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**EUROPEAN COMPANY LAW AND
CORPORATE GOVERNANCE**

Implementation of
Directive 2005/56/EC on
Cross-Border Mergers of
Limited Liability Companies

DRAFT REGULATIONS

ANNEX E

MARCH 2007

STATUTORY INSTRUMENTS

2007 No. 0000

COMPANIES

The Companies (Cross-Border Mergers) Regulations 2007

Made - - - - - ***

Laid before Parliament ***

Coming into force - - - in accordance with regulation 1(2) and (3)

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SCHEDULE — Transitional provisions

The Secretary of State is a Minister designated^(a) for the purposes of section 2(2) of the European Communities Act 1972^(b) in relation to [cross-border mergers of companies].

In exercise of the powers conferred by section 2(2) of that Act the Secretary of State makes the following Regulations:

PART 1

GENERAL

Citation and commencement

1.—(1) These Regulations may be cited as the Companies (Cross-Border Mergers) Regulations 2007.

^(a) [Designation order reference to be inserted when made]

^(b) 1972 c.68. The enabling powers of section 2(2) were extended by virtue of the amendment of section 1(2) by section 1 of the European Economic Area Act 1993 (c.51).

(2) These Regulations shall come into force on 15th December 2007, except as provided in paragraph (3).

(3) The following provisions of these Regulations shall come into force on 1st October 2008—

- (a) regulation 4(b) (application of section 1081 of the Companies Act 2006 (annotation of the register));
- (b) regulation 4(d) (application of section 1112 of the Companies Act 2006 (offence of false statement to registrar));
- (c) regulation 11(6)(g) (application of section 1098 of the Companies Act 2006 (public notice of removal of certain material from register)); and
- (d) regulation 19(3)(i) (application of section 1098 of the Companies Act 2006 (public notice of removal of certain material from register)).

Meaning of “cross-border merger”

2.—(1) In these Regulations “cross-border merger” means a merger by absorption, a merger by absorption of a wholly-owned subsidiary, or a merger by formation of a new company.

(2) In these Regulations “merger by absorption” means an operation in which—

- (a) there are one or more transferor companies;
- (b) there is an existing transferee company;
- (c) at least one of those companies is a UK company;
- (d) at least one of those companies is an EEA company; and
- (e) every transferor company is dissolved without going into liquidation, and on its dissolution transfers all its assets and liabilities to the transferee company, in exchange for the issue to the transferor company’s members of—
 - (i) shares or other securities representing the capital of the transferee company, and
 - (ii) if so agreed, a cash payment.

(3) In these Regulations “merger by absorption of a wholly-owned subsidiary” means an operation in which—

- (a) there is one transferor company, of which all the shares or other securities representing its capital are held by an existing transferee company;
- (b) either the transferor company or the transferee company is a UK company;
- (c) either the transferor company or the transferee company is an EEA company; and
- (d) the transferor company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the transferee company.

(4) In these Regulations “merger by formation of a new company” means an operation in which—

- (a) there are two or more transferor companies, at least two of which are each governed by the law of a different EEA State;
- (b) every transferor company is dissolved without going into liquidation, and on its dissolution transfers all its assets and liabilities to a transferee company formed for the purposes of, or in connection with, the operation, in exchange for the issue to the transferor company’s members of—
 - (i) shares or other securities representing the capital of the transferee company, and
 - (ii) if so agreed, a cash payment; and
- (c) at least one of the transferor companies or the new transferee company is a UK company.

Interpretation

3.—(1) In these Regulations—

“the 1996 Act” means the Employment Rights Act 1996(a);

“Appeal Tribunal” means the Employment Appeal Tribunal;

“CAC” means the Central Arbitration Committee;

“the Companies Acts” have the same meaning as in section 2 of the Companies Act 2006(b);

“competent authority of another EEA State” means a court or other authority designated in accordance with the law of an EEA State other than the United Kingdom as competent for the purposes of Articles 8 (appointment of independent expert), 10 (issue of pre-merger certificate) or 11 (scrutiny of completion of merger) of the Directive;

“the court” means the High Court or, in Scotland, the Court of Session;

