Legal Entity Reduction

When it comes to eliminating companies, what are the options and what steps need to be taken?

Background

Group structures, particularly those which have been subject to multiple acquisitions, are frequently unnecessarily complex, include a plethora of non-trading entities and have complicated and inefficient intercompany debt arrangements.

This drains group resources both financially and operationally. Simplifying the group structure by eliminating redundant and surplus entities can:

- promote a marketable group structure;
- free up resource to focus on business critical issues;
- reduce the risk of non-compliance with legal obligations; and
- significantly reduce maintenance costs.

It Can Also:

- eliminate corporate memory issues; and
- bring early resolution to contingent liabilities.

How Do I Dissolve a Company?

There are two main ways of dissolving a solvent Irish Company:

1. Members' Voluntary Liquidation; and
2. Voluntary Application for Strike Off.

What is the Difference between Members' Voluntary Liquidation and Strike Off?

Members' Voluntary Liquidation

It is a procedure that involves the directors, shareholders, auditors and a third party individual that accepts and consents to the appointment as liquidator.

A members' voluntary liquidation is only appropriate if the company is solvent.

Procedure

A Declaration of Solvency is prepared and sworn by the directors, to the effect that they have made a full enquiry into the affairs of the company and, having done so, have formed the opinion that the company will be able to pay its debts within a period that cannot exceed twelve (12) months from the commencement of the liquidation. This Declaration of Solvency embodies a statement of the company's assets and liabilities as at a date not more than three months before the making of the Declaration and must be sworn by all, or a majority, of the directors.

A Report, made by an independent person, usually the existing auditor, must be attached to the Declaration of Solvency opining that (i) the statement of the company's assets and liabilities and (ii) the opinion of the directors that the company will be able to pay its debts in full are not unreasonable.

Within thirty (30) days of the swearing of the Declaration of Solvency, the shareholders of the company must resolve that the company be wound up voluntarily.

The voluntary winding up is deemed to commence at the time of the passing of the required resolutions by the shareholders of the company. The company must then cease to carry on business except under the directions of the liquidator. The liquidator takes control of any remaining assets, realises them to discharge creditors and makes distributions of surplus assets to the shareholders.

The Declaration of Solvency, the Statement of the Independent Person and numerous statutory forms must be filed, within strict timeframes, in the Companies Registration Office ("CRO").

As soon as the affairs of the company are fully wound up, a final general meeting of the shareholders is called. At this meeting, the liquidator will lay before it an account of the winding up, showing how the winding up has been conducted and the property of the company disposed.

A number of final forms must be filed with the CRO after the holding of this meeting and the company is deemed to be dissolved within three months of the registration of the final forms by the CRO.

Effect of Voluntary Liquidation

When dissolved following the liquidation process, the company cannot be reinstated for any reason after a period of two (2) years has passed from the date it was dissolved.

Strike Off

If a company never traded or has ceased to trade, has no assets or liabilities that exceed €150 and it is not a party to ongoing or pending litigation, it can request the CRO to strike the company off the Register of Companies.

Procedure

The company must:

- Have never traded or ceased to trade;
- Give the CRO reasonable cause to believe it has ceased trading (or that it never traded);
- Pass a shareholder resolution, within three (3) months prior to the application, to be struck off on the grounds that it has never traded or it has ceased trading and will not carry on business or incur any liabilities up to the date of strike off;
- Deliver all outstanding annual returns to the CRO (if any);
- Deliver a letter of no objection from the Revenue Commissioners dated not more than three (3) months prior to the date the application is made;
- Cause an advertisement of the intention to strike off the company to be published within thirty (30) days before the date of the application in at least one daily newspaper circulating in Ireland (a copy of which must be affixed to the certificate upon application); and
- Deliver a certificate signed by all the current directors of the company certifying that the assets or liabilities of the company do not exceed €150 and that the company is not party to ongoing or pending litigation.

Upon receipt of the application to strike the company off the Register, the CRO will, as soon as practicable, make arrangements for the publication of a notice in the CRO Gazette of its intention to strike off the company. The CRO gazette is published monthly.

The notice in the CRO Gazette invites any interested party to object to the application for strike off. The application for strike off may be objected to within ninety (90) days after the date of the notice being published in the CRO Gazette and the objection must be that one or more of the strike off conditions have not been met.

If the Registrar has published notice and no objection has been received or sustained nor has the company revoked the request for strike off, the CRO may strike the company off the Register.

The CRO will then publish a notice of the strike off in the CRO Gazette; the date of dissolution of the company will be the date of publication of the notice by the CRO.

Effect of Strike Off

Directors should note that specified persons may apply for the restoration of the company to the Register of Companies for a period of twenty (20) years after the dissolution date, if the applicant has been disadvantaged by the dissolution and the restoration is just and equitable. The liability of any director, other officer or member of the company shall continue and may be enforced as if the company had not been dissolved.

Directors should therefore ensure that the affairs of the company are in order prior to applying to the CRO for voluntary strike off. The company should, in particular, ensure its tax affairs are in order, any charges in the name of the company and any guarantees provided by the company are released and no objection to being struck off will arise either now or in the future.

What Else Do I Need to Know?

No matter what option is chosen to dissolve a solvent company, there will be some pre-dissolution steps to implement, including:

- declaration and payment of dividends;
- reduction of share capital;
- assignment of inter-company debts;
- disposal of assets to other group companies; and
- settlement of creditors, particularly third party creditors.

Additionally, the trading history of a company can be a determining factor for which option to choose and the tax implications for the company to be dissolved and the group as a whole must be considered.

Is there an alternative?

Mergers

It is possible for two Irish private companies to merge so that the assets and liabilities of one transfer by operation of law to the other after which the former company is dissolved without going into liquidation or applying for strike off. The provisions have been modelled on the European Communities (Cross-Border Mergers) Regulations 2008 (as amended) which implement Directive 2005/56/EC on cross-border mergers in Ireland.

Mergers can be effected by a court order or by using the summary approval procedure. This is a new validation procedure involving the passing of a special resolution by the shareholders of a company and the swearing by the directors of that company of a statutory declaration of solvency.

Divisions

It is also possible for private companies to divide such that (i) two or more companies acquire between them all the assets and liabilities of another company that is dissolved without going into liquidation or applying for strike off in exchange for the issue to the shareholders of the transferring company of shares in the successor companies; and (ii) by the incorporation of the successor companies for the purposes of the acquisition of the assets and liabilities in return for the issue of shares.

There are significant tax issues with each of these options. Additionally, in the case of a merger using the summary approval procedure, the directors can be held personally liable if their opinion on the future solvency of a successor company was made without having reasonable grounds to do so. Summary approval procedure is not available in the case of a division so an application has to be made to the High Court.

We Have:

- a proven track record and offer competitive pricing with discounts for multiple eliminations; and
- a multi disciplined (audit, tax and legal) flexible approach which can be tailored to client specific needs, resulting in a simplified group structure.

How can KPMG help me?

- devise an optimal structure and identify target entities for elimination;
- undertake detailed due diligence, focused on identifying assets, liabilities and risk;
- assess whether surplus entitles should be eliminated by solvent liquidation or strike off;
- pinpoint critical pre-elimination steps; and
- plan and help execute an elimination strategy.

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Produced by: KPMG's Creative Services. Publication Date: July 2016 (1975)