L.N. 415 of 2007

COMPANIES ACT
(CAP. 386)

Cross-Border Mergers of Limited Liability Companies Regulations, 2007

IN exercise of the powers conferred by article 425(1)(m) of the Companies Act, the Prime Minister and Minister of Finance has made the following regulations:-

Citation and commencement.

1. (1) The title of these regulations is the Cross-Border Mergers of Limited Liability Companies Regulations, 2007.

(2) These regulations shall come into force on the 15th December, 2007.

Purpose.

2. The purpose of these regulations is to transpose and implement the EC Directive and they shall be interpreted accordingly.

Interpretation.

3. (1) Any reference in these regulations to "the Act" shall be construed as a reference to the Companies Act, and subject to the provisions of sub-regulation (2), the provisions of article 2 of the Act shall also apply to these regulations.

(2) In these regulations, unless the context otherwise requires:

"cross-border merger or mergers" means a merger or mergers referred to in regulation 4(1) and (2);

"EC Directive" means the European Community Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, as amended from time to time;

"Directive 68/151/EEC" means the European Economic Community Directive 68/151/EEC of 9 March 1968 on the coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of

companies within the meaning of the second paragraph of article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, as amended by subsequent legislation;

"company resulting from the merger" means either the acquiring company in the case of a merger of the type referred to in sub-regulation (4)(a) and (c), or the new company in the case of a merger of the type referred to in sub-regulation (4)(b);

"foreign merging company or companies" means a company or companies registered in a Member State or EEA State other than Malta taking part in a cross-border merger and includes an acquiring company;

"management or administrative organ" means, in the case of a company registered in Malta, the board of directors;

"Maltese merging company or companies" means a company or companies registered in Malta taking part in a cross-border merger and includes an acquiring company;

"Merging companies" means all the companies taking part in a cross-border merger and includes an acquiring company.

(3) For the purpose of these regulations, "company", unless otherwise qualified, means:

(a) a company as referred to in article 1 of"Directive 68/151/EEC; or

(b) a company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning safeguards such as are provided for by European Community Directive 68/151/EEC for the protection of the interests of members or others.

(4) For the purpose of these regulations, "merger" means an operation whereby:

(a) one or more companies, on being dissolved without going into liquidation, transfer all their assets, rights, liabilities and obligations to another existing company ("the acquiring company") in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10% of the nominal value,

or, in the absence of a nominal value, of the accounting par value of those securities or shares, hereinafter referred to as "merger by acquisition"; or

(b) two or more companies, on being dissolved without going into liquidation, transfer all their assets, rights, liabilities and obligations to a company that they form ("the new company") in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10% of the nominal value, or in the absence of a nominal value, of the accounting par value of those securities or shares, hereinafter referred to as""merger by formation"; or

(c) a company, on being dissolved without going into liquidation, transfers all its assets, rights, liabilities and obligations to the company holding all the securities or shares representing its capital, the acquiring company.

Applicability of these regulations.

4. (1) These regulations shall apply to mergers of companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, provided at least two of such companies are governed by the laws of different Member States and provided further that at least one of the merging companies, or the company resulting from the merger, is registered in Malta.

(2) Notwithstanding the definition of "merger" in regulation 3(4), these regulations shall also apply to cross-border mergers where the law of at least one of the Member States concerned allows the cash payment referred to in paragraphs (a) and (b) of the said definition to exceed 10% of the nominal value, or, in the absence of a nominal value, of the accounting par value of the securities or shares representing the capital of the company resulting from the cross-border merger.

(3) These regulations shall not apply to cross-border mergers involving a company the object of which is the collective investment of capital provided by the public, which operates on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of that company. Action taken by such a company to ensure that the stock exchange value of its units does not vary significantly from its net asset value shall be regarded as equivalent to such repurchase or redemption.

(4) Mergers between companies, all of which are registered in Malta, shall continue to be regulated by Title II of Part VIII of the Act.

Applicability of the Act to cross-border mergers.

5. (1) Unless otherwise provided in these regulations, a Maltese merging company shall comply with the provisions and formalities of the Act, in particular those concerning the decision making process relating to the merger, the protection of creditors, debenture holders and holders of securities or shares of the said company, as well as the provisions of any other law in force in Malta concerning the rights of employees.

