies to the District Court, requesting a certificate conclusively attesting to the proper completion of the pre-merger acts and formalities. If the District Court is satisfied that relevant formalities have been observed, it issues a certificate (a “ **Pre-Merger Certificate**”) to each Cypriot Merging Company.

Following the issue of the Pre-Merger Certificate, the actions for implementation of the Cross-Border Merger get underway and once complete, in case the Resulting Company is registered in Cyprus, the District Court has competency to scrutinise the legality of the completion of the Cross-Border Merger and, where relevant, the formation of the New Company. For the purpose of the District Court’s review, the documents set out in schedule 3 to this memorandum are submitted to the District Court. If the District Court is satisfied with the legality of the procedure for the completion of the Cross-Border Merger, it issues its decision (the “ **Final Decision**”) approving the completion of the Cross - Border Merger (and the Cross-Border Merger is effective on the date determined in the Final Decision).

6 Registration

Once the Final Decision is issued, each Cypriot Merging Company files with the ROC a copy of the Final Decision and a copy of the Final Decision is also appended to every copy of the memorandum of the Resulting Company.

On registration with the ROC of the Final Decision, the ROC removes from its register the Cypriot Acquired Companies indicating the date on which the Cross-Border Merger takes effect.

7 Simplified Formalities

Where a Cross-Border Merger is carried out by a Cypriot Acquiring Company which holds all the shares (and any other securities) conferring the right to vote at general meetings of the Acquired Companies:

- (i) certain particulars need not be included in the common draft terms (see schedule 1 to this memorandum);
- (ii) the common draft terms need not be approved by the shareholders of the Acquired Companies;
- (iii) the report(s) by the independent expert is not required; and
- (iv) the members of the Acquired Company shall not become members of the Resulting Company.

Such simplified formalities offer substantial advantages in terms of savings on expenses and time involved in completing a Cross-Border Merger. This has created an added incentive to international group of companies to use such simplified formalities in order to restructure, consolidate and/or merge their businesses and take advantage of the favourable tax regime in Cyprus.

Schedule 1 Minimum particulars for Common Draft Terms

The common draft terms for the Cross-Border Merger shall include at least the following particulars:

- the form, name and registered office of the Merging Companies and those proposed for the Resulting Company;
- the ratio applicable to the exchange of securities or shares representing the company capital and where applicable, the amount of any cash payment;*
- the terms for the allotment of securities or shares representing the capital of the Resulting Company;*
- the likely repercussions of the Cross-Border Merger on employment;
- the date from which the holding of such securities or shares representing the Resulting Company capital will entitle the holders to share in profits and any special conditions affecting that entitlement;*
- the date from which the transactions of the Merging Companies will be treated for accounting purposes as being those of the Resulting Company;
- the rights conferred by the Resulting Company on members enjoying special rights or on holders of securities other than shares representing the company capital, or the measures proposed concerning them;
- any special advantages granted to the experts who examine the draft terms of the Cross-Border Merger or to members of the administrative, management, supervisory or controlling organs of the Merging Companies;
- the memorandum and articles of the Resulting Company;
- where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the Resulting Company are determined;
- information on the evaluation of the assets and liabilities which are transferred to the Resulting Company; and
- dates of the Merging Companies' accounts used to establish the conditions of the Cross -Border Merger.

* Note: not applicable in case simplified formalities apply.

Schedule 2 **Minimum Particulars for Independent Expert Report**

The independent expert report shall include at least the following particulars:

- the method(s) used to arrive at the share exchange ratio proposed;
- state whether such method(s) 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; and
- any special valuation difficulties.

Schedule 3 Documents submitted to District Court

For the purpose of the District Court's review of the legality of the Cross -Border Merger, the following documents shall be submitted to the District Court:

- each Cypriot Merging Company shall submit: (i) the Pre-Merger Certificate within six months from its issue; and (ii) the common draft terms of Cross-Border Merger approved by its members; and
- every non-Cypriot Merging Company shall submit to the District Court: (i) the certificate issued by the competent authority subject to the relevant national legislation according to Article 10(2) of Directive 2005/56/EC within six months of its issue; and (ii) the common draft terms of Cross-Border Merger approved by its members in accordance with the provisions of Article 9 or of Directive 2005/56/EC.

Key Contacts

For further information, please contact:



Pavlos Kaimakliotis

Partner

Tel: +357 24 01 01 02

pavlos.kaimakliotis@kaimakliotis.com

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Telephone

+357 24 01 01 01

Fax

+357 24 01 01 00

Email

info@kaimakliotis.com

Website

www.kaimakliotis.com