

Suppliment tal-Gazzetta tal-Gvern ta' Malta, Nru. 21,003,7 ta' Frar, 2023

Taqsim B

L.N. 26 of 2023

**COMPANIES ACT
(CAP. 386)**

**Cross-border Divisions of Limited Liability Companies
Regulations, 2023**

IN EXERCISE of the powers conferred upon him by article 425 (1)(p) of the Companies Act, the Minister responsible for the regulation of commercial partnerships has made the following regulations:-

1. (1) The title of these regulations is the Cross-border Divisions of Limited Liability Companies Regulations, 2023. Title and commencement.

(2) These regulations shall be deemed to have come into force on 31st January 2023.

2. The scope of these regulations is to transpose and implement Directive 2019/2121/EU of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions. Scope.

3. In these regulations, unless the context otherwise requires: Interpretation.

"Act" means the Companies Act; Cap. 386.

"company" means a limited liability company formed in accordance with the Act, any other limited liability company listed in Annex II of Directive 2017/1132/EU and any other body corporate formed and incorporated or registered under the laws of any other approved country or jurisdiction which is similar in nature to a company under Maltese legislation that carries out a cross-border division;

"company being divided" means a company which, in the process of a cross-border division, transfers all its assets and liabilities to two (2) or more companies in the case of a full division, or transfers part of its assets and liabilities to one (1) or more companies in the case of a partial division or division by separation;

"Directive 2002/14/EC" means Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

"Directive 2009/38/EC" means Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees;

"Directive 2014/59/EU" means Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council;

"Directive 2017/1132/EU" means Directive 2017/1132/EU of the European Parliament and of the Council relating to certain aspects of company law;

"Directive 2019/2121/EU" means Directive 2019/2121/EU of the European Parliament and of the Council of 27 November 2019 amending Directive 2017/1132/EU as regards cross-border divisions, mergers and divisions;

"dividing companies" means all the companies taking part in a cross-border division including a recipient company;

"division" means an operation whereby:

(a) a company being divided, on being dissolved without going into liquidation, transfers all its assets and liabilities to two (2) or more recipient companies, in exchange for the issue to the members of the company being divided of securities or shares in the recipient companies and, if applicable, a cash payment not exceeding 10% of the nominal value, or, in the absence of a nominal value, a cash payment not exceeding 10% of the accounting par value of those securities or shares ("full division");

(b) a company being divided transfers part of its assets and liabilities to one (1) or more recipient companies, in exchange for the issue to the members of the company being divided of securities or shares in the recipient companies, in the company being divided or in both the recipient companies and the company being

divided and, if applicable, a cash payment not exceeding 10% of the nominal value or, in the absence of a nominal value, a cash payment not exceeding 10% of the accounting par value of those securities or shares ("partial division"); or

(c) a company being divided transfers part of its assets and liabilities to one (1) or more recipient companies, in exchange for the issue to the company being divided of securities or shares in the recipient companies ("division by separation").

"recipient company" means a company newly formed in the course of a cross-border division;

4. (1) These regulations shall apply to cross-border divisions of limited liability companies formed in accordance with the law of a Member State or EEA State and having their registered office, central administration or principal place of business within the Community provided that at least two (2) of the limited liability companies involved in the division are governed by the laws of different Member States or EEA States. Applicability.

(2) These regulations shall also apply to cross-border divisions of limited liability companies formed in accordance with the law of any other approved country or jurisdiction provided that at least two (2) of the limited liability companies involved in the division are governed by the laws of different approved countries or jurisdictions:

Provided further that for the purpose of divisions regulated by these regulations, at least one (1) of the dividing companies must be registered in Malta.

(3) Notwithstanding the definition of "division", these regulations shall also apply to cross-border divisions where the law of at least one (1) of the countries or jurisdictions concerned allows the cash payment referred to in paragraphs (a) and (b) of the definition to exceed 10% of the nominal value or, in the absence of a nominal value, 10% of the accounting par value of the securities or shares representing the capital of the recipient companies.

(4) These regulations shall apply to companies which are:

(a) subject to preventive restructuring frameworks; or

(b) the subject of crisis prevention measures as defined in point (101) of Article 2(1) of Directive 2014/59/EU.

(5) These regulations shall not apply:

(a) to cross-border divisions 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;

(b) to a company which is subject to resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU;

(c) to a company which is the subject of insolvency proceedings; or

(d) to a company which is the subject of liquidation proceedings.

Procedures and formalities.

5. (1) Where the company being divided is a company registered in Malta, these regulations shall govern those parts of the procedures and formalities to be complied with in connection with the cross-border division in order to obtain the pre-division certificate.

(2) Where the recipient company is a company registered in Malta, these regulations shall govern those parts of the procedures and formalities to be complied with following receipt of the pre-division certificate issued by the country or jurisdiction of the company being divided.