(2) Any law in force in Malta which empowers any authority in Malta to oppose a merger between companies registered in Malta on grounds of public interest, shall also be applicable to a cross-border merger in which a Maltese merging company participates:

Provided that this provision shall not prejudice the provisions of article 21 of European Community Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

Duty to draw up common draft terms of cross-border mergers.

6. The management or administrative organ of each of the merging companies shall draw up the common draft terms of cross-border merger which shall include at least the following particulars:

(a) the form, name and registered office of the merging companies and those proposed for the company resulting from the cross-border merger;

(b) the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment;

(c) the terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger;

(d) the likely repercussions of the cross-border merger on employment;

(e) the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement;

(f) the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the company resulting from the cross-border merger;

(g) the rights conferred by the company resulting from the cross-border merger on members enjoying special rights or on

holders of securities other than shares representing the company capital, or the measures proposed concerning them;

(h) any special advantages granted to the experts who examine the draft terms of the cross-border merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;

(i) the statutes of the company resulting from the cross-border merger;

(j) where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined;

(k) information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger;

(l) dates of the merging companies' accounts used to establish the conditions of the cross-border merger.

Registration and publication of the common draft terms of cross-border merger.

7. (1) The Maltese merging company or companies shall deliver to the Registrar for registration the common draft terms of the cross-border merger, duly completed and signed by at least one director and the company secretary of such company or companies.

(2) On being satisfied that the requirements of regulation 6 and sub-regulation (1) of this regulation have been complied with, the Registrar shall register the common draft terms of cross-border merger and shall cause without delay a statement to be published in the Gazette or on the website maintained by him showing:

(a) the date on which registration was made, together with an indication that the document registered relates to the common draft terms of the cross-border merger;

(b) the type, name and registered office of every merging company;

(c) the register in which the documents referred to in article 3(2) of Directive 68/151/EEC are filed in respect of each merging company, and the number of the entry in that register;

(d) an indication, for each of the merging companies, of the arrangements made for the exercise of the rights of creditors and of any minority members of the merging companies and the address at which complete information on those arrangements may be obtained free of charge.

(3) The publication referred to in sub-regulation (2) shall be made at least one month before the date of the general meeting which is to decide on the approval of the common draft terms of cross-border merger in terms of regulation 10.

Report of the board of directors.

8. (1) The board of directors of the Maltese merging company or companies shall draw up a report intended for the members explaining and justifying the legal and economic aspects of the cross-border merger and explaining the implications of the cross-border merger for members, creditors and employees.

(2) The report shall be made available to the members and to the representatives of the employees or, where there are no such representatives, to the employees themselves, not less than one month before the date of the general meeting referred to in regulation 10.

(3) Where the board of directors of the Maltese merging company or companies receives, in good time, an opinion from the representatives of their employees that opinion shall be appended to the report.

Independent expert report.

9. (1) One or more experts acting on behalf of each Maltese merging company but independent of it and approved by the Registrar, shall examine the common draft terms of cross-border merger and draw up a written report for each Maltese merging company. The report shall be made available to the members not less than one month before the date of the general meeting referred to in regulation 10.

(2) The report shall examine the common draft terms of cross-border merger and shall specify whether the share exchange ratio is fair and reasonable and to this effect it shall -

(a) indicate the method or methods used to arrive at the share exchange ratio proposed;

(b) state whether such method or methods are adequate in the case in question, indicating the values arrived at using such method or methods and giving an opinion on the relative importance attributed to such method or methods in arriving at the value decided on;

(c) describe any special valuation difficulties which have arisen.

(3) Each expert shall be entitled to obtain from the merging companies all relevant information and documents for the discharge of his duties.

(4) As an alternative to experts operating on behalf of each of the merging companies, where at least one of the merging companies is a Maltese merging company or where the company resulting from the cross-border merger will be registered in Malta, one or more independent experts may be appointed by the Registrar, at the joint request of the merging companies, in order to draw up a single written report for all the merging companies.

(5) Neither an examination of the common draft terms of cross-border merger by independent experts nor an expert report shall be required if all the members of each of the merging companies have so agreed.