“the Directive” means Directive 2005/56/EC on cross-border mergers of limited liability companies(c);

“director” has the same meaning as in the Companies Acts (see section 250 of the Companies Act 2006);

“directors’ report” means a report prepared and adopted in accordance with regulation 8 (directors’ report), and includes any opinion of the employee representatives which must accompany it in accordance with regulation 8(6);

“dismissed” and “dismissal”, in relation to an employee, shall be construed in accordance with Part 10 of the 1996 Act;

“draft terms of merger” means a draft of the proposed terms of a cross-border merger drawn up and adopted in accordance with regulation 7 (draft terms of merger);

“EEA company” means a company governed by the law of an EEA State other than the United Kingdom;

“employee” means an individual who has entered into or works under a contract of employment and includes, where the employment has ceased, an individual who worked under a contract of employment;

“employee representatives” means—

- (a) if the employees are of a description in respect of which an independent trade union is recognised by their employer for the purpose of collective bargaining, representatives of the trade union who normally take part as negotiators in the collective bargaining process, and
- (b) any other employees of their employer who are elected or appointed as employee representatives to positions in which they are expected to receive, on behalf of the employees, information—
 - (i) which is relevant to the terms and conditions of employment of the employees, or
 - (ii) about the activities of the undertaking which may significantly affect the interests of the employees,
 but excluding representatives who are expected to receive information relevant only to a specific aspect of the terms and conditions or interests of the employees, such as health and safety, collective redundancies, or pension schemes;

“existing transferee company” means a transferee company other than one formed for the purposes of, or in connection with, a cross-border merger;

“First Company Law Directive” means First Council Directive on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty,

(a) 1996 c.18

(b) 2006 c.46

(c) OJ L 310, 25.11.2005, p.1. The Directive extends to the European Economic Area by virtue of Decision of the EEA Joint Committee No. 127/2006 of 22 September 2006 amending Annex XXII (Company law) to the EEA Agreement (OJ L 333, 30.11.2006, p.59).

with a view to making such safeguards equivalent throughout the Community (68/151/EEC) **(a)**;

“the Gazette” means—

- (a) as respects UK companies registered in England and Wales, the London Gazette,
- (b) as respects UK companies registered in Scotland, the Edinburgh Gazette, and
- (c) as respects UK companies registered in Northern Ireland, the Belfast Gazette;

“independent expert’s report” means a report prepared in accordance with regulation 9 (independent expert’s report);

“liabilities” includes duties;

“member” in relation to a UK company has the same meaning as in the Companies Acts (see section 112 of the Companies Act 2006**(b)**);

“participation” means the influence of the employees and/or their representatives in the transferee company or a merging company by way of the right to—

- (a) elect or appoint some of the members of the transferee company's or the merging company's supervisory or administrative organ; or
- (b) recommend and/or oppose the appointment of some or all of the members of the transferee's or the merging company's supervisory or administrative organ;

“the register” has the same meaning as in the Companies Acts (see section 1080 of the Companies Act 2006);

“registrar of companies” has the same meaning as in the Companies Acts (see section 1060 of the Companies Act 2006);

“share exchange ratio” means the number of shares or other securities in any transferee company that the draft terms of merger provide to be allotted to members of any transferor company for a given number of their shares or other securities;

“standard rules on employee participation” means the rules in regulation 30;

“transferee company” means a UK company or an EEA company to which assets and liabilities are to be transferred by way of a cross-border merger;

“transferor company” means a UK company or an EEA company whose assets and liabilities are to be transferred by way of a cross-border merger;

“treasury shares” has the same meaning as in the Companies Acts (see section 724 of the Companies Act 2006);

“UK company” means a company within the meaning of the Companies Acts (see section 1 of the Companies Act 2006) and references in these Regulations to a—

- (a) “UK merging company” are to a merging company which is a UK company;
- (b) “UK transferee company” are to a transferee company which is a UK company;
- (c) “UK transferor company” are to a transferor company which is a UK company

“UK employee” means an employee employed to work in the United Kingdom; and “UK members of the special negotiating body” means members of the special negotiating body, established pursuant to regulation 21, elected or appointed by UK employees.