Part I: Procedure and formalities to be applied when the company being divided is registered in Malta

Duty to draw up the draft terms of the cross-border division.

6. (1) The Board of Directors of the Maltese company being divided shall draw up the draft terms of a cross-border division. The draft terms of a cross-border division shall include at least the following particulars:

(a) the legal form and name of the company being divided and the location of its registered office, and the legal form and name proposed for the new companies resulting from the cross-border division and the proposed location of their registered offices;

(b) the ratio applicable to the exchange of securities or

shares representing the companies' capital and the amount of any cash payment, where appropriate;

(c) the terms for the allotment of securities or shares representing the capital of the recipient companies or of the company being divided;

(d) the proposed indicative timetable for the cross-border division;

(e) the likely repercussions of the cross-border division on employment;

(f) the date from which the holding of securities or shares representing the companies' capital shall entitle the holders to share in profits, and any special conditions affecting that entitlement;

(g) the dates from which the transactions of the company being divided shall be treated for accounting purposes as being those of the recipient companies;

(h) any special advantages granted to members of the administrative, management, supervisory or controlling bodies of the company being divided;

(i) the rights conferred by the recipient companies on members of the company being divided enjoying special rights or on holders of securities other than shares representing the divided company capital, or the measures proposed concerning them;

(j) the instruments of constitution of the recipient companies, where applicable, and the statutes if they are contained in a separate instrument, and any changes to the instrument of constitution of the company being divided in the case of a partial division or a division by separation;

(k) where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the recipient companies are determined;

(l) a precise description of the assets and liabilities of the company being divided and a statement of how those assets and liabilities are to be allocated between the recipient companies, or are to be retained by the company being divided in the case of a partial division or a division by separation, including provisions

B 176

on the treatment of assets or liabilities not explicitly allocated in the draft terms of a cross-border division, such as assets or liabilities which are unknown on the date on which the draft terms of cross-border division are drawn up;

(m) information on the evaluation of the assets and liabilities which are to be allocated to each company involved in the cross-border division;

(n) the date of the accounts of the company being divided used to establish the conditions of the cross-border division;

(o) where appropriate, the allocation to the members of the company being divided of shares and securities in the recipient companies, in the company being divided or in both, and the criterion upon which such allocation is based;

(p) details of the offer of cash compensation for members;

(q) any safeguards offered to creditors, such as guarantees or pledges; and

(r) the electronic address to be used by members for the purposes of exercising their right in accordance with regulation 12(2).

(2) Where any one of the dividing companies is not or shall not be formed, incorporated or registered in a Member State, a reasoned opinion of one or more practising advocates confirming that the proposed cross-border division is permitted by the laws of the relevant jurisdiction must be attached to the draft terms of cross-border division.

(3) The draft terms of a cross-border division shall be signed by one (1) director if the company has a sole (1) director or by two (2) directors if the company has two (2) or more directors. Furthermore, the draft terms of a cross-border division may be signed in counterparts and such counterparts together shall constitute one (1) and the same document.

Board of
Directors'
report.

7. (1) The Board of Directors of the Maltese company being divided shall draw up a report for members and employees, explaining and justifying the legal and economic aspects of the cross-border division, as well as explaining the implications of the cross-border division for employees. It shall, in particular, explain the implications of the cross-border division for the future business of the dividing companies.

(2) The report shall also include a section for members and a section for employees. The company may decide either to draw up one (1) report containing those two (2) sections or to draw up separate reports for members and employees respectively, containing the relevant section.

(3) The section of the report for members shall, in particular, explain the following:

(a) the cash compensation and the method used to determine the cash compensation;

(b) the share exchange ratio and the methods used to arrive at the share exchange ratio, where applicable;

(c) the implications of the cross-border division for members; and

(d) the rights and remedies available to members in accordance with regulation 12.

(4) The section of the report for members shall not be required where all the members of the company have agreed to waive that requirement in writing or where the company being divided is a single-member company;

(5) The section of the report for employees shall, in particular, explain the following:

(a) the implications of the cross-border division for employment relationships, as well as, where applicable, any measures for safeguarding those relationships;

(b) any material changes to the applicable conditions of employment or to the location of the company's places of business; and

(c) how the factors set out in paragraphs (a) and (b) affect any subsidiaries of the company.

(6) The reports shall be made available in any case electronically, together with the draft terms of the cross-border division, if available, to the members and representatives of the employees or, where there are no such representatives, to the employees themselves, not less than six (6) weeks before the date of the general meeting referred to in regulation 11.

