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Cross-Border Merger

1. Introduction

The Cross-Border Merger Directive (Directive 2005/56, 10th Company Law Directive on Cross-Border Merger, herein “CBMD”),¹ facilitates the cross-border mergers of limited-liability companies by harmonising rules and providing for the procedure to be followed. A merger is only considered cross-border if at least two of the participating companies are governed by the laws of different Member States.² In Cyprus, the Cyprus Companies Law (Cap. 113), regulates cross-border mergers. Cap. 113 has incorporated the requirements and procedures in line with the CBDM.

2. Scope of CBMD

Three types of mergers can be identified:³

- (a) **Merger by acquisition:** one or more companies are acquired, on being dissolved without going into liquidation. The acquired companies transfer their assets and liabilities to another existing company, (the “Acquiring Company”) in exchange for the issuance of securities or shares, representing the capital of the new company.
- (b) **Merger by the formation of a new company:** two or more companies are acquired, on being dissolved without going into liquidation. The acquired companies transfer all their assets and liabilities to a newly formed company, in exchange for the issuance of securities or shares, representing the capital of the new company.
- (c) **Simplified-merger:** This involves a merger with a parent company and (i) a wholly owned subsidiary and (ii) a 90% subsidiary. There exists a simplified procedure for cases in which a parent company will merge by acquisition (absorption) with its

¹ Directive 2005/56 on cross-border mergers of limited liability companies [2005] OJ L 310/1-9 (herein “CBMD”).

² Gerven, D.V. (eds), *Cross-Border Mergers in Europe*, Cambridge University Press, 2010, 5; Article 1, CBMD.

³ Article 2(2), CBMD; Vermeylen J., and Velde I. V., (eds.), *European Cross-Border Mergers and Reorganisations*, Oxford University Press, 2011, 1.13; Article 201H, Cap.113.

subsidiary.⁴

Only companies which are entitled to participate in domestic mergers may participate in a merger governed by the CBMD.⁵ For the purposes of Cyprus Law, limited liability companies by guarantee and companies subject to liquidation do not fall within the ambit of the CBMD, and are therefore excluded from taking part in a cross-border merger.⁶

3. Procedure

Cross-border mergers governed by the CBMD are subject to the applicable provisions of national law on mergers, unless the Directive provides otherwise.⁷ The provisions governing cross-border mergers in Cyprus are set out in Articles 20IH-20IKZ (A.20I0-A.20IKZ).

I. Common Draft Terms

The responsible organs of each merging company must draw up a “Common Draft Terms”⁸ which:

- (a) sets out the main terms and conditions of the proposed merger;
- (b) informs the shareholders of the merging companies of the specifics; and
- (c) serves as the foundation of various reports, i.e., management, independent experts, shareholders’ general assembly on voting the merger etc.

The content of the Common Draft Terms drafted by each of the merger companies must be identical between them.⁹ Exactly what must be included in the Common Draft Terms is specified under national law. Indicatively, this includes:

- (a) the legal form, name, and registered office address of the merging companies, including those of the post-merger company;
- (b) the likely impacts on employment;

⁴ Article 31 of SE; Welauff E, *SE, The Law of the European Company* (Denmark: DJOF Publishing, 2003), 56.

⁵ Article 4(1), CBMD.

⁶ Article 20IIA, Cap.113.

⁷ Article 4(1)(b), CMBD; Recital 3, CMBD; Vermeulen J., and Velde I. V., (eds.), *European Cross-Border Mergers and Reorganizations*, Oxford University Press, 2011, 1.35.

⁸ Article 20IIB, Cap. 113.

⁹ Recital 4, CBMD.

(c) the terms for the allocation of securities or shares representing the capital of the company resulting from the merger.

After drafting the terms, the Directors (at the Board of Directors Meeting) and consequently the shareholders (at the General Assembly) must approved them.

II. Procedure prior to approval

Filing and Publication

Before holding the shareholders' general assembly, the Common Draft Terms must be rendered public. The purpose of this publication is the protection of interests of the merging companies' shareholders and third parties.¹⁰

As far as the Cyprus procedure is concerned, the Common Draft Terms must be filed with the Cyprus Registrar of Companies and consequently published in the Official Gazette of the Republic of Cyprus. This must be achieved at least one month prior to holding the general assembly.¹¹

Management Report

The Directors, management or administrative organ of each merging company must prepare a report and present this to the members, employees and creditors of the each company before the date of the shareholders' general assembly. This report must explain and justify the legal and economic aspects and the long-term implications of the cross-border merger.

