

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

*Taqsimha B*

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**L.N. 28 of 2023**

**COMPANIES ACT  
(CAP. 386)**

**Cross-border Mergers 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 Mergers 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:

(i) 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 registered under Maltese legislation;

(ii) a company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and that is subject, under the national law governing it, to conditions concerning guarantees such as are provided for by Directive 2017/1132/EU for the protection of the interests of members or others;

"company resulting from the merger" means either the acquiring company in the case of a merger of the type referred to

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in sub-regulation (2)(a), (c) and (d) or the new company in the case of a merger of the type referred to in sub-regulation (2)(b);

"cross-border merger or mergers" means a merger or mergers referred to in regulation 3(2);

"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 mergers, mergers and mergers;

"merging company" means a company taking part in a cross-border merger including an acquiring company and "merging companies" shall be construed accordingly;

"Regulation (EU) 2021/23" means Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/

25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132;

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

(a) one (1) or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities 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;

(b) two (2) or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities 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 ("merger by formation");

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

(d) one (1) or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to the acquiring company, without the issue of any new shares by the acquiring company, provided that one (1) person holds directly or indirectly all the shares in the merging companies or the members of the merging companies hold their securities and shares in the same proportion in all merging companies.

4. (1) These regulations shall apply to cross-border mergers 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 merger are governed by the laws of different Member States or EEA States. Applicability.

(2) These regulations shall also apply to cross-border mergers of limited liability companies formed in accordance with the law of any other approved country or jurisdiction provided that at least two

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(2) of the limited liability companies involved in the merger are governed by the laws of different approved countries or jurisdictions:

Provided further that for the purpose of mergers regulated by these regulations, at least one (1) of the merging companies, or the company resulting from the merger, must be registered in Malta.

(3) Notwithstanding the definition of "merger", these regulations shall also apply to cross-border mergers 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 or in point (48) of Article 2 of Regulation (EU) 2021/23.

(5) These regulations shall not apply:

(a) 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;

(b) to a company which subject to resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU or in Title V of Regulation (EU) 2021/23;

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

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

5. (1) Unless otherwise provided for 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, 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.

Maltese merging company and opposition to a merger between companies registered in Malta.

(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 company participates:

Provided that this provision shall not prejudice the provisions of article 21 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

6. (1) The board of directors of the Maltese merging company shall draw up the common draft terms of a cross-border merger. The common draft terms of a cross-border merger shall include at least the following particulars:

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

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

(b) the ratio applicable to the exchange of securities or shares representing the company 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 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 shall 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 shall 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

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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 members of the administrative, management, supervisory or controlling bodies of the merging companies;

(i) the instrument of constitution of the company resulting from the cross-border merger, where applicable, and the statutes if they are contained in a separate instrument;

(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;

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

(n) any safeguards offered to creditors, such as guarantees or pledges.

(o) 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 (1) of the merging companies or the company resulting from the merger is not or shall not be formed, incorporated or registered in a Member State or EEA State, a reasoned opinion of one or more practising advocates confirming that the proposed cross-border merger is permitted by the laws of the relevant jurisdiction must be attached to the common draft terms of cross-border merger.

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

7. (1) The board of directors of the Maltese merging company or companies shall draw up a report for members and employees, explaining and justifying the legal and economic aspects of the cross-border merger, as well as explaining the implications of the cross-border merger for employees. It shall, in particular, explain the implications of the cross-border merger for the future business of the company. Directors' report.

(2) The report shall also include a section for members and a section for employees. The company may decide either to draw up one report containing those two 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 method or methods used to arrive at the share exchange ratio, where applicable;

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

(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 a Maltese merging company have agreed to waive that requirement in writing or where the Maltese merging company 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 merger 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;

(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 common draft terms of the cross-border merger, if 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 six (6) weeks before the date of the general meeting referred to in regulation 11:

Provided that where the approval of the cross-border merger is not required by the general meeting of the acquiring company in accordance with the proviso to regulation 11(1), the report shall be made available at least six (6) weeks before the date of the general meeting of the other merging company or companies.

(7) Where the Board of Directors of the Maltese merging company or companies 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 Maltese merging company or companies and its subsidiaries, if any, have no employees other than those who form part of the said Board or other management bodies of the Maltese merging company or companies.

(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 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 and the same document.

Declaration of  
solvency.

**8.** (1) The directors of a Maltese merging company, 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 Board of Directors is unaware of any reason why the company resulting from the merger, is not in a position to meet liabilities when those liabilities fall due:



Provided that no declaration of solvency shall be required where the Maltese merging company 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 30 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 merging company but independent of it and approved by the Registrar, shall examine the common draft terms of a cross-border merger 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.