(7) Where the Board of Directors of the company receives an

opinion on the information referred to in sub-regulations (1) and (5) in good time from the representatives of the employees or, where there are no such representatives, from the employees themselves, the members shall be informed thereof and that opinion shall be appended to the report.

(8) The section of the report for employees shall not be required where a company being divided and its subsidiaries, if any, have no employees other than those who form part of the said Board or other management bodies of the company.

(9) Where the section of the report for members referred to in sub-regulation (3) is waived or not required in accordance with sub-regulation (4) and the section for employees referred to in sub-regulation (5) is not required under sub-regulation 8, the report shall not be required.

(10) Sub-regulations (1) to (9) shall be without prejudice to the provisions of any other law applicable in Malta regarding the applicable information and consultation rights and procedures pursuant to Directives 2002/14/EC and 2009/38/EC.

(11) A report drawn-up in accordance with this regulation shall be signed by one (1) director if the company has a sole (1) director or by two (2) directors if the company has two (2) or more directors. Furthermore, the directors' report may be signed in counterparts and such counterparts together shall constitute one (1) and the same document.

Declaration of solvency.

8. (1) The directors of the Maltese company being divided, or in the case of a company having more than two (2) directors, the majority of the directors, shall make a written declaration of solvency to the effect that, on the basis of the information available to the Board of Directors at the date of the declaration, and after having made reasonable enquiries, the said Board of Directors is unaware of any reason why any recipient company and, in the case of a partial division, the Maltese company being divided, may after the division takes effect, not be in a position to meet the liabilities allocated to them under the draft terms of the cross-border division when those liabilities fall due:

Provided that no declaration of solvency shall be required where the Maltese company being divided is a company which is undergoing any one of the procedures referred to in regulation 4(4).

(2) A declaration made in accordance with sub-regulation (1) shall have no effect for the purposes of these regulations unless:

(a) it is made within the month immediately preceding the disclosure referred to in regulation 10; and

(b) it contains a statement of the company's assets and liabilities made up to a date not earlier than one (1) month prior to the disclosure referred to in regulation 10(3). Without prejudice to regulation 28 a director who makes a declaration of solvency under this regulation without having reasonable grounds for the opinion expressed in the said declaration shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding three (3) years or to a fine (*multa*) of not more than fifty thousand euro (€50,000), or to both such fine and imprisonment.

(3) Without prejudice to regulation 28 a director who makes a declaration of solvency under this regulation without having reasonable grounds for the opinion expressed in the said declaration shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding three years or to a fine (*multa*) of not more than fifty thousand euro (€50,000), or to both such fine and imprisonment.

9. (1) An expert acting on behalf of the Maltese company being divided but independent of it and approved by the Registrar, shall examine the draft terms of a cross-border division and draw up a written report for the company's members. The report shall be made available to the members not less than one (1) month before the date of the general meeting referred to in regulation 11.

Independent
expert's report.

(2) The report shall include the expert's opinion as to whether the cash compensation and the share exchange ratio are adequate. When assessing the cash compensation, the expert shall consider any market price of the shares in the company being divided prior to the announcement of the division proposal or the value of the company excluding the effect of the proposed division, as determined in accordance with generally accepted valuation methods.

(3) The report shall at least:

(a) indicate the methods used to determine the cash compensation proposed;

(b) indicate the methods used to arrive at the share exchange ratio proposed;

(c) state whether the methods used are adequate for the assessment of the cash compensation and the share exchange ratio, indicate the value arrived at using such methods and give

B 180

an opinion on the relative importance attributed to those methods in arriving at the value decided on; and

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

(4) The expert shall be entitled to obtain from the company being divided all information necessary for the discharge of his duties.

(5) Neither an examination of the draft terms of cross-border division by an independent expert nor an independent expert report shall be required if all the members of the company being divided have so agreed or if the company being divided is a single-member company.

Registration and publication of draft terms of cross-border division.

10. (1) Without prejudice to sub-regulation (3), the Maltese company being divided shall file with the Registrar for registration:

(a) the draft terms of the cross-border division;

(b) the declaration of solvency referred to in regulation 8, if required in terms of these regulations; and

(c) a notice informing the members, creditors and representatives of the employees of the company being divided, or, where there are no such representatives, the employees themselves, that they may submit to the company, at the latest five (5) working days before the date of the general meeting, comments concerning the draft terms of the cross-border division.

(2) On being satisfied that the requirements of regulations 6 and 10(1) have been complied with, the Registrar shall register the draft terms of the cross-border division, the declaration of solvency and the notice referred to in sub-regulation (1)(c) and shall cause without delay a statement to be published in the Gazette or on the website maintained by the Registrar specifying:

(a) the date on which registration was made, together with an indication that the documents registered relate to the draft terms of the cross-border division;

(b) the type, name, registration number and registered office of the company being divided;

(c) the legal form and name proposed for each recipient company and the proposed location of its registered office in each respective jurisdiction; and

(d) the information provided by the Maltese company being divided in terms of sub-regulation (1)(c).

