Cross-Border Mergers

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CROSS-BORDER MERGERS

Introduction

Directive 2005/56/EC (the "**CBM Directive**") (implemented in Ireland on 27 May, 2008 by the European Communities (Cross-Border Mergers) Regulations, 2008 (the "**CBM Regulations**")) provides a harmonised platform for mergers within the European Economic Area ("**EEA**"). The CBM Regulations permit an Irish limited liability company (other than a company that is limited by guarantee) to be party to a cross-border merger with another such entity registered in an EEA member state.

How to Effect a Cross-Border Merger

A cross-border merger may be effected in one of three ways, as follows:

(i) Merger by absorption, whereby an existing company acquires all the assets and liabilities of its wholly owned subsidiary. On being dissolved and without going into liquidation, the subsidiary transfers all of its assets and liabilities to its parent.

(ii) Merger by acquisition, whereby a company (other than a company formed for the purpose of the operation) acquires all of the assets and liabilities of another company in exchange for the issue to the members of the transferor company of securities or shares in the acquiring company, either with or without any cash payment. The transferor company is then dissolved without going into liquidation.

(iii) Merger by formation of a new company, whereby two or more companies (on being dissolved without going into liquidation) transfer all of their assets and liabilities to a successor company that they form in exchange for the issue to their members of securities or shares representing the capital of that new company, with or without any cash payment.

The Benefits of a Cross-Border Merger

The cross-border merger process provides legal certainty as once the merger is approved by the competent authority in a member state (in Ireland, the High Court) it cannot subsequently be deemed null and void.

In addition, and provided the successor company complies with all filing requirements/any other special formalities required by law (including the law of any other relevant EEA member state) for the transfer of the assets and liabilities of the transferor companies to be effective in relation to other persons:

(i) liquidation is avoided as the transferor company will be dissolved automatically once the merger is effected, thereby providing significant cost savings; and

(ii) the assets and liabilities of the transferor companies transfer automatically by operation of law, thereby eliminating the need for any additional documentation.

Steps Involved in a Cross-Border Merger

There are a number of steps which an Irish company must carry out in order to effect a cross-border merger. These steps may be summarised as follows:

(i) In conjunction with the management of the other companies involved in the cross-border merger, the Irish company must draw up and adopt draft common terms of merger;

(ii) The directors of the Irish company must prepare an explanatory report for the members of the company. This report must explain the implications of the cross-border merger for the members, creditors and employees of the Irish company and state the legal and economic grounds for the draft terms of merger;

(iii) A qualified person must be appointed (usually by one of the merging companies) to prepare a report for the members of the Irish company on the cross-border merger proposals. The report must be made available at least one month prior to the general meeting of the Irish company to approve the merger. Such a report will not be required where the merger is by means of absorption, where every member of the merging company agrees that such report is not necessary or where the successor company already owns 90% or more of the voting rights in the transferor company;

(iv) The draft terms of merger and notice specifying certain details regarding the Irish company and the proposed cross-border merger must, at least one month before the general meeting of the Irish company to approve the merger, either be delivered to the Registrar of Companies in Ireland or be made available on the Irish company's website. If published on the company's website, the draft terms and notice must remain on accessible for at least one month following the general meeting. Notice of this delivery or publication, as appropriate, must then be published in two national newspapers prior to the common draft terms of merger being approved at the aforementioned general meeting of the members of the Irish Company;

(v) The Irish company must apply to the High Court for a certificate of compliance with the pre-merger requirements required of that company. This certificate, if obtained, will be conclusive evidence that the Irish company has properly completed the pre-merger requirements;

(vi) All of the transferor companies must apply jointly to the competent authority in the country in which the company resulting from the merger will be registered for an order confirming the completion of the merger. Where the successor company is an Irish company, the parties must seek High Court approval in respect of the proposed merger.

The High Court will not approve the merger unless it is satisfied that:

(a) where the merger falls under the jurisdiction of the Competition Authority, the Competition Authority has either authorised or been deemed to have authorised the merger;

(b) where the merger is a concentration with a Community dimension within the meaning of Council Regulation (EC) No 139/2004 of 20 January 2004 (the "**Merger Control Regulation**"), it has been declared compatible with the common market or approved by the Competition Authority, as appropriate; and

(c) where the successor company is a regulated entity, that all requirements under an enactment for any other authorisation, approval, consent, waiver, licence, permission or agreement that affects the merger are satisfied.