Approval by the general meeting.

10. (1) After taking note of the reports referred to in regulations 8 and 9, the general meeting of the Maltese merging company or companies shall decide on the approval of the common draft terms of cross-border merger by extraordinary resolution:

Provided that where a Maltese merging company is an acquiring company, the approval of the merger by the general meeting of such company shall not be required if the conditions laid down in article 345 (6) of the Act are fulfilled.

(2) For the purposes of sub-regulation (1), approval shall not be valid unless the extraordinary resolution is adopted at least one month after the publication of the common draft terms of the cross-border merger and not later than three months therefrom.

(3) When a Maltese merging company approves the common draft terms of cross-border merger by extraordinary resolution in accordance with this regulation, it shall be required to redeem the shares held by any dissenting members who so request, on such terms as may be agreed, or as the Court, pursuant to an application filed within the three month period referred to in sub-regulation (2) by either the Maltese merging company or the dissenting members, thinks fit to order. Where such an application has been filed before the Court, the Registrar may nonetheless issue the certificate referred to in regulation 14, as long as he indicates in the certificate that the procedure is pending. The

Court's decision in the procedure shall be binding on the company resulting from the cross-border merger and all its members:

Provided that where one or more of the other merging companies is situated in a Member State which does not provide for such a procedure, the provisions of this sub-regulation shall only apply if such other merging company or companies explicitly accept, when approving the draft terms of cross-border merger, the possibility for the members of the Maltese merging company to have recourse to such procedure.

(4) Where there is more than one class of shares in a Maltese merging company or companies, the extraordinary resolution of that company or companies concerning the merger shall be subject to a separate vote by at least each class of shareholders whose rights are affected thereby.

(5) The extraordinary resolution taken by the Maltese merging company or companies shall cover both the approval of the common draft terms of the cross-border merger and any alterations and additions to the memorandum and articles necessitated by the cross-border merger.

(6) The provisions of the Act governing alterations and additions to the memorandum and articles shall, as appropriate, apply to any alterations and additions to the memorandum and articles necessitated by the cross-border merger.

(7) The general meeting of each of the merging companies may reserve the right to make implementation of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger.

Documents which members are entitled to inspect.

11. (1) All members of a Maltese merging company are entitled to inspect the following documents at the registered office of the company at least one month before the date fixed for the general meeting which is to decide on the draft terms of cross-border merger:

(a) the common draft terms of cross-border merger;

(b) the annual accounts and the annual reports of each merging company for the preceding three financial years;

(c) an accounting statement, drawn up by each merging company as at a date which shall not be earlier than the first day of

the third month preceding the date of the draft terms of the merger, if the latest annual accounts relate to an accounting period which ended more than six months before that date;

(d) the report of the directors relating to the Maltese merging company or companies prepared pursuant to regulation 8;

(e) the report of the independent experts relating to the Maltese merging company or companies prepared pursuant to regulation 9.

(2) The accounting statement provided for in paragraph (c) of sub-regulation (1) shall be drawn up using the same methods and the same layout as used for the latest balance sheet:

Provided that –

(a) it shall not be necessary to take a fresh physical inventory; and

(b) the valuations shown in the latest balance sheet shall be altered only to reflect entries in the accounting records.

Notwithstanding the provisions of paragraphs (a) and (b), interim depreciation and provisions as well as material changes in actual values not shown in the accounting records shall be taken into account.

(3) Every member shall be entitled to obtain, on request and free of charge, full or, if so desired, partial copies of the documents mentioned in sub-regulation (1).

Registration and publication of the cross-border merger.

12. (1) The extraordinary resolution taken by the Maltese merging company or companies approving the cross-border merger together with the instruments giving effect thereto, or an authentic copy thereof, shall be delivered for registration to the Registrar, who, being satisfied that the requirements of these regulations have been complied with, shall register them and shall cause without delay a statement to be published in the Gazette or on a website maintained by him.

(2) The Registrar shall additionally be required to publish, without delay, in a daily newspaper circulating wholly or mainly in Malta, a notice consequent to the registration referred in sub-regulation (1). Such publication shall be made by the Registrar at the expense of the Maltese merging company or companies and the provisions of article 401(1)(e) of the Act shall apply.