(3) The requirements of sub-regulation (1) shall not apply where, for a continuous period beginning at least one (1) month before the date fixed for the general meeting referred to in regulation 11 and ending not earlier than the conclusion of that meeting, the Maltese company being divided makes the documents referred to in sub-regulation (1) available on its website free of charge to the public.

(4) Where the Maltese company being divided makes the draft terms of the cross-border division and, where applicable, the declaration of solvency, available in accordance with sub-regulation (3), the company shall submit to the Registrar for registration, the following information:

(a) the legal form, registration number and name of the company being divided and the location of its registered office in Malta;

(b) the legal form and name proposed for the newly created companies resulting from the cross-border division and the proposed location of their registered office;

(c) an indication of the arrangements made for the exercise of the rights of creditors, employees and members; and

(d) details of the website from which the draft terms of the cross-border division, the declaration of solvency, the notice referred to in sub-regulation 1(c), the reasoned opinion referred to regulation 6(2) and complete information on the arrangements referred to in paragraph (c) may be obtained online and free of charge.

(5) On being satisfied that the requirements of regulation 6 and sub-regulation (4) have been complied with, the Registrar shall register the information referred to in sub-regulation (4) and shall cause without delay a statement to be published in the Gazette or on the website maintained by the Registrar specifying:

(a) the date on which registration was made, together with an indication that the information relates to the draft terms of the cross-border division; and

(b) the information provided by the Maltese company being divided in terms of sub-regulation (4).

(6) In addition to the publications referred to in sub-regulations

(2) and (5), the Registrar shall 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-regulations (2) and (5), as may be applicable. Such publication shall be made by the Registrar at the expense of the Maltese company being divided and the provisions of article 401(1)(e) of the Act shall apply.

Approval by
general meeting.

11. (1) After taking note of the reports referred to in regulations 7 and 9, where applicable, the employees' opinions submitted in accordance with regulation 7(7) and comments submitted in accordance with regulation 10, the general meeting of the company being divided shall decide, by means of an extraordinary resolution, whether to approve the draft terms of the cross-border division and whether to amend its memorandum and articles of association.

(2) The approval by the general meeting referred to in sub-regulation (1) shall not be valid unless the extraordinary resolution is approved by the company's shareholders holding at least sixty-seven (67) per cent of the nominal value of the shares conferring the right to vote and is adopted at least one (1) month after registration of the documents or the information referred to in regulation 10(1) and (3), as may be applicable.

(3) The general meeting of the company being divided may reserve the right to make implementation of the cross-border division conditional on express ratification by the general meeting of the arrangements decided on with respect to employee participation in the company upon completion of the cross-border division.

Shareholder
protection.

12. (1) When a Maltese company being divided approves the draft terms of division by extraordinary resolution in accordance with regulation 11, it shall be required to redeem the shares held by any dissenting shareholders who so request, for adequate cash compensation in accordance with the conditions laid down in this regulation provided that, as a result of the cross-border division, they would acquire shares in the recipient companies which would be governed by the law of a country or jurisdiction other than Malta.

(2) Any dissenting shareholders wishing to exercise the right referred to in sub-regulation (1) must declare to the company being divided their decision to exercise their right to have their shares redeemed. The declaration must be made in writing and must be received by the company not later than one (1) month after the general meeting referred to in regulation 11.

(3) Without prejudice to sub-regulation (4), upon receipt of any declarations in accordance with sub-regulation (2), the company being

divided shall redeem the shares held by the dissenting shareholders and pay the cash compensation specified in the draft terms of the cross-border division prior to the date when the cross-border division becomes effective.

(4) Any dissenting shareholders who have declared their decision to exercise the right to have their shares redeemed but who consider that the cash compensation offered by the company being divided has not been adequately set may, by means of an application filed in Court not later than one (1) month after the general meeting referred to in regulation 11, request the company to pay additional cash compensation. The Court shall decide the application on its merits within not more than thirty (30) days from the date of service of the application on the company being divided.

(5) Any shareholders of the company being divided who did not have or did not exercise the right to dispose of their shares, but who consider that the share-exchange ratio set out in the draft terms of the cross-border division is inadequate, may dispute that ratio and claim a cash payment. Where no agreement is reached, an application may be filed in Court by the relevant shareholders not later than one (1) month after the general meeting referred to in regulation 11, requesting an additional cash payment from the company being divided and the Court's judgement on such matter shall be binding on the recipient companies and, in the event of a partial division, also on the company being divided. The Court shall decide the application on its merits within not more than thirty (30) days from the date of service of the application on the company being divided. Where an application has been filed before the Court in terms of this regulation, the Registrar may nonetheless issue the pre-division certificate, as long as the Registrar indicates in the certificate that such an application has been filed and that the proceedings relating thereto are ongoing.