(2) References in these Regulations to “the merging companies” are—

- (a) in relation to a merger by absorption or a merger by absorption of a wholly-owned subsidiary, to the transferor company or companies and the existing transferee company;
- (b) in relation to a merger by formation of a new company, to the transferor companies.

(a) OJ L 65, 14.3.1968, p. 8. The Directive has been amended on a number of occasions, but the only amendments relevant to the United Kingdom are those made by Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 (OJ L 221, 4.9.2003, p. 13).

(b) 2006 c. 46

The Companies Act 2006

4. The following provisions of the Companies Act 2006^(a) apply for the purposes of these Regulations as they apply for the purposes of the Companies Acts—

- (a) sections 1061 (registrar’s functions) and 1063 (fees payable to registrar);
- (b) section 1081 (annotation of the register);
- (c) sections 1102 to 1107 (language requirements for documents delivered to registrar);
- (d) section 1112 (offence of false statement to registrar);
- (e) section 1113 (enforcement of company’s filing obligations);
- (f) sections 1121 to 1123 (liability of officer in default);
- (g) section 1125 (meaning of “daily default fine”);
- (h) sections 1127 to 1130 (general provisions relating to offences).

Transitional provisions

5. References in these Regulations to provisions of the Companies Act 2006^(b) that are not yet in force are to be read as references to the corresponding provisions of companies legislation that are in force, as set out in the Schedule.

PART 2

PRE-MERGER REQUIREMENTS

Court approval of pre-merger requirements

6.—(1) A UK merging company may apply to the court for an order certifying for the purposes of Article 10.2 of the Directive (issue of pre-merger certificate) that the company has completed properly the pre-merger acts and formalities for the cross-border merger.

(2) The court must not make such an order unless the requirements of regulations 7 to 13 and 15 (pre-merger requirements) have been complied with.

Draft terms of merger

7.—(1) A draft of the proposed terms of the cross-border merger must be drawn up and adopted by the directors of the UK merging company.

(2) The draft must give particulars of at least the following matters—

- (a) in relation to each of the merging companies—
 - (i) its name,
 - (ii) its registered office,
 - (iii) its legal form and the law by which it is governed, and
 - (iv) the register in which it is entered (including details of the relevant State) and its registration number in that register;
- (b) the share exchange ratio and the amount of any cash payment;
- (c) the terms relating to the allotment of shares or other securities in the transferee company;
- (d) the likely effects of the cross-border merger for employees of each merging company;

(a) 2006 c.46
(b) 2006 c.46

- (e) the date from which the holding of shares or other securities in the transferee company will entitle the holders to participate in profits, and any special conditions affecting that entitlement;
 - (f) the date from which the transactions of any transferor company are to be treated for accounting purposes as being those of the transferee company;
 - (g) any rights or restrictions attaching to shares or other securities in the transferee company to be allotted under the cross-border merger to the holders of shares or other securities in a transferor company to which any special rights or restrictions attach, or the measures proposed concerning them;
 - (h) any amount or benefit paid or given or intended to be paid or given to the independent expert referred to in regulation 9 (independent expert's report) or to any director of a merging company, and the consideration for the payment of benefit;
 - (i) the transferee company's articles of association, or if it does not have articles, the instrument constituting the company or defining its constitution;
 - (j) information on the procedures by which any employee participation rights are to be determined in accordance with Part 4 of these Regulations (employee participation);
 - (k) information on the evaluation of the assets and liabilities to be transferred to the transferee company; and
 - (l) the dates of the accounts of every merging company which were used for the purpose of preparing the draft terms of merger.
- (3) Particulars of the matters referred to in sub-paragraphs (b), (c) and (e) of paragraph (2) may be omitted in the case of a merger by absorption of a wholly-owned subsidiary.
- (4) The draft—
- (a) must not provide for any shares in the transferee company to be allotted to—
 - (i) a transferor company (or its nominee) in respect of shares in the transferor company held by the transferor company itself (or its nominee); or
 - (ii) the transferee company (or its nominee) in respect of shares in the transferor company held by the transferee company (or its nominee); and
 - (b) must provide that where any securities of a UK transferor company (other than shares) to which special rights are attached are held by a person other than as a member or creditor of the company, that person is to receive rights in the transferee company of equivalent value, unless—
 - (i) the holder has agreed otherwise; or
 - (ii) the holder is, or under the draft is to be, entitled to have the securities purchased by the transferee company on terms which the court considers reasonable.