In addition, before granting an order approving of a merger, the High Court must have regard to any powers exercised by the Takeover Panel in accordance with the Irish Takeover Panel Act 1997 as the jurisdiction of the Irish Takeover Panel is not limited by the CBM Regulations; and

(vii) The Irish company must notify completion of the merger to the Registrar of Companies for either the registration of the merger or the de-registration of an Irish transferor company, as appropriate.

Employee Participation Rights in Cross-Border Mergers

Generally, when a cross-border merger is effected, the rights and obligations arising from the contracts of employment of the transferor companies are transferred to the successor company.

The CBM Regulations specifically protect what are known as "employee participation rights".

Employee participation is defined in the CBM Regulations as meaning "the influence of the representative body or the employees' representatives (or both) in the affairs of a company by the way of (*a*) the right to elect or appoint some of the members of the company's supervisory or administrative organ, or (*b*) the right to recommend or oppose, or both to recommend and oppose, the appointment of some or all of the members of the company's supervisory or administrative organ".

Employee protection during the course of a cross-border merger is dealt with under two headings:

(i) Involvement

The management or administrative organs of the transferor companies must make arrangements for the establishment of a "special negotiating body". This is established to negotiate with the competent body of the transferor companies regarding the establishment of arrangements for the involvement of employees within the successor company. The remit of the special negotiating body will be to ascertain what the position of the employees will be in the successor company.

The rules governing the involvement of employees in the successor company may be agreed between the special negotiating body and the management or administrative organs of the transferor companies. Should no agreement be reached within 6 months, the Standard Rules (as set out in Schedule 1 of the CBM Regulations) will apply.

(ii) Participation

Irish law deals generally with the concepts of employee information and consultation procedures, however, it does not provide for employee participation. Consequently, the employee participation provisions in the CBM Regulations will only apply if a system of employee participation previously exists in any of the merging companies. As such, the CBM Regulations do not create new rights in this regard, but merely protect existing rights in merging companies.

Where employee participation rights do exist, the Regulations provide that the transferor companies can either agree to negotiate a new agreement in relation to participation rights or alternatively they can adopt the default position of the Standard Rules.

Consequences of a Cross-Border Merger

Provided the successor company complies with all filing requirements and any other special formalities required by law (including the law of any other relevant EEA State) for the transfer of the assets and liabilities of the transferor companies to be effective in relation to other persons, as of the effective date of transfer:

(i) All the assets and liabilities of the transferor companies are transferred to the successor company;

(ii) In the case of a merger by acquisition or merger by formation of a new company, shareholders in the transferor companies will be issued with shares in the successor company;

(iii) The transferor companies are dissolved;

(iv) The rights and obligations arising from the contracts of employment of the transferor companies are transferred to the successor company;

(v) Every contract, agreement or instrument to which a transferor company is a party being construed and having effect as if the successor company had been a party thereto instead of the transferor company; and

(vi) An offer or invitation to treat made to or by a transferor company before the effective date of the merger will be construed as having being made by the successor company.

Other Considerations concerning Cross-Border Mergers

Pre-merger Reorganisation:

A pre-merger reorganisation on the part of a transferor company that will be automatically dissolved post-merger may be prudent in order to ensure that any assets or liabilities attributable to that entity which are not intended to be transferred as part of the merger are tended to prior to the merger.

Tax:

A cross-border merger under the Regulations gives rise to certain tax concerns, including the issue of whether the cross-border merger gives rise to a charge to Irish capital gains tax, stamp duty or corporation tax.

Part 21 of the Taxes Consolidation Act 1997 implemented certain provisions of Council Directive 2009/133/EC of 19 October 2009, which provides for tax neutrality in relation to cross-border mergers. The Revenue Commissioners of Ireland have indicated that they are satisfied that the tax legislation as drafted is adequate to achieve tax neutrality in the case of cross-border mergers.

Conclusion

The CBM Regulations provide Irish companies with a range of re-structuring options, facilitating reorganisation at European level without needing to register as an “SE” (or “European Company”) under the European Communities (European Public Limited-Liability Company) Regulations 2007.

The CBM Regulations remove considerable barriers to such reorganisations, allowing for legal certainty and the removal of the significant cost of liquidation of any transferor company.

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