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公司重组的框架和程序

Framework and procedure for company reconstruction



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塞浦路斯《公司法》第198节至200节规定了促进公司安排和重组计划的法律框架。

在没有明文规定的法律定义时，重组可以宽松地理解为全部或部分业务从一家公司（转让公司）转移到另一家公司（受让公司），公司股东大体相同，目的是为了业务由接管公司继续运营，而不一定要解散转让公司。

根据《2002年塞浦路斯所得税法》第30节的规定，合并、分拆、部分分立、资产转让、股份交换和公司迁册都构成重组。

尽管重组计划的主要动因是出于资本或债务重组，重组计划也可以用来重塑公司结构，特别是当一家持有资产的管理权和所有权的控股公司因业务（或税务）效率原因需要缩小至相关公司规模时。当重组计划获得法庭批准，该计划就不再是受影响当事方之间的协议安排，而且被赋予法律效力。法庭命令有效地使重组计划对转让公司，以及其股东和债权人（或清算人）产生约束力。

审计员参与

任何重组计划都要求审计员的参与。转让公司审计员的介入有两个方面：制订重组计划；将重组计划提交塞浦路斯所得税监管机构且获得通过和批准。获得税务批准可以消除或剔除与重组相关的潜在税务

“ **重组程序的启动需要通过向法庭申请** ”

风险。由于公司重组出于会计目的被作为账面价值/损失重组，因而通常不导致收入的产生（或认可），公司重组产生的利润或收益在塞浦路斯不用纳税。在塞浦路斯共和国，重组免于征收增值税、资本利得税和印花税。

重组程序的启动需要通过向法庭申请，由法庭发出命令。支持申请的证词应由公司管理人员作出，并附上重组计划。申请会寻求法庭下令召集由债权人和转让公司成员参加的特别大会，使他们考虑重组计划，如重组计划被认为合适，则会获得批准。

因此，通常是由法庭命令指示特别大会召集的方式和媒介，并任命一名主席主持该等特别大会。

相关特别大会的通知发送到公司成员和债权人，并/或在官方刊物和地方报纸中广而告之。如果明知公司债权人在国外，建议在债权人所在地的报纸上登载特别大会通知，以适当履行转让公司对法庭进行充分和坦诚披露的义务。

应准备重组计划，辅以一份解释重组效果和转让公司董事任何重大利益的陈述，无论是作为转让公司的董事、成员还是债权人，并连同特别大会通知一起，发送给该公司的成员和债权人。

然后可以举行特别大会，特别大会上通过的决议应在转让公司的会议记录簿中适当留存文件和记录。

一旦公司成员和债权人以至少占75%的大多数通过重组计划，则需要向法庭提交新的申请。该申请寻求法庭批准执行重组计划，该重组因此对转让公司所有债权人和公司（在公司解散情形下，包括清算人和出资者）有约束力。提出申请时应提交

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LEADING. EVOLVING. ACHIEVING.

特别大会主席的宣誓书，特别大会主席由法庭首次指令任命。我们建议，该宣誓书应该显示受让公司适当决策机构的会议记录，证明该管理层对重组计划明示的同意和批准。

通常在实践中，除了寻求批准将转让公司的任何部分业务、资产或责任转让给受让公司之外，申请时还会寻求以下指令，即：

- 根据重组计划将权利或利益分配给受让公司；
- 转让公司提起或面临的未决法律程序由受让公司承继；
- 未履行完毕的合同由受让公司继续履行；
- 转让公司雇员的调动以及他们与受让公司雇佣关系的继续；
- 为确保重组计划能够完全和有效执行的必要的附带性、间接性和补充性事务。

法庭指令的官方副本在指令做出后七天之内提交到公司登记机关进行登记之后，该指令才具有法律效力。法庭指令副本成为转让公司组织大纲的附件并构成其组成部分。

从竞争法的角度，根据现行《塞浦路斯经营集中控制法律》，如果出现以下情形，则经营集中产生，视乎营业额门槛的高低，可能需通知竞争委员会并获得其批准：1) 此前独立的两家公司的合并；2) 取得对另一公司直接或间接的控制；或者3) 建立永久从事某一自主实体所有功能的合资公司的情形下。但是，在该等集中涉及同一家企业的两个或更多的子公司时，不存在通知义务。■

Sections 198-200 of the Cyprus Companies Law provide the legal framework for the facilitation of company arrangement and reconstruction schemes. In the absence of an express statutory definition, a reconstruction may loosely be interpreted as entailing the transfer, whether in whole or in part, of an undertaking from one company (the “transferor company”) to another (the “transferee company”) consisting of substantially the same shareholders with a view to its being continued by the receiving company, without necessarily dissolving the transferor company. For the purposes of section 30 of the Cyprus Income Tax Law 2002, mergers, spin-offs, partial divisions, transfer of assets, exchange of shares and redomiciliations amount to reconstruction schemes.

