

Corporate Restructuring and Employee Benefit Trusts

In the current economic environment, there are a number of entities that are being restructured. Our current experience has been that such restructurings fall into two areas, namely a debt for equity swap or a release of "toxic" assets from a group structure in order to minimise exposure to this asset class.

Debt for Equity Swap

A number of banks or lenders have a significant level of debt exposure to companies that may not be recovered. In order to reduce the level of "toxic" debt on their balance sheets and to limit any further downside to their investment, the lender switches their interest from debt in the borrower to a shareholding in the borrower. The equity holding would normally be structured in such a way which ensures that the debtor group is not required to be consolidated onto the lender's balance sheet. The resulting equity holding may thus be a mixture of ordinary and preference shares with enhanced redemption or dividend rights but no voting rights.

Any ordinary shares not taken up by the former lender would be held by one or multiple Employee Benefits Trusts ("EBT's"). The EBTs function would be to make value available to the new or existing management team either in the form of equity incentives in the normal way or to provide incentives generally in the form of cash or other assets that may be obtained following a sale or IPO of the recovered business.

Assuming the management team is successful in recovering the business, the lender receives the growth on its investment in any ordinary shares, a return on its preference shares (usually equal to the value of its original debt or a percentage thereof) and the management team are rewarded for their success via the EBTs.

Segregation of Toxic Assets

Banks or fund management groups may have funds under management that are considered "toxic" assets and to maintain these funds on their balance sheet or within their fund structures may no longer be acceptable from either a regulatory or reputational perspective.

The owner of the funds may wish key individuals to continue to manage the funds under a new, independent corporate structure that accepts the ownership of the relevant assets. Although the original owner becomes remote from the ownership of the assets, they may wish

to retain an interest in the growth and any recovery in the value of the assets through financing arrangements with the newly established independent corporate structure.

EBTs can be introduced to hold shares in the new vehicle and to control ownership following any unexpected changes to the key individuals responsible for the management of the assets and also to provide incentives to senior executives in the usual way using equity and or cash.

The Employee Benefit Trust

The rationale for establishing an EBT as part of these complex transactions is primarily: (i) to hold shares in the newly formed entity and for those shares or any assets arising from a liquidity event to subsequently be used to provide tax efficient incentives for management, and (ii) to allow an entity independent of a creditor or original owner to hold equity under the terms of a shareholders' agreement or the relevant articles.

There are an increasing number of incentive plans that can be put in place to align management's interest with that of their employer and shareholders. Specific plans do not have to be determined ahead of the restructuring and can be implemented subsequent to the equity being placed into the EBT. The plans that are then implemented can be the most current and relevant arrangements that are appropriate for the executive team that are being incentivised.

The plans implemented could include share option plans, long term incentive plans, restricted share plans or plans designed to ensure that any value created is a capital gain rather than value that is taxed at higher income rates. All management incentives can be designed to incorporate performance conditions, retention periods and bespoke good and bad leaver provisions.

It is not uncommon for an EBT to hold a majority and/or controlling stake in operating entities in order to avoid consolidation issues for banks and other lenders and also to ensure that a controlled level of influence is placed in the hands of management.



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Ogier's Involvement

Ogier's Employee Benefits Team has worked on several of these transactions over the past few months and Ogier has been able to draw on its multi-jurisdictional experience in corporate restructuring both from a legal and administrative perspective. Ogier also has the experience to monitor significant holdings of shares in active businesses and where appropriate to source non-executive directors to represent the EBT's shareholdings in such businesses. Ogier works with all the top law firms and tax advisors and can recommend advisors to our clients who wish to explore this type of planning further.

For any queries please contact Philip Norman in the first instance.

Author: Philip Norman, Group Director
+44 (0)1534 504430
philip.norman@ogier.com

About Ogier

Ogier is an award winning offshore legal and fiduciary services provider. The Group advises on all aspects of BVI, Cayman, Guernsey and Jersey law and provides fiduciary services through a global network of offices covering all time zones and key financial markets.

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Contact details

NORTH & SOUTH AMERICA

British Virgin Islands

Legal:

Ray Wearmouth
+1 (284) 852 7364
ray.wearmouth@ogier.com

Cayman Islands

Legal:

James Bergstrom
+1 345 815 1855
james.bergstrom@ogier.com

Fiduciary:

Vijayabalan Murugesu
+1 345 815 1481
balan.murugesu@ogier.com

EUROPE, MIDDLE EAST & AFRICA

Bahrain

Paul Perris
+973 1720 0025
paul.perris@ogier.com

Guernsey

Legal:

Nick Gamble
+44 (0) 1481 752257
nick.gamble@ogier.com

Jersey

Fiduciary:

Philip Norman
+44 (0) 1534 504430
philip.norman@ogier.com

Tania Bearryman
+44 (0) 1534 753936
tania.bearryman@ogier.com

Simon Mackenzie
+44 (0)1534 504392
simon.mackenzie@ogier.com

Jane Pearce
+44 (0)1534 753806
jane.pearce@ogier.com

Legal:

Clive Chaplin
+44 (0) 1534 504240
clive.chaplin@ogier.com

ASIA & AUSTRALIA

Hong Kong

Legal:

Nicholas Plowman
+852 3656 6014
nicholas.plowman@ogier.com

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