Independent Expert Report

An independent expert report examining the Common Draft Terms, must be prepared by each of the merging companies and presented to the members.¹² The report should state whether the terms are fair and reasonable and indicate the methods used to arrive

¹⁰ Recital 4, CBMD.

¹¹ Article 201IC, Cap. 113.

¹² Vermeylen J., and Velde I. V., (eds.), *European Cross-Border Mergers and Reoragnazations*, Oxford University Press, 2011, 1.61.

to their conclusions. This report must be concluded at least one month prior the general assembly.¹³

Shareholder Approval

After the aforesaid reports have been previously presented to the members of each company, the Directors, following the procedures set out in the company's Articles of Association, give notice for a shareholders' general assembly to vote upon Common Draft Terms. Majority and quorum requirements are determined in accordance with national law. According to Cyprus law, in order to take effect, this must be approved by virtue of a special resolution.

III. Verification procedure

The verification of the legality of the merger takes place in two stages. The first level involves the verification of the merger by the designated national authority of each merging company. The second level refers to verification from the designated national authority of the company resulting from the merger.

a. Pre-merger certificate

Once the abovementioned steps have been completed, the Cyprus Company must apply to the District Court at which its registered office is found, and request a pre-merger certificate. This indisputably verifies the existence, compliance and the legality of all acts and formalities.¹⁴ The same pre-merger certificate must be ensured by the non-Cypriot company from its own jurisdiction.

b. Completion of cross-border merger

The second verification is performed by the designated national authority of the company resulting from the merger. It scrutinizes the legality of the completion procedure and checks that all the merging companies are in conformity with the national rules.

In case that the surviving entity is situated in Cyprus, the Court issues a Court Order approving and confirming the completion of the merger. It must specify the date on

¹³ Article 201IE, Cap. 113.

¹⁴ Article 201IZ, Cap. 113.

which the merger is deemed to take effect. This Court Order is also filed to the Cyprus Registrar of Companies and consequently published in the Official Gazette of the Republic of Cyprus. A notice of completion must also be published in accordance with national law in the Member State of the company that will disappear as a result of the merger.¹⁵

IV. Consequences of a Merger

As a result of a cross-border merger, governed by the CBMD, the disappearing companies will be dissolved but not liquidated. Therefore, the acquired companies cease to exist¹⁶ and all of the assets, rights, obligations and liabilities of the acquired companies are transferred into the company resulting from the merger.¹⁷ The shareholders of the acquired companies become the shareholders of the company resulting from the merger.¹⁸

4. Final Remarks

The CBMD undoubtedly mitigates excessively high costs and burdensome formalities which potentially posed obstacles to cross-frontier business activities, mobility, expansion and investment.¹⁹ The choice of companies to establish themselves in other Member States is now accompanied by the necessary flexibility of corporate restructuring. It is true that when the merger involves independent parties, there exist some burdensome and complex procedures.²⁰ Nevertheless, this does not cause great concerns to legal certainty and the clarity of procedures. Cap. 113 has clearly incorporated the prerequisites and procedures necessary for an effective cross-border merger to take substance.

Disclaimer

This publication has been prepared as a general guide and for information purposes only. It is not a substitution of professional advice. No responsibility will be accepted by the publisher for any loss occasioned by acting or refraining from acting on the basis of this publication.

¹⁵ Gerven, D.V. (eds), *Cross-Border Mergers in Europe*, Cambridge University Press, 2010, 34.

¹⁶ They are dissolved without liquidation by the operation of the law.

¹⁷ Article 11(2), CBMD.

¹⁸ Article 201KA, Cap. 113.

¹⁹ Papadopoulos T., "The Magnitude of EU Fundamental Freedoms: Application of the Freedom of Establishment to the Cross-Border Merger Directive" *European Business Law Review* (2012), 518.

²⁰ Rickford J., "The Proposed Tenth Company Law Directive on Cross-Border Mergers and its Impact in the UK", (2008) *European Business Law Review* 1410-11.