Provided that where the approval of the cross-border merger is not required by the general meeting of the acquiring company in accordance with the proviso to regulation 11(1), the report shall be made available at least one (1) month before the date of the general meeting of the other merging company or companies.

(2) As an alternative to experts operating on behalf of each of the merging companies, one (1) or more independent experts, appointed for that purpose at the joint request of the companies, by a judicial or administrative authority in the country or jurisdiction of one (1) of the merging companies or of the company resulting from the cross-border merger or approved by such an authority, may examine the common draft terms of cross-border merger and draw up a single written report to all the members.

(3) The report referred to in (1) 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 merging companies

prior to the announcement of the merger proposal or the value of the company excluding the effect of the proposed merger, as determined in accordance with generally accepted valuation methods.

(4) 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 an opinion on the relative importance attributed to those methods in arriving at the value decided on, and in the event that different methods are used in the merging companies, state also whether the use of different methods was justified; and

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

(5) The expert shall be entitled to obtain from the merging companies all information necessary for the discharge of the duties of the expert.

(6) Neither an examination of the common draft terms of a cross-border merger by an independent expert nor an independent expert report shall be required if all the members of each of the companies involved in the cross-border merger have so agreed or if the Maltese merging company is a single member company.

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

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

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

(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 Maltese merging company 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 common draft terms of the cross-border merger:

Provided that where the approval of the cross-border merger is not required by the general meeting of the acquiring company in accordance with the proviso to regulation 11(1) comments may be submitted not later than five (5) working days before the date of the general meeting of the other merging company or companies.

(2) On being satisfied that the requirements of regulations 6 and 10(1) have been complied with, the Registrar shall register the common draft terms of the cross-border merger, 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 common draft terms of the cross-border merger;

(b) the type, name, registration number and registered office of each merging company;

(c) the register in which the documents referred to in Article 14 of Directive 2012 /1132/EU are filed in respect of each of the merging companies and the registration number of the respective company in the said register;

(d) the information provided by the Maltese merging company 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 merging company makes the documents referred to in sub-regulation (1) available on its website free of charge to the public.

(4) Where the Maltese merging company makes the common draft terms of the cross-border merger 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) for each of the merging companies its legal form, registration number and name and the location of its registered office;

(b) the legal form and name proposed for any newly

created companies resulting from the cross-border merger and the proposed location of their registered office;

(c) the register in which the documents referred to in Article 14 of Directive 2012 /1132/EU are filed in respect of each of the merging companies and the registration number of the respective company in the said register;

(d) an indication, for each of the merging companies, of the arrangements made for the exercise of the rights of creditors, employees and members; and

(e) details of the website from which the common draft terms of the cross-border merger, 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 (d) may be obtained online and free of charge.

(5) Where the approval of the cross-border merger is not required by the general meeting of the acquiring company in accordance with the proviso to regulation 11(1), the disclosure referred to in paragraphs (1) to (4) shall be made at least one (1) month before the date of the general meeting of the other merging company or companies.

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

(b) the information provided by the Maltese merging company 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 merging company and the provisions of article 401(1)(e) of the Act shall apply.

**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 each Maltese merging company shall decide, by means of an extraordinary resolution, whether to approve the common draft terms of the cross-border merger and whether to amend its memorandum and articles of association, if applicable:

Approval by the general meeting.

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) The approval by the general meeting referred to in sub-regulation (1) shall not be valid unless the extraordinary resolution is approved by the Maltese merging 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 each Maltese merging company may reserve the right to make implementation of the cross-border merger conditional on express ratification by the general meeting of the arrangements decided on with respect to employee participation in the company resulting from the cross-border merger.

**12.** (1) When a Maltese merging company approves the common draft terms of merger 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 as specified in regulation 6(1)(m) in accordance with the conditions laid down in this regulation provided that, as a result of the cross-border merger, they would acquire shares in the company resulting from the merger which would be governed by the law of a country or jurisdiction other than Malta.

Shareholder protection.

(2) Any dissenting shareholders wishing to exercise the right referred to in sub-regulation (1) must declare to the Maltese merging company 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 Maltese

merging company shall redeem the shares held by the dissenting shareholders and pay the cash compensation specified in the common draft terms of the cross-border merger prior to the date when the cross-border merger 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 Maltese merging company 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 Maltese merging company.

(5) Any shareholders of the Maltese merging company 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 common draft terms of the cross-border merger 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 Maltese merging company and the Court's judgement on such matter shall be binding on the company resulting from the cross-border merger. 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 Maltese merging company. Where an application has been filed before the Court in terms of this regulation, the Registrar may nonetheless issue the pre-merger 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 Maltese merging company dispute the share-exchange ratio in accordance with sub-regulation 5, the company resulting from the cross-border merger 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 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.