Directors' report

- 8.**—(1) The directors of the UK merging company must draw up and adopt a report.
- (2) The report must—
- (a) explain the effect of the cross-border merger for members, creditors and employees of the company; and
 - (b) state—
 - (i) the legal and economic grounds for the draft terms;
 - (ii) any material interests of the directors (whether as directors or as members or as creditors or otherwise);
 - (iii) the effect on those interests of the cross-border merger, in so far as it is different from the effect on the like interests of other persons.

(3) Where the cross-border merger affects the rights of debenture holders of the company, the report must give the like explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the directors.

(4) It is the duty of any trustee for the company's debenture holders to give notice to the company's directors of such matters relating to himself as may be necessary for the purposes of paragraph (3).

(5) The directors of the UK merging company must deliver copies of the report to its employee representatives (or if there are no such representatives, the employees) at least 2 months before the date of the first meeting of the members, or any class of members, of the company (see regulation 12).

(6) If the employee representatives deliver an opinion on the report to the company's registered office not more than 14 days after the date on which copies of the report were delivered to them, every copy of the report issued after the date on which the opinion was delivered must be accompanied by the opinion.

(7) Any person who makes default in complying with paragraph (4) commits an offence.

(8) A person guilty of an offence under this regulation is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Independent expert's report

9.—(1) A report must be drawn up in accordance with this regulation, unless—

- (a) the cross-border merger is a merger by absorption of a wholly-owned subsidiary;
- (b) the cross-border merger is a merger by absorption where 90% or more (but not all) of the relevant securities of the transferor company (or, if there is more than one transferor company, of each of them) are held by or on behalf of the transferee company; or
- (c) every member of every merging company agrees that such a report is not required.

(2) The report must be prepared by—

- (a) an independent expert who has been appointed for the UK merging company by its directors;
- (b) an independent expert who has been appointed for all the merging companies by the court in accordance with paragraph (3); or
- (c) a person who has been appointed for all the merging companies for the purposes of Article 8 (independent expert's report) of the Directive by a competent authority of another EEA State.

(3) The court may, on the joint application of all the merging companies, order the appointment of an independent expert to prepare a report for those companies in accordance with this regulation.

(4) Where it appears to an independent expert that a valuation is reasonably necessary to enable him to draw up the report, and it appears to him to be reasonable for that valuation, or part of it, to be made by another person who—

- (a) appears to him to have the requisite knowledge and experience to make the valuation or that part of it, and
- (b) is independent,

he may arrange for such a valuation (or accept one which has already been made), together with a report which will enable him to prepare his own report in accordance with this regulation.

(5) In the report the independent expert must—

- (a) indicate—
 - (i) the methods used to arrive at the share exchange ratio; and
 - (ii) the values arrived at using each such method;
- (b) describe any special valuation difficulties which have arisen;

- (c) give an opinion—
 - (i) as to whether the methods used are reasonable in all the circumstances of the case;
 - (ii) if there is more than one method, on the relative importance attributed to each method in arriving at the value decided on; and
 - (iii) as to whether the share exchange ratio is reasonable;
- (d) in the case of a valuation made by another person in accordance with paragraph (4)—
 - (i) state that fact and the date of the valuation;
 - (ii) state the person’s name and what knowledge and experience he has to carry out the valuation;
 - (iii) describe so much of the assets and liabilities as was valued by the other person, and the method used to value them; and
 - (iv) state that it appeared to himself reasonable to arrange for the valuation to be so made or to accept a valuation so made.
- (6) The independent expert has the right—
 - (a) of access to all such documents of every merging company; and
 - (b) to require from the companies’ officers all such information,
 as he thinks necessary for the purpose of making his report.
- (7) In this regulation, “independent expert” means a person who—
 - (a) is eligible for appointment as a statutory auditor in accordance with section 1212 of the Companies Act 2006^(a) (eligibility for appointment as statutory auditor), and
 - (b) is independent.
- (8) For the purposes of this regulation—
 - (a) a person is not independent if, by virtue of section 1214 of the Companies Act 2006 (independence requirement for statutory auditor), he would not be able to act as statutory auditor of all the merging companies; and
 - (b) section 1214 of the Companies Act 2006 applies in relation to all the merging companies as if they were companies in respect of which a person must be appointed as auditor under Part 16 of that Act (audit of companies).
- (9) In this regulation “relevant securities”, in relation to a transferor company, means shares or other securities carrying the right to vote at general meetings of the company.