(6) Where one (1) or more shareholders of the company being divided dispute the share-exchange ratio in accordance with sub-regulation 5, the recipient company concerned and, in the event of a partial division, also the company being divided, can provide shares or other compensation instead of a cash payment.

(7) The substantive merits of any disputes relating to the shareholders' rights arising under this regulation 12 shall be decided in accordance with the laws of Malta and, without prejudice to any valid and binding arbitration agreement recognised by the laws of Malta, any such disputes shall be subject to the exclusive jurisdiction of the Courts in Malta.

B 184

Protection of
holders of
securities.

13. The holders of securities, other than shares, in a Maltese company being divided, to which special rights are attached, shall be given rights against the Maltese company being divided in accordance with the draft terms of the cross-border division at least equivalent to those they possess prior to the division:

Provided that any dissenting holders of those securities shall be entitled to have their securities redeemed by the Maltese company being divided in accordance with regulation 12.

Registration of
extraordinary
resolution.

14. (1) The extraordinary resolution approving the cross-border division shall be delivered for registration to the Registrar within fourteen (14) days from approval, and the Registrar, being satisfied that the requirements of regulation 11 have been complied with, shall register the resolution and shall cause without delay a statement to be published in the Gazette or on a website maintained by the Registrar.

(2) The statement referred to in sub-regulation (1) 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 purposes of approving the cross-border division;

(b) the type, name, registration number and registered office of the Maltese company being divided; and

(c) the legal form and name proposed for the newly created companies resulting from the cross-border division and the proposed location of their registered office.

Contestation of
registration.

15. (1) A registration made by the Registrar by virtue of either regulation 10 or 14 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 (1) month from the publication following the registration referred to in regulation 10 on the grounds that the draft terms of the cross-border division were not drawn up in accordance with the provisions of regulation 6; or within one (1) month from the last publication following the registration referred to in regulation 14 on the grounds that the resolution of the extraordinary general meeting was void or voidable:

Provided that in the latter case, the resolution of the extraordinary general meeting cannot be challenged solely on the

following grounds:

(i) that the share exchange ratio referred to in regulation 6(1)(b) has been inadequately set;

(ii) that the cash compensation referred to in regulation 6(p) has been inadequately set; or

(iii) that the information given with regard to the share exchange ratio referred to in paragraph (i) or the cash compensation referred to in (ii) did not comply with the legal requirements;

(b) notice of the application shall be published by the Registrar in the Gazette or on a website maintained by the Registrar;

(c) where it is possible to remedy a defect liable to render the cross-border division void or voidable, the Court shall grant the Maltese company being divided a period not exceeding one (1) month within which to rectify the situation;

(d) the Court shall decide whether to dismiss or uphold the application within not more than thirty (30) days from the filing of the application.

(e) 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 company being divided whose debt existed prior to the publication made pursuant to regulation 10 may, within the period of three (3) months from the said publication, by application, request adequate safeguards to protect his claims on the ground that the safeguards offered in the draft terms of the cross-border division, as provided for in regulation 6(q) are inadequate. If the creditor credibly demonstrates that, due to the cross-border division, the satisfaction of his claims is at stake and that he has not obtained adequate safeguards from the Maltese company being divided, the Court shall uphold the creditor's request and order that additional safeguards be provided subject to the cross-border division becoming effective. The Court shall decide whether to dismiss or uphold the application within not more than thirty(30) days from the date of notification of the application on the Registrar and the company being divided.

B 186

(3) Where a creditor of the company whose debt existed prior to the publication made pursuant to regulation 10 does not obtain satisfaction from the company to which the liability is allocated, the other recipient companies, and in the case of a partial division or a division by separation, the company being divided, shall be jointly and severally liable with the company to which the liability is allocated for that obligation. However, the maximum amount of joint and several liability of any company involved in the division shall be limited to the value, at the date on which the division takes effect, of the net assets allocated to that company.

Right of appeal.

Cap. 12.

16. (1) Any party who feels aggrieved by the Court's judgement relating to an application in terms of regulations 12(4), 12(5), 15(1) or (2) may appeal to the Court of Appeal as constituted in accordance with article 41(1) of the Code of Organization and Civil Procedure by means of an application filed in the registry of that court within thirty (30) days from the date of that judgement and the Court of Appeal shall set down the cause for hearing at an early date, in no case later than one(1) month from the date on which the appeal is brought before it and shall cause notice of such date to be given to the parties to the suit who, on their part, shall assume the responsibility to visit the court registry and be aware of the latest information regarding the appointment for the hearing of the case.