**13.** The holders of securities, other than shares, in a Maltese merging company, to which special rights are attached, shall be given

rights against the Maltese merging company in accordance with the common draft terms of the cross-border merger at least equivalent to those they possess prior to the merger:

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

**14.** (1) The extraordinary resolution approving the cross-border merger 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.

Registration of the extraordinary resolution.

(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 merger;

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

(c) the legal form and name proposed for the company resulting from the cross-border merger and the proposed location of its registered office.

**15.** (1) A registration made by the Registrar by virtue of regulation 10 or 14 may be contested before the Court by any interested party in accordance with the following conditions:

Contestation of registration.

(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 common draft terms of the cross-border merger 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(m) has been inadequately set; or

(iii) the information submitted with regard to the share exchange ratio referred to in paragraph (i) above or the cash compensation referred to in paragraph (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 merger void or voidable, the Court shall grant the Maltese merging company 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 merging company 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 common draft terms of the cross-border merger, as provided for in regulation 6(n) are inadequate. If the creditor credibly demonstrates that, due to the cross-border merger, the satisfaction of his claims are at stake and that he has not obtained adequate safeguards from the Maltese merging company, the Court shall uphold the creditor's request and order that additional safeguards shall be provided subject to the cross-border merger 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 Maltese merging company and the Registrar.



**16.** (1) Any party who feels aggrieved by the Court's judgement relating to an application in terms of regulations 12(4) or (5), 15(1), 15(2) or 28, 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 verify with the court registry the latest information regarding the appointment for the hearing of the case.

Right of appeal.

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(2) In the case of an appeal from the Court's judgement 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 defaulting party an administrative penalty, to be paid to the counterparty, either between ten thousand (€10,000) and two hundred and fifty thousand euro (€250,000), or ten (10) per centum (%) of the Maltese merging company's annual turnover for the preceding financial year.

**17.** (1) Upon the lapse of one (1) month from the last publication following the registration referred to in regulation 14, each Maltese merging company shall submit to the Registrar a written application in the prescribed form, to obtain a pre-merger certificate.

Request for  
issue of pre-  
merger  
certificate.

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

be accompanied by the following documents:

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

(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, where applicable;

(g) where the Maltese merging company carries on in or from Malta any licensable activity, evidence of the consent of the competent authority in Malta to the cross-border merger;

(h) where the Maltese merging company is a public company quoted on a recognized investment exchange, evidence that the said exchange of the cross-border merger has been notified and evidence of the consent of the listing authority in Malta to the cross-border merger;

(i) where any shares of the Maltese merging company 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 (1) and the same document.

**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 merger as set out in these regulations; and

(b) in respect of compliance with the rules concerning employee participation, verify that the common draft terms of the cross-border merger 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 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 merger complies with all the relevant conditions and that all necessary procedures and formalities have been completed, the Registrar shall issue the pre-merger certificate:

Provided that no pre-merger 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 regulation 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 merger 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-merger certificate and shall inform the Maltese merging company of the reasons for such decision by not later than seven (7) days from the lapse of the period referred to in regulation 17(2). In that case, the Registrar may give the Maltese merging company 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-merger certificate where it is determined that the cross-border merger 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 merger 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 merging company 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 merger, including those of the country or jurisdiction of the company resulting from the merger;

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

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

Provided that any independent expert appointed by the Registrar for such purpose must be independent from the Maltese company applying for the pre-merger certificate and must have no past or current link with the Maltese merging company which might affect the expert's independence.

Effect of pre-merger certificate.

**19.** A pre-merger certificate issued by the Registrar following the Registrar's review in accordance with regulation 17, shall attest to compliance by the Maltese merging company with all relevant conditions and to the proper completion of all procedures and formalities in terms of these regulations.

20. (1) When the company resulting from the merger has or is to have its registered office in Malta the Registrar shall ensure that the merging companies have approved the common draft terms of cross-border merger on the same terms and, where appropriate, that arrangements for employee participation have been determined.

Process of the issue of certificate of completion of cross-border merger.

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

(a) the common draft terms of the cross-border merger approved by the company's general meeting or, in the event that the approval by the general meeting is not required in accordance with Article 132(3) of Directive 2017/1132/EU, the common draft terms of the cross-border merger approved by each merging company in accordance with national law;

(b) the pre-merger certificate or an equivalent document issued by the jurisdiction of each merging company;

(c) where in the case of a merger by formation the company resulting from the merger shall be a Maltese company:

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

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

(d) in those cases where the country or jurisdiction of any merging company is not a Member State or EEA State, a reasoned opinion of one or more practising advocates confirming that the proposed cross-border merger is permitted by the laws of each such country or jurisdiction.