Inspection of documents

- 10.**—(1) The members of the UK merging company and its employee representatives (or if there are no such representatives, the employees) must be able, during the period specified in paragraph (2)—
- (a) to inspect at the registered office of the company copies of the documents listed in paragraph (3);
 - (b) to obtain copies of those documents or any part of them on request free of charge.
- (2) The period referred to above is the period—
- (a) beginning one month before, and
 - (b) ending on the date of,
- the first meeting of the members, or any class of members, of the company (see regulation 12).
- (3) The documents referred to above are—
- (a) the draft terms of merger;

(a) 2006 c.46

- (b) the directors' report;
- (c) the independent expert's report, if such a report is required by regulation 9 (independent expert's report).

Public notice of receipt of registered documents

11.—(1) The directors of the UK merging company must deliver to the registrar of companies—

- (a) a copy of the draft terms of merger;
- (b) a copy of any order made under regulation 14 (power of court to summon meeting of members or creditors) and the details of every meeting summoned under that regulation; and
- (c) documents giving the following particulars in relation to each merging company—
 - (i) its name,
 - (ii) its registered office,
 - (iii) its legal form and the law by which it is governed, and
 - (iv) particulars of the register in which the company file mentioned in Article 3 of the First Company Law Directive (file for each registered company to be kept in national register) is kept (including details of the relevant State) and its registration number in that register.

(2) The directors must deliver these documents to the registrar at least two months before the date of the first meeting of the members, or any class of members, of the company (see regulation 12).

(3) If the documents are delivered to the registrar in accordance with paragraphs (1) and (2), he must publish—

- (a) in the Gazette, or
- (b) if regulations have been made under section 1116 of the Companies Act 2006^(a) (alternative to publication in the Gazette), in accordance with those regulations,

notice of his receipt of the documents.

(4) The notice must be published by the registrar at least one month before the date of the first meeting of the members, or any class of members, of the company (see regulation 12).

(5) The notice must include—

- (a) the date of receipt of the documents;
- (b) the particulars referred to in paragraph (1)(c);
- (c) a statement that copies of the draft terms of merger, the directors' report and (if there is one) the independent expert's report are available for inspection at the company's registered office in accordance with regulation 10 (inspection of documents);
- (d) the details of every meeting summoned under regulation 14 (power of court to summon meeting of members or creditors).

(6) The following provisions of the Companies Act 2006 apply to the documents delivered to the registrar in accordance with paragraph (1) in the same way as they apply to documents subject to the Directive disclosure requirements (as defined in section 1078(1) of that Act)—

- (a) section 1068(5) (registrar to take delivery of documents by electronic means);
- (b) section 1080 (the register);
- (c) section 1086 (right to copy of material on the register);
- (d) section 1089 (form of application for inspection or copy);
- (e) section 1090 (form and manner in which copies to be provided);

(a) 2006 c.46

- (f) section 1091 (certification of copies as accurate);
- (g) section 1098 (public notice of removal of certain material from register); and
- (h) section 1106 (voluntary filing of translations).

Approval of members in meeting

12.—(1) — Except as provided in paragraphs (3) and (4), the draft terms of merger must be approved by a majority in number, representing 75% in value, of each class of members of the UK merging company, present and voting either in person or by proxy at a meeting summoned under regulation 14.

(2) The approval of the members may be made subject to—

- (a) ratification of the arrangements adopted for employee participation in the transferee company in accordance with Part 4 of these Regulations (employee participation);
- (b) an order of a competent authority of another EEA State which amends the share exchange ratio in accordance with Article 10.3 of the Directive (national procedure for amendment of share exchange ratio).