(2) In the case of an appeal from the Court's judgment relating to regulation 15(1), notice of the appeal application shall be published by the Registrar in the Gazette or on a website maintained by the Registrar.

(3) After appointing the application for hearing, and after listening to the oral submissions made by the parties, the Court of Appeal shall decide to uphold or reject the appeal, within the shortest time possible but in any case not later than three (3) months from the day when the appeal had been filed and the parties and the Registrar have been duly notified.

(4) In the case of an appeal from the Court's judgement relating to regulation 15(1), a notice that the judgment of the Court of Appeal 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.

(5) If, during the hearing of the appeal, the Court of Appeal finds that the application is frivolous and vexatious, the Court of Appeal may impose on the party an administrative penalty, to be paid to the counter-party, either between ten thousand (€10,000) and two

hundred and fifty thousand euro (€250,000), or ten (10) per centum (%) of the annual turnover for the preceding financial year of the company being divided.

17. (1) Upon the lapse of one (1) month from the last publication following the registration referred to in regulation 14, the Maltese company being divided shall submit to the Registrar a written application in the prescribed form to obtain a pre-division certificate. Request for issue of pre-division certificate.

(2) The application referred to in sub-regulation (1) shall be signed by at least two (2) directors of the Maltese company being divided, unless the Board of Directors is composed of one (1) director, and shall be accompanied by the following documents:

- (a) the draft terms of the cross-border division;
- (b) the declaration of solvency referred to in regulation 8, if required in terms of these regulations;
- (c) the directors' report and the appended opinion, if any, referred to in regulation 7, where available;
- (d) the independent expert's report, where required in terms of these regulations;
- (e) any comments submitted in accordance with regulation 10(1);
- (f) a copy of the extraordinary resolution referred to in regulation 11;
- (g) where the Maltese company being divided carries on in or from Malta any licensable activity, evidence of the consent of the competent authority in Malta to the cross-border division;
- (h) where the Maltese company being divided is a public company quoted on a recognized investment exchange, evidence that the said exchange has been notified of the cross-border division and evidence of the consent of the listing authority in Malta to the cross-border division; and
- (i) where any shares of the Maltese company being divided are pledged, the written consent of the pledgee.

(3) The application referred to in sub-regulation (2) may be signed in counterparts and such counterparts together shall constitute one and the same document.

B 188

Review by
Registrar and
issue of pre-
division
certificate.

18. (1) Upon receipt of the application referred to in regulation 17 the Registrar shall:

(a) examine all documents and information submitted to the Registrar in accordance with regulation 17 in order to confirm the validity of the cross-border division as set out in this part of the regulations; and

(b) in respect of compliance with the rules concerning employee participation, verify that the draft terms of the cross-border division include information on the procedures by which the relevant arrangements are determined and on the possible options for such arrangements.

(2) The review referred to in this regulation 18 shall be carried out within three (3) months from the date of receipt by the Registrar of the documents and information referred to in regulation 17.

(3) Upon completion of the Registrar's review:

(a) where it is determined that the cross-border division complies with all the relevant conditions and that all necessary procedures and formalities have been completed, the Registrar shall issue the pre-division certificate:

Provided that no pre-division certificate shall be issued prior to the lapse of three (3) months from the publication referred to in regulation 10:

Provided further:

(i) where an application has been made under regulation 15(1), the Registrar shall only issue such certificate after the date of the final judgment rejecting the application;

(ii) where an application has been made under regulations 12(4) or 15(2), the Registrar shall only issue such certificate after the date of the final judgment rejecting or upholding the application.

(b) where it is determined that the cross-border division does not comply with all the relevant conditions or that not all necessary procedures and formalities have been completed, the Registrar shall not issue the pre-division certificate and shall inform the Maltese company being divided of the reasons for such decision by not later than seven (7) days from the lapse of the period referred to in regulation 18(2). In that case, the

Registrar may give the Maltese company being divided the opportunity to fulfil the relevant conditions or to complete the procedures and formalities within an appropriate period of time.

(4) The Registrar shall not issue the pre-division certificate where it is determined that the cross-border division is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Community or national law, or for criminal purposes.

(5) Where the Registrar, during the review referred to in sub-regulation (1), has serious doubts indicating that a cross-border division is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Community or national law, or for criminal purposes, the Registrar shall take into consideration relevant facts and circumstances, of which the Registrar has become aware, in the course of the review referred to in sub-regulation (1), including through consultation of relevant authorities.

(6) Where it is necessary for the purposes of the Registrar's assessment under sub-regulations (4) and (5) to take into account additional information or to perform additional investigative activities, the period of three (3) months provided for in sub-regulation (2) may be extended by a maximum of three (3) months.

