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放胆一跃

纵身跳向中国市场的风险与回报

Leap of faith

Perils and rewards of jumping into the China market

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以控股公司提高股权收购能力
Raising acquisition equity through a Cypriot holding company

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从资金策略的角度来看，上市使公司能够扩大及多元化自己的股本基础。到证券交易所首次公开募股（IPO）意味着进入了广阔的潜在投资者圈，并由此获得用于增长及营运的资本，与场外交易市场相比，这可能是一个更廉价的资金渠道。然而，达到上市这一步无疑是一个艰巨的过程，IPO 伴随着大规模的启动成本和推进费用，如法律、会计和承销费用等。同时，准上市公司在财务及业务报告和信息披露等方面也需要达到更高的门槛，而且谁也无法排除可能筹集不到所需资金的风险。

对于那些能证明自己的发展潜力、盈利或现金流得到改善的新兴企业，收购很可能是另一种有吸引力的流动性策略。如果对目标公司的主收购被设计为通过对目标公司的塞浦路斯控股公司的次级收购来完成，买方将几乎总是通过该控股公司探索购买途径。

塞浦路斯私人公司的公司章程中，股本条款载列了法定股本总额，并进一步列明如何划分股本以及股份所代表的固定金额。法定股本亦即一家公司获授权发行的股本总额。该公司可能在股东大会上形成股东决议以确定其法定股本的增加数额，如果公司章程细则有这样的授权（及授权方式）。法定股本中已发行予本公司股东的部分即为公司的已发行股本。

> “法定股本亦即一家公司获授权发行的股本总额”

配发股份

配发股份的先决条件是塞浦路斯控股公司拥有已获授权但尚未发行的股本。如果法定股本已全部发行，就有必要按照公司组织章程细则规定的股东决议类型来决定增加法定股本。

根据《公司法》第 62 条，上述特别决议的结果须在获通过之日起 15 天内提交公司注册处备案；并向公司注册处缴纳资本税，税额为所增加资本总金额的 0.6 %，以 20 欧元为下限。

一旦股本增加决议获得通过并产生了新的股份，随后即授权控股公司董事会向有意愿的买方 - 股东进行新股配发。除了法律规定的数量有限的例外情况，股份的配发价不应低于其面值，亦即公司章程中规定的票面价值。

由于法律未设定最高上限，控股公司董事会在配发股份时享有一种近乎绝对的酌情权来决定任何超出其面值的溢价金额。这种超出的金额反映在资产负债表项目中，并存放于控股公司的股份溢价账户。

根据《公司法》第 51 条，须在相关决议获通过之日起一个月内将配发结果报至公司注册处备案。迟报须经法院许可。应该指出的是，资本税不适用于溢价部分。

此外，第 51 条也解释了如何以现金以外的对价配发股份。这条路径在并购中比较少见，但与债务重组高度相关，因为配发股份可以用作对价来支付任何未清偿的债务，并使公司的资产负债表看起来更体面。

贷款协议

对买方来说并不罕见的是，通过贷款协议获得对目标控股公司的购买金额。考虑到买方 / 贷方的目的是通过控股公司 / 借款人收购目标公司，在这种情况下贷款协议的偿还条款需经精心设计，从而满足以目标控股公司的股份而不是现金来结算贷款金额。

股份质押

质押是一种合同关系，指任何实体上能够移交或者推定能够移交的资产，其实际占有状态由一个人（出质人）移交给另一个人（质权人），作为偿还债务或履行承诺的担保。对有关控股公司股份的质押协议而言，这种资产包含原始股权证，其中明确证明该控股公司对这些股份的所有权。

对于债权人来说，股份质押协议构成一个非常可靠的介质，使借款得到担保。在签署股权质押协议时，出质人将控股公司所持股份的股权证作为担保物交给质权人。被质押的股份的所有权仍然属于出质人，因为移交给质权人的只是对股权证的占有。如果根据股份质押协议规定的条款，出质人一旦违约，或处于持续违约状态，质权人或其指定的任何其他人即应当成为被质押股份的法定所有人。

关于收购涉及的股权将如何产生自或注入于塞浦路斯控股公司，税务状况最终会成为决定性因素之一。除了实施阶段和专业咨询环节的费用，资本和印花税如果适用的话，也会征收，这些成本从一开始就应加以量化。

视乎收购的结构如何分层，有关一个公司购买或认购自身的或其控股公司的股份时的财务支持，必须时时参照《公司法》第 53 条规定的禁令和例外情况。■

From a funding strategy perspective, going public enables a company to enlarge and diversify its equity base. By tapping into a wide pool of potential investors and thus generating growth and working capital, an initial public offering (IPO) on a securities exchange may enable cheaper access to capital compared to the over-the-counter market. Getting there is undoubtedly a demanding process, as an IPO is associated with significant start-up – and ongoing – legal, accounting and underwriting costs. Increased thresholds of financial and business reporting and disclosures would need to be met by the prospective public company as well, and one cannot sign off the risk that the required funding may not be raised.