(3) The approval of the members is not required in the case of a transferor company concerned in a merger by absorption of a wholly-owned subsidiary.

(4) The approval of the members is not required in the case of an existing transferee company if—

- (a) the publication of the notice required by regulation 11 (public notice of receipt of registered documents) took place in respect of the company at least one month before the date of the first meeting of members of the transferor companies;
- (b) the members of the transferee company were able during a period beginning one month before, and ending on, the date of the first such meeting—
 - (i) to inspect at the registered office of the transferee company copies of the documents listed in regulation 10(3) (inspection of documents) in relation to all the merging companies, and
 - (ii) to obtain copies of those documents or any part of them on request; and
- (c) (i) one or more members of the transferee company, who together held not less than 5% of the paid-up capital of the company which carried the right to vote at general meetings of the company (excluding any shares held as treasury shares), would have been able, during that period, to require a meeting of each class of members to be called for the purpose of deciding whether or not to agree to the scheme, and
- (ii) no such requirement was made.

Approval of creditors in meeting

13. If a meeting of creditors or a class of creditors is summoned under regulation 14 (power of court to summon meeting of members or creditors), the draft terms of merger must be approved by a majority in number, representing 75% in value, of the creditors or class of creditors (as the case may be), present and voting either in person or by proxy at the meeting.

Power of court to summon meeting of members or creditors

14.—(1) The court may, on an application under this regulation, order a meeting of—

- (a) members or a class of members, for the purposes of regulation 12 (approval of members in meeting);
- (b) creditors or a class of creditors, for the purposes of regulation 13 (approval of creditors in meeting);

to be summoned in such manner as the court directs.

(2) An application under this regulation may be made by—

- (a) the UK merging company,
- (b) any member of the UK merging company in the case of a meeting of members or a class of members, or
- (c) any creditor of the UK merging company in the case of a meeting of creditors or a class of creditors.

Documents to be circulated or made available

15.—(1) Where a meeting is summoned under regulation 14 (power of court to summon meeting of members or creditors)—

- (a) every notice summoning the meeting that is sent to a member or creditor must include copies of the documents referred to in regulation 10(3) (inspection of documents), and
- (b) every notice summoning the meeting that is given by advertisement must—
 - (i) include copies of those documents, or
 - (ii) state where and how members or creditors may obtain copies.

(2) Where a notice given by advertisement states that copies of the documents referred to in regulation 10(3) (inspection of documents) can be obtained by members or creditors entitled to attend the meeting, every such member or creditor is entitled, on making application in the manner indicated by the notice, to be provided by the company with a copy of the documents free of charge.

PART 3

COURT APPROVAL OF CROSS-BORDER MERGER

Court approval of cross-border merger

16.—(1) The court may, on the joint application of all the merging companies, make an order approving the completion of the cross-border merger for the purposes of Article 11 of the Directive (scrutiny of completion of merger) if—

- (a) the transferee company is a UK company;
- (b) an order has been made under regulation 6 (court approval of pre-merger requirements) in relation to each UK merging company;
- (c) an order has been made by a competent authority of another EEA State for the purposes of Article 10.2 of the Directive (issue of pre-merger certificate) in relation to each merging company which is an EEA company;
- (d) the application is made to the court on a date not more than 6 months after the making of any order referred to in sub-paragraph (b) or (c);
- (e) the draft terms of merger approved by every order referred to in sub-paragraphs (b) and (c) are the same; and
- (f) any arrangements for employee participation in the transferee company required by Part 4 of these Regulations (employee participation) have been determined.

(2) Where the court makes such an order—

- (a) it must in the order fix a date on which the consequences of the cross-border merger (see regulation 17) are to have effect; and
- (b) that date must be no less than 21 days after the date on which the order is made.

(3) After the consequences of the cross-border merger (see regulation 17) have taken effect, an order made under this regulation is conclusive evidence that—

- (a) the conditions set out in paragraph (1) have been satisfied; and

- (b) the requirements of regulations 7 to 13 and 15 (pre-merger requirements) have been complied with.