(7) Where, due to the complexity of the cross-border procedure, it is not possible to carry out the assessment within the deadlines provided for in sub-regulations (2) and (6), the Registrar shall notify the Maltese company being divided of the reasons for any delay before the expiry of those deadlines.

(8) In carrying out the review in terms of this regulation, the Registrar may:

(a) consult other relevant authorities with competence in the different fields concerned by the cross-border division, including those of the country or jurisdiction of the recipient companies;

(b) obtain from those authorities and from the Maltese company being divided information and documents necessary to assess the legality of the cross-border division in terms of these regulations;

(c) appoint an independent expert to assist with the Registrar's assessment:

Provided that any independent expert appointed by

B 190

the Registrar for such purpose must be independent from the Maltese company applying for the pre-division certificate and must have no past or current link with the Maltese company being divided which might affect the expert's independence.

Effect of pre-division certificate.

19. A pre-division certificate issued by the Registrar following the Registrar's review in accordance with regulation 18, shall attest to compliance by the Maltese company being divided with all relevant conditions and to the proper completion of all procedures and formalities in terms of these regulations.

Completion of cross-border division and issuance of certificate of completion of cross-border division by Registrar.

20. When the Registrar is notified by the registry in the country or jurisdiction of each recipient company, that each respective recipient company has been registered:

(a) the cross-border division shall become effective upon receipt of all notifications and the Registrar shall proceed to issue a Certificate of Completion of Cross-Border Division;

(b) the Registrar shall cause without delay a notice to be published in the Gazette or on a website maintained by the Registrar, indicating that the cross-border division has been completed;

(c) in the event of a full division, the Registrar shall:

(i) immediately strike the name of the Maltese company being divided off the register and specify in his register that the striking off of the Maltese company being divided is the result of a cross-border division;

(ii) register the date of striking off of the company being divided from the register;

and the provisions of article 401(1)(e) of the Act shall apply; and

(d) the Registrar shall notify the registers in the country or jurisdiction of each recipient company that the cross-border division has taken effect.

Part II: Procedure and formalities to be applied when Malta is the jurisdiction of a recipient company

21. (1) When a company carrying out a cross-border division indicates Malta as the jurisdiction of a recipient company, the Registrar shall review the legality of the cross-border division as regard that part of the procedure which concerns the completion and approval of the cross-border division. In particular, the Registrar shall ensure that the Maltese recipient company complies with the provisions of the Act on the incorporation and registration of companies and, where appropriate, that arrangements for employee participation have been determined.

Review of legality of cross-border division when Malta is the jurisdiction of a recipient company.

(2) For the purposes of sub-regulation (1), the company being divided shall submit to the Registrar:

(a) the draft terms of the cross-border division approved by the company's general meeting;

(b) the pre-division certificate or a certified true copy thereof issued by the jurisdiction of the company being divided;

(c) the memorandum and articles of association of the recipient company drawn up in accordance with the requirements of the Act;

(d) in those cases where the country or jurisdiction of the company to be divided or of any other recipient company involved in the cross-border division is not a Member State or EEA State, a reasoned opinion of one or more practising advocates confirming that the proposed cross-border division is permitted by the laws of each such country or jurisdiction; and

(e) any other documents and information required for the purposes of registering the recipient company as a Maltese company.

(3) The Registrar shall accept the pre-division certificate referred to in sub-regulation (2)(b) as conclusively attesting to the proper completion of the applicable pre-division procedures and formalities in the departure jurisdiction, without which the cross-border division cannot be approved.

22. (1) Upon determining that all relevant conditions have been properly fulfilled and formalities properly completed in Malta as the jurisdiction governing the recipient company, the Registrar shall, without delay, and in any event, not later than ten (10) working days from the submission of the documents referred to in regulation 21(2),

Approval of cross-border division and the issue of certificate of registration of recipient company.

approve the cross-border division and proceed to register the recipient company as a Maltese company and notify the register in the country or jurisdiction of the company being divided that the Maltese recipient company has been registered.

(2) The certificate of registration of the recipient company shall include the following:

- (a) a statement confirming that the registration of the recipient company is the result of a cross-border division;
- (b) the date of registration of the recipient company; and
- (c) the registration number, name and legal form of the company being divided and of the recipient companies.

Part III – Consequences of a cross-border division

Consequences
of cross-border
division.

23. (1) A cross-border full division shall, as from the date on which it becomes effective, have the following consequences:

- (a) all the assets and liabilities of the company being divided, including all contracts, credits and rights and obligations shall be transferred to the recipient companies in accordance with the allocation specified in the draft terms of the cross-border division;
- (b) the members of the company being divided shall become members of the recipient companies in accordance with the allocation of shares specified in the draft terms of the cross-border division, unless they have disposed of their shares as referred to in regulation 12(1);
- (c) the rights and obligations of the company being divided arising from contracts of employment or from employment relationships and existing at the date on which the cross-border division takes effect shall be transferred to the recipient companies; and
- (d) the company being divided shall cease to exist.