For emerging companies evidencing potential profit or cash flow improvements, a takeover may well be an appealing liquidity alternative strategy. Where the primary acquisition of the target company is structured through the secondary acquisition of the target's Cypriot holding company, the buyer will almost always explore purchase avenues through the holding company itself.

The capital clause in the memorandum of a Cypriot private company sets out the amount of the authorised capital and, further, how this authorised capital is divided and represented in shares of a fixed amount.

The authorised capital connotes the amount of capital that a company is authorised to issue. The company may in general meeting, if so (and how so) authorised by its articles of association, increase its authorised capital by such amount as may be resolved by its shareholders. The subset of the authorised capital that has been issued to the shareholders of the company forms the issued share capital.

Allotment of shares

An allotment of shares presupposes that the Cypriot holding company has authorised yet-unissued share capital. Where the authorised share capital has been issued in its entirety, a shareholders' resolution of the type prescribed in the articles of association of the company, resolving its increase, will be necessary. Pursuant to section 62 of the Companies Law, the return of the said special resolution would need to be filed with the Registrar of Companies within 15 days from the date the resolution is passed. The total amount of the increased capital multiplied by 0.6% or the sum of €20 (US$27), whichever amount proves higher, represents the sum that will be payable to the Registrar of Companies by way of capital duty.

> *"The authorised capital connotes the amount of capital that a company is authorised to issue"*

Once the increase resolution is passed and the new shares created, their subsequent allotment to the willing buyer-shareholder vests with the board of directors of the holding company. Save for limited exceptions provided by statute, shares may not be allotted for less than their nominal value, as the same is connoted in the memorandum. With no maximum value ceiling set by statute, the board of directors of the holding company enjoys a near absolute discretion in allotting the shares at any amount at a premium, i.e. in excess of their nominal value. This excess amount is reflected as a balance sheet entry and placed in the holding company's share premium account.

Pursuant to section 51 of the Companies Law, the return of allotments would need to be filed with the Registrar of Companies within one month from the date the relevant resolution is passed. Late filings are permitted with the leave of the court. It should be noted that capital duty does not apply to amounts paid as premium.

It should be noted that section 51 is also explanatory as to how shares can be allotted for consideration other than cash. This route is less popular in acquisitions yet highly relevant in debt restructuring, as an allotment of shares may be used as consideration to pay off any outstanding debts and keep the balance sheet of the company presentable.

Loan agreement

It is not uncommon for the buyer to channel the purchase amount to the target holding company through a loan agreement. Taking into account that the aim of the buyer/lender is the acquisition of the target through the holding company/borrower, the repayment provisions of the loan agreement in this context are crafted so as to cater for the settlement of the loan amount by shares of the target holding company, rather than cash.

Pledge of shares

A pledge describes a contractual relationship where the physical possession of any asset capable of actual, or constructive, delivery is delivered by one person (the pledgor) to another (the pledgee) as security for payment of a debt or performance of a promise. In the context of a pledge agreement concerning the shares of the holding company, such asset comprises the original shares certificate that evidences title to such shares of the holding company as therein expressly mentioned.

The shares pledge agreement comprises a much trusted medium for creditors in securing a loan. On execution of the shares pledge agreement, the pledgor hands over to the pledgee the shares certificate of the shares of the holding company that are used as security.

The ownership of the pledged shares remains with the pledgor, as it is only the possession of the shares certificate that is delivered to the pledgee.

The pledgee – or any other person nominated by the pledgee – shall become the registered owner of the pledged shares once, and if, the pledgor is in default, or in continuous default, of the terms stipulated in the shares pledge agreement.

The tax position will ultimately be among the decisive factors as to how acquisition equity will be generated out, or injected into, the Cyprus holding company. Implementation and professional advice fees apart, costs for capital and stamp duty, if applicable, should also be levied and quantified from the outset. Depending on how the acquisition structure is layered, reference must always be made to the prohibitions and exceptions afforded in section 53 of the Companies Law concerning the financial assistance by a company for purchase of, or subscription for, its own or its holding company's shares. ■

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