

## **IMPLEMENTATION IN THE UNITED KINGDOM OF THE EUROPEAN DIRECTIVE ON CROSS-BORDER MERGERS OF LIMITED LIABILITY COMPANIES**

Prior to the adoption of the European Directive on Cross-Border Mergers of Limited Liability Companies (Directive 2005/56/EC) (the "**Directive**"), limited liability companies wishing to take part in cross-border mergers had encountered many legislative and administrative difficulties in the EEA.

The Directive contains rules to enable mergers between companies in different EU member states which effects a more uniform and straightforward structure for cross-border mergers. It applies to public and private companies with limited liability and to mergers involving at least two companies from **different** member states.

Each company taking part in a cross-border merger remains subject to the provisions and formalities of the national law which would be applicable in the case of a national merger.

In order to protect the interests of members/shareholders, distinguishing as to whether the company resulting from the cross-border merger is an acquiring company or a new company should be specified throughout the merger process. Furthermore, in the interest of legal certainty, it is no longer possible to declare the merger null and void after the date on which a cross-border merger takes effect.

The Companies (Cross-Border Mergers) Regulations 2007 (the "**Regulations**") implement the Directive in the UK and came into force on 15 December 2007. The Regulations establish:

- a common framework for cross border mergers to occur between companies in the UK and companies from other European Economic Area ("**EEA**") states; and
- the process to be completed where employee participation arrangements exist in one or more of the companies wanting to merge. Employee participation is a system which gives employees a statutory or contractual right to involvement at board level.

The Regulations apply where a UK company is involved in a merger with one or more EEA companies. A UK company includes public, private, unlimited and unregistered companies and companies in administration but excludes a company limited by guarantee without a share capital or a company being wound up.

As well as complying with the Regulations, cross-border mergers may also need to comply with the City Code on Takeovers and Mergers<sup>1</sup> (the "**Code**") e.g. if the transferor company is a company subject to the Code. Further information on this subject can be found at <http://www.thetakeoverpanel.org.uk/new/practiceStatements/DATA/PS18.pdf>.

### **THE DIRECTIVE'S PRE-MERGER REQUIREMENTS**

Pre-merger requirements will apply to any UK company that is involved in a cross-border merger. The other EEA company involved in the merger will have to comply with a similar procedure as laid down in its national law that implements the Directive.

The main steps involved in a cross-border merger are:

1. **Each company circulates a merger proposal, directors' management report and independent expert's report to its shareholders.**

The common draft terms of the merge are to be drawn up in the same terms for each of the companies concerned in the various member states.

A report on the common draft terms of the merger should be drawn up by one or more experts on behalf of each of the companies that are merging. In order to limit experts'

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<sup>1</sup> The Code regulates the conduct of takeovers and mergers of UK companies and is designed to ensure fair and equal treatment of all shareholders in a takeover.

costs, it will be possible for a single report to be drawn up intended for all members of companies taking part in a cross-border merger.

2. **Member/shareholder approval for the merger (and creditor approval where creditors require a meeting).**
3. **The competent authorities in the jurisdictions where the merging companies are registered certify completion of the pre-merger requirements.**

In order to protect the interests of members/shareholders and others, both the common draft terms and the completion of the merger are to be publicised for each merging company via an entry in the appropriate public register.

The monitoring of the completion and legality of the decision-making process should be carried out by the national authorities having jurisdiction over each of the merging companies.

4. **The merger is approved by the competent authority of the country where the merged entity will be registered. In the UK the competent authority is the court.**

The monitoring of the completion and legality of the completion of the cross-border merger should be carried out by the national authority having jurisdiction over the company resulting from the cross-border merger.

5. **The company registries in the jurisdictions where the merging companies are registered have certain registration functions.**

## **EMPLOYEE PARTICIPATION**

### **Directive Requirements**

The Directive requires that any cross-border merger must take into account employee participation arrangements where these exist in one or more of the merging companies. It does not impose any new participation requirements where rights do not already exist.

There is a statutory right to participation in a number of EEA states including Germany, Austria, the Netherlands and Spain. Employees in the UK do not have a statutory right to involvement at board level but employers and employees can create such arrangements voluntarily. Where voluntary arrangements meet the definition of employee participation, these will need to be retained after the merger.

The definition of employee participation in the Directive is wide to ensure it covers the different forms of system used throughout the EEA. It is defined as the influence of the employees or their representatives in the affairs of a company by way of:

- The right to elect or appoint members of the company's supervisory or administrative organ; or
- The right to recommend and or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.

The principle on employee participation is that the company resulting from the merger will be subject to the employee participation rules in force, if any, in the EEA state where it will have its registered office. This principle is subject to the following exceptions:

- Where at least one of the merging companies has, in the six months before the publication of the draft terms of merger, an average number of employees of above 500 and is operating under an employee participation system.
- Where the national law applicable to the merged entity would give the employees participation rights that are less than those in any of the merging companies.

- Where the national law applicable to the merged entity does not provide for employees outside the country the same entitlement to exercise participation rights as employees in the state of registration.

### **Employee Participation under the Regulations**

The employee participation provisions in Part 4 of the Regulations apply where the UK company is the transferee company and:

- A merging company has, in the six months before the publication of the draft terms of merger, an average number of employees that exceeds 500 and has a system of employee participation;
- A UK merging company has a proportion of employee representatives amongst the directors; or
- A merging company has employee representatives amongst members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company.

The merging companies have two options:

- They can agree to be subject to standard rules on employee participation without prior negotiation with the employee representatives. The standard rules set out the minimum requirements for participation rights. The merged company may limit the level to the maximum level in any of the merging companies, subject to a ceiling of 33.3%.
- They can agree to set up a special negotiating body (SNB) with a view to agreeing arrangements with employees. The deadline for negotiating an agreement is six months after the date on which the duty to negotiate begins; this can be extended by agreement to 12 months. If no agreement can be reached, the standard rules will apply and the merging companies decide which type of employee participation should exist in the merged company.