(2) A cross-border partial division shall, as from the date on which it becomes effective, have the following consequences:

- (a) part of the assets and liabilities of the company being divided, including contracts, credits and rights and obligations shall be transferred to the recipient companies, while the remaining part shall continue to be that of the company being

divided in accordance with the allocation specified in the draft terms of the cross-border division;

(b) at least some of the members of the company being divided shall become members of the recipient companies and at least some of the members shall remain in the company being divided or shall become members of both in accordance with the allocation of shares specified in the draft terms of the cross-border division, unless those members have disposed of their shares; and

(c) the rights and obligations of the company being divided arising from contracts of employment or from employment relationships and existing at the date on which the cross-border division takes effect, allocated to the recipient companies under the draft terms of the cross-border division, shall be transferred to the respective recipient companies.

(3) A cross-border division by separation shall, as from the date on which it becomes effective, have the following consequences:

(a) part of the assets and liabilities of the company being divided, including contracts, credits and rights and obligations, shall be transferred to the recipient companies, while the remaining part shall continue to be that of the company being divided, in accordance with the allocation specified in the draft terms of the cross-border division;

(b) the shares of the recipient companies shall be allocated to the company being divided;

(c) the rights and obligations of the company being divided arising from contracts of employment or from employment relationships and existing at the date on which the cross-border division takes effect, allocated to the recipient companies under the draft terms of the cross-border division, shall be transferred to the respective recipient company or companies.

(4) Without prejudice to regulation 15(3), where an asset or a liability of the company being divided is not explicitly allocated under the draft terms of the cross-border division, and where the interpretation of those terms does not make a decision on its allocation possible, the asset, the consideration therefore or the liability is allocated to all the recipient companies or, in the case of a partial division or a division by separation, to all the recipient companies and the company being divided in proportion to the share of the net assets

B 194

allocated to each of those companies under the draft terms of the cross-border division.

Special formalities to be adhered to.

24. For the avoidance of doubt the provisions of these regulations shall be without prejudice to any laws in Malta or in any other jurisdiction requiring the completion of special formalities before the transfer of certain assets, rights and obligations by the company being divided becomes effective as against third parties and those formalities shall be carried out by the company being divided or by the recipient companies, as appropriate.

Prohibition of share exchange.

25. Upon a cross-border division becoming effective, no shares in a recipient company shall be exchanged for shares in the company being divided which are either held by the company itself or through a person acting in his or her own name but on behalf of the company.

Powers of national authorities.

26. A cross-border division which has taken effect in compliance with these regulations may not be declared null and void:

Provided that the provision in regulation 25 shall be without prejudice to powers vested in national authorities, *inter alia*, in relation to criminal law, the prevention and combatting of terrorist financing, social law, taxation and law enforcement and to impose measures and penalties under national law, after the date on which the cross-border division took effect.

Part IV – General Provisions

Simplified formalities.

27. Where a cross-border division is carried out as a division by separation, paragraphs (b), (c), (f), (i), (o) and (p) of regulation 6(1) and regulations 7, 9, and 12 shall not apply.

Liability of director or expert for wilful or negligent misconduct.

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

Applicable legislation regulating credit intermediaries and other financial undertakings.

29. These regulations are without prejudice to 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.

SCHEDULE**CROSS-BORDER DIVISIONS OF LIMITED LIABILITY
COMPANIES REGULATIONS, 2022**

*Application by Board of Directors to obtain a pre-division certificate
in terms of Regulation 17(1)*

Form DIVISION

Company Reg. No.

Name of Company

Delivered by

To the Registrar of Companies:

I/We (a).....hereby submit
the application in accordance with Regulation 17(1) of the Cross-
Border Divisions of Limited Liability Companies Regulations, 2022,
in order to obtain the pre-division certificate of
(b)..... having registration number (c)
.....

I / We (d) confirm that the company has followed the procedures
provided for by the Cross-Border Divisions of Limited Liability
Companies Regulations, 2022, and the documents referred to in terms
of Regulation 17(2) are hereby attached.

Employee consultation in terms of the applicable legislation
under the employment law framework stipulated in regulation 7(10)
has commenced/is not applicable (e).

Signature/s.....

Director/s

Dated this..... day of..... of the year
.....

This form must be completed in typed form.

- (a) *Delete as necessary and insert name and surname of director/s*
- (b) *Insert company name*
- (c) *Insert company registration number*
- (d) *Delete as necessary*

B 196

(e) *Delete as necessary*