While reconstruction schemes are primarily capital or debt restructuring-motivated, they may also be used to remould corporate structures, particularly where the administration and ownership of assets held by a holding company is required for business (or tax) efficacy reasons to be scaled down to underlying companies. When a reconstruction scheme is sanctioned by the court, it ceases to operate as an agreement between the parties affected and is given statutory force. The court order effectively renders the scheme binding to the transferor company, in as much as its shareholders and creditors (or a liquidator).

Input of auditors

Any reconstruction scheme would invariably require the input of auditors. The involvement of the auditors of the transferor company is twofold: the preparation of the reconstruction plan; and further, its submission to, approval by and clearance from the Cyprus income tax authorities. Securing a tax clearance eliminates or fleshes out, as the case may be, any potential tax risks that may be associated with the reconstruction.

As company reconstructions are mirrored, for accounting purposes, to a book-value/losses reconstruction and thus do not normally lead to the generation (or recognition) of income, profits or gains made as a result of company reconstructions are not taxable in Cyprus. Reconstructions are exempt from value-added tax, capital gains tax and stamp duty in the Republic of Cyprus.

The reconstruction process is initiated by application in court, the same made

by originating summons. The affidavit in support of the application must be made by an officer of the company and have annexed thereto the proposed reconstruction plan. The application will seek an order of the court to summon the extraordinary general meetings (EGMs) of creditors and members of the transferor company in order for them to consider, and if thought fit, approve the reconstruction plan. For that reason, it is common for the order to direct the method and mediums through which such EGMs will be called, as well as to appoint a chairman to preside over such EGMs.

Notices of the relevant EGMs are dispatched to the members and creditors and/or are advertised in the official gazette and local newspapers. Where the company’s creditors are known to be situated overseas, it is advisable for the EGM notices to be published in a newspaper of the creditors’ locality, in order to properly discharge the duty of the transferor company to make full and frank disclosure to the court. The reconstruction plan, complimented further by a statement explaining the effect of the reconstruction and any material interests of the directors of the transferor company, whether as directors, members or as creditors of the transferor company, must be prepared and dispatched to the members and creditors, together with the EGM notices. The EGMs may then take place and the resolutions passed appropriately documented and recorded in the minute book of the transferor company.

Once the members and creditors have approved the reconstruction scheme by a majority of at least 75%, a new application needs to be filed in court. This second application will seek to obtain the sanction of the court on the implementation of the reconstruction scheme, so the reconstruction is binding on all the transferor company’s creditors and the company (including the liquidator and contributories in the event the company is wound up).

The application is supported by an affidavit made by the chairman of the EGMs, the same having been nominated by the first court order. It is advisable for such an affidavit to exhibit, among others, the minutes of the appropriate decision making body of the transferee company furnishing its express consent to, and approval of, the reconstruction scheme at its level.

In practice, it is customary for the application to seek, apart from the approval

“ *The reconstruction process is initiated by application in court* ”

of the transfer of any part of the undertaking, assets or liabilities of the transferor company to the transferee company, the following orders, namely:

- a. the allotment to the transferee company of any rights or interests that under the reconstruction scheme are to be allotted to the transferee company;
- b. the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
- c. the continuation by the transferee company of any pending contracts;
- d. the transfer of any employees from the transferor company and the continuation of their employment in the transferee company;
- e. such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction scheme shall be fully and effectively carried out.

The court order shall have no effect until an office copy of the order is delivered to the Registrar of Companies for registration within seven days of the making of the order. A copy of the court order will then be appended to, and form part of, the memorandum of association of the transferor company.

From a competition law perspective, and under the current Cyprus Concentration Control Law, a concentration arises and is notifiable for approval, subject to turnover thresholds, to the Competition Commission, regarding: (a) the merger of two previously independent undertakings; (b) the acquisition of control, directly or indirectly, of another undertaking; or (c) the establishment of a joint venture that permanently carries out all the functions of an autonomous entity. However, there is no duty to notify where such a concentration relates to two or more undertakings, each of which is a subsidiary of the same undertaking. ■

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