(3) The statements referred to in sub-regulations (1) and (2) shall include the following particulars:

(a) the date on which the registration of the extraordinary resolution was made, together with a reference that it was passed for the purpose of approving the cross-border merger;

(b) the type, name and registered office of every merging company.

Contestation and objection.

13. (1) A registration made by the Registrar by virtue of either regulation 7 or regulation 12 may be contested before the Court by any interested party in accordance with the following conditions:

(a) the contestation shall be made by application against the Registrar within one month from the publication following the registration referred to in regulation 7 on the grounds that the common draft terms of cross-border merger were not drawn up in accordance with the provisions of regulations 6 and 7(1); or within three months from the last publication following the registration referred to in regulation 12 on the grounds that the resolution of the extraordinary general meeting was void or voidable. Notice of the application shall be published by the Registrar in the Gazette or on a website maintained by him;

(b) where it is possible to remedy a defect liable to render the cross-border merger void or voidable, the Court shall grant the companies involved a period within which to rectify the situation;

(c) a notice that the judgment of the Court has been delivered shall be published by the Registrar in the Gazette or on a website maintained by him, which notice shall specify whether the application has been allowed or dismissed.

(2) Without prejudice to sub-regulation (1), any creditor of the Maltese merging company or companies whose debt existed prior to the publication of the common draft terms of cross-border merger made pursuant to regulation 7(2) may, within the period of three months from the last publication referred to in regulation 12, by application, object to the cross-border merger and, if he shows good cause why it should not take effect, the Court shall either uphold the objection or allow the cross-border merger on sufficient security being given. This remedy shall apply also to the debenture holders of the Maltese merging company or companies so long as the merger has not already been approved by the debenture holders individually, or by a special meeting

of the debenture holders called specifically for that purpose, at which meeting all the debenture holders signify their consent.

Issue of Pre-merger Certificate.

14. After verifying that each Maltese merging company has complied with the requirements of these regulations, the Registrar shall, after the lapse of three months from the date of the last publication referred to in regulation 12, issue without delay to every Maltese merging company a Cross-Border Pre-Merger Certificate conclusively attesting to the proper completion of the pre-merger acts and formalities:

Provided that where an application has been made under regulation 13, the Registrar shall only issue such certificate, after the date of the final judgment rejecting the application. Where an application under regulation 13 is allowed, the Registrar shall not issue such certificate and shall amend the registration accordingly as if the merger procedure had never commenced.

Protection of holders of securities.

15. The holders of securities, other than shares, in a Maltese merging company, to which special rights are attached, shall be given rights against the company resulting from the merger in accordance with the common draft terms of the cross-border merger at least equivalent to those they possessed in such merging company, unless:

(a) the holders of those securities individually agree to the alteration of their rights; or

(b) the alteration has been approved by a meeting of the holders of those securities called specifically for that purpose, at which meeting all the holders of such securities shall signify their consent; or

(c) the holders of those securities are entitled to have their securities re-purchased by the company resulting from the merger.

Liability of director or expert for misconduct.

16. Any director of a Maltese merging company responsible for wilful or negligent misconduct in the preparation and the implementation of the cross-border merger, or an expert responsible for drawing up, on behalf of any Maltese merging company, of the report on the common draft terms of cross-border merger responsible for wilful or negligent misconduct in the performance of his duties, shall be liable for all damages occasioned to any shareholder of such merging company as a consequence of his misconduct.

Scrutiny of the legality of the cross-border merger and issue of Certificate of Completion of Cross-Border Merger.

17. Where the company resulting from the cross-border merger has or is to have its registered office in Malta, the following rules shall apply:

(1) The Registrar shall scrutinise the legal validity of the cross-border merger as regards that part of the procedure which concerns the completion of the cross-border merger and, where appropriate, the formation of the new company resulting from the cross-border merger. In particular, he shall ensure that all the merging companies have approved the common draft terms of cross-border merger in the same terms and, where appropriate, that arrangements for employee participation have been determined.