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

(4) After verifying that the provisions of these regulations and all other applicable provisions of the Act have been complied, including the payment of any applicable fees, the Registrar shall:

(a) without delay, and in any event, not later than ten (10) working days from the submission of the documents referred to

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in paragraph (2), issue a Certificate of Completion of Cross-Border Merger which shall include the name and registration number of the Maltese 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;

(b) cause a statement to be published in the Gazette or on a website maintained by him confirming the completion of the cross-border merger; and

(c) the Registrar shall notify the registers in the country or jurisdiction of each merging company that the cross-border merger has taken effect.

(4) The Registrar shall ensure that at least the following information is entered in the register:

(a) that the registration of the company resulting from the merger is the result of a cross-border merger;

(b) the date of registration of the company resulting from the merger;

(c) the registration number, name and legal form of each merging company and of the company resulting from the merger.

Striking off.

**21.** (1) When a Maltese merging company is to cease to exist as a result of the cross-border merger, and the Registrar is notified by the foreign registry to whose jurisdiction the company resulting from the merger is subject, of the effective date of the cross-border merger, the Registrar shall immediately strike the name of the Maltese merging company off the register and 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 the provisions of article 401(1)(e) of the Act shall apply.

(2) The Registrar shall ensure that at least the following information is entered in the register:

(a) that the striking off or removal of the merging company from the register is the result of a cross-border merger;

(b) the date of striking off or removal of the merging company from the register; and

(c) the registration number, name and legal form of each

merging company and of the company resulting from the merger.

**22.** (1) A cross-border merger carried out in accordance with regulation 3(2)(a), (c) and (d) shall, from the effective date of the cross-border merger have the following consequences:

Consequences of a cross-border merger.

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

(b) the members of the company being acquired shall become members of the acquiring company, unless they have disposed of their shares; and

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

(2) A cross-border merger carried out in accordance with regulation 3(2)(b) shall, from the effective date of the cross-border merger have the following consequences:

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

(b) the members of the merging companies shall become members of the new company, unless they have disposed of their shares; and

(c) the merging companies shall cease to exist.

**23.** 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 merging companies becomes effective as against third parties and those formalities shall be carried out by the company resulting from the merger.

Special formalities to be adhered to.

**24.** Upon a cross-border merger becoming effective, no shares in the acquiring company shall be exchanged for shares in the company being acquired held either:

Prohibition of share exchange.

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

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

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Employment rights and obligations of merging companies.

**25.** The rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing on the effective date of the cross-border merger 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.

Powers of national authorities.

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

Provided that the provision in the 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 merger took effect.

Simplified formalities.

**27.** Where a cross-border merger by acquisition is carried out either 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 or by a person who holds directly or indirectly all the shares in the acquiring company and in the company or companies being acquired, and the acquiring company does not allot any shares under the merger:

(a) paragraphs (b), (c), (e) and (m) of regulations 6, 9 and 22(1)(b) shall not apply;

(b) regulations 7 and 11(1) shall not apply to the company or companies being acquired.

Exemption from drawing up independent expert's report.

**28.** 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 experts referred to in regulation 9 shall not be required as long as the dissenting minority shareholders of the 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. 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 Maltese merging company and the Registrar and regulation 16 shall apply to any appeal relating to the application referred to in this regulation.



**29.** Where the laws of the jurisdictions of all of the merging companies provide for the exemption from the approval by the general meeting in accordance with the proviso to regulations 11(1) and 27, the common draft terms of a cross-border merger or the information referred to in regulation 10(1), (3) and (4) respectively and the reports referred to in regulations 7 and 9, shall be made available at least one (1) month before the decision on the merger is taken by the Maltese merging company in accordance with the Act.

Exemption from approval by the general meeting.

**30.** Any director of a Maltese 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 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 company as a consequence of his misconduct.

Damages resulting from wilful or negligent misconduct.

**31.** These regulations are without prejudice to:

Without prejudice to other applicable legislation.

(a) the application of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings;

(b) the Control of Concentrations Regulations promulgated under the Competition Act; S.L. 379.08.

(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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**SCHEDULE**

**COMPANIES ACT (CROSS-BORDER MERGERS OF LIMITED LIABILITY COMPANIES) REGULATIONS, 2023**

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

**Form - MERGER**

Company Reg. No. ....

Name of Company .....

Delivered by .....

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To the Registrar of Companies:

We / I (a) ..... hereby submit the application in accordance with Regulation 17(1) of the Companies Act (Cross-Border Mergers of Limited Liability Companies) Regulations, 2023, in order to obtain the pre-merger certificate of (b) ..... having registration number (c) .....

We / I (d) confirm that the company has followed the procedures provided for by the Companies Act (Cross-Border Mergers of Limited Liability Companies) Regulations, 2023, 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*
- (e) *Delete as necessary*

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