(2) Each merging company shall submit to the Registrar the certificate which conclusively attests to the completion of the pre-merger acts and formalities:

(a) in respect of a Maltese merging company or companies, the certificate issued by the Registrar in accordance with regulation 14;

(b) in respect of a foreign merging company or companies, the certificate issued by the foreign authority in accordance with Article 10(2) of the EC Directive:

Such certificate shall be submitted to the Registrar within six months of its issue, together with the common draft terms of cross-border merger approved by the general meeting.

(3) After verifying that the provisions of these regulations and all other applicable provisions of the Act have been complied with, including the payment of any applicable fees, the Registrar shall without delay, issue a Certificate of Completion of Cross-Border Merger, which shall include the name and registration number of the company resulting from the cross-border merger, a brief reference to the particulars of the merging companies, a reference to the type of cross-border merger which has taken place, and the date on which the cross-border merger takes effect. Upon the issuance of such certificate, the Registrar shall cause a statement to be published in the Gazette or on a website maintained by him confirming the completion of the cross-border merger.

(4) A certificate issued by the Registrar under sub-regulation (3) is conclusive evidence that the requirements of these regulations have been complied with and it shall not be possible to declare the merger null and void after the date on which the cross-border merger takes effect.

(5) When the Registrar issues a Certificate of Completion of Cross-Border Merger under sub-regulation (3), he shall without delay notify the registry where each of the merging companies was required

to file documents that the cross-border merger has taken effect, indicating the effective date of the cross-border merger.

(6) When a Maltese merging company ceases to exist as a result of the cross-border merger, and the Registrar is notified by the registry of the Member State to whose jurisdiction the company resulting from the merger is subject, of the effective date of the cross-border merger, the Registrar shall cause without delay a notice to be published in the Gazette or on a website maintained by him, indicating that the cross-border merger has been completed and he shall strike the name of the Maltese merging company off the register and the provisions of article 401(1)(e) of the Act shall apply.

Consequences of the cross-border merger.

18. (1) From the date on which the cross-border merger takes effect, a cross-border merger carried out pursuant to regulation 3(4) (a) and (c) shall have the following consequences:

(a) all the assets, rights, liabilities and obligations of the company being acquired shall be transferred to the acquiring company;

(b) the members of the company being acquired shall become members of the acquiring company;

(c) the company being acquired shall cease to exist.

(2) From the date on which the cross-border merger takes effect, a cross-border merger carried out pursuant to regulation 3(4)(b) shall have the following consequences:

(a) all the assets, rights, liabilities and obligations of the merging companies shall be transferred to the new company;

(b) the members of the merging companies shall become members of the new company;

(c) the merging companies shall cease to exist.

(3) Where the laws in force in Malta or in another Member State require the completion of special formalities for the transfer of certain assets, rights and obligations by the merging company or companies to become effective against third parties, those formalities shall be carried out by the company resulting from the cross-border merger.

(4) The rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing at the date on which the cross-border merger takes effect shall, by reason of that cross-border merger taking effect, be transferred to the company resulting from the cross-border merger on the date on which the cross-border merger takes effect.

(5) No shares in the acquiring company shall be exchanged for shares in the company being acquired held either:

(a) by the acquiring company itself or through a person acting in his or her own name but on its behalf;

(b) by the company being acquired itself or through a person acting in his or her own name but on its behalf.

Simplified formalities.

19. (1) Where a cross-border merger by acquisition is carried out by a company which holds all the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, the provisions of regulation 6(b), (c) and (e), regulation 9 and regulation 18(1)(b) shall not apply. Regulation 10(1) shall not apply to the company or companies being acquired.

(2) Where a cross-border merger by acquisition is carried out by a company which holds 90% or more but not all of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, and the acquiring company or the company being acquired is a Maltese merging company, the report by an independent expert or experts referred to in regulation 9 shall not be required as long as the dissenting minority shareholders of the company or companies being acquired have the right to have their shares purchased by the acquiring company for an agreed consideration corresponding to the fair value of their shares, or in the event of disagreement regarding the fair value of such consideration, as shall be determined by the Court.

Miscellaneous.

20. These regulations are without prejudice to:

(a) the application of European Community Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings;

(b) the Control of Concentration Regulations promulgated under the Competition Act;

(c) the application of Community legislation regulating credit intermediaries and other financial undertakings and any law in force in Malta made or introduced pursuant to such community legislation.

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