Consequences of a cross-border merger

17.—(1) The consequences of a cross-border merger are that—

- (a) the assets and liabilities of the transferor companies are transferred to the transferee company;
- (b) the rights and obligations arising from the contracts of employment of the transferor companies are transferred to the transferee company;
- (c) the transferor companies are dissolved; and
- (d) in the case of a merger by absorption or a merger by formation of a new company, the members of the transferor companies except the transferee company (if it is a member of a transferor company) become members of the transferee company.

(2) The consequences take effect—

- (a) where an order has been made under regulation 16 (court approval of merger), on the date fixed in that order;
- (b) where an order has been made by a competent authority of another EEA State for the purposes of Article 11 of the Directive (scrutiny of completion of merger), on the date fixed in accordance with the law of that State.

(3) The transferee company must take such steps as are required by law (including by the law of another EEA State) for the transfer of the assets and liabilities of the transferor companies to be effective in relation to other persons.

Copy of order to be provided to members

18.—(1) Where an order is made under regulation 16 (court approval of merger) approving the completion of a cross-border merger, the UK transferee company must, on request by any member, send to him a copy of the order.

(2) If a company makes default in complying with this regulation, an offence is committed by every officer of the company who is in default.

(3) A person guilty of an offence under this regulation is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Copy of order to be delivered to the registrar of companies

19.—(1) Where an order is made under regulation 16 (court approval of merger)—

- (a) the UK transferee company, and
- (b) every UK transferor company,

must deliver a copy of the order to the registrar of companies for registration not more than 7 days after the date on which it was made.

(2) Where an order is made by a competent authority of another EEA State approving the completion of a cross-border merger for the purposes of Article 11 of the Directive (scrutiny of completion of merger), every transferor company which is a UK company must deliver a copy of the order to the registrar of companies for registration not more than 14 days after the date on which it was made.

(3) The following provisions of the Companies Act 2006^(a) apply to an order delivered to the registrar in accordance with paragraph (1) or (2) in the same way as they apply to documents subject to the Directive disclosure requirements (as defined in section 1078(1) of that Act)—

(a) 2006 c.46

- (a) section 1068(5) (registrar to take delivery of documents by electronic means);
- (b) section 1077 (public notice of receipt of certain documents);
- (c) section 1079 (effect of failure to give public notice);
- (d) section 1080 (the register);
- (e) section 1086 (right to copy of material on the register);
- (f) section 1089 (form of application for inspection or copy);
- (g) section 1090 (form and manner in which copies to be provided);
- (h) section 1091 (certification of copies as accurate);
- (i) section 1098 (public notice of removal of certain material from register); and
- (j) section 1106 (voluntary filing of translations).

(4) If a UK merging company makes default in complying with paragraph (1) or (2), an offence is committed by—

- (a) the company, and
- (b) every officer of the company who is in default.

(5) A person guilty of an offence under this regulation is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale.

Obligations of transferee company with respect to articles etc

20.—(1) If an order made under regulation 16 (court approval of merger) amends—

- (a) the articles of association of the UK transferee company, or
- (b) any resolution or agreement in relation to the UK transferee company to which Chapter 3 of Part 3 of the Companies Act 2006^(a) (resolutions and agreements affecting a company's constitution) applies,

the copy of the order delivered to the registrar of companies by the UK transferee company under regulation 19 (copy of order to be delivered to the registrar of companies) must be accompanied by a copy of the company's articles, or the resolution or agreement in question, as amended.

(2) Every copy of the company's articles issued by the company after the order is made must be accompanied by a copy of the order, unless the effect of the order has been incorporated into the articles by amendment.

(3) In this regulation—

- (a) references to the effect of the order include the effect of the cross-border merger to which the order relates; and
- (b) in the case of a company not having articles, references to its articles shall be read as references to the instrument constituting the company or defining its constitution.

(4) If a UK transferee company makes default in complying with this regulation, an offence is committed by—

- (a) the company, and
- (b) every officer of the company who is in default.

(5) A person guilty of an offence under this regulation is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Notification of registration

21.—(1) Where the registrar of companies receives a copy of an order made under regulation 16 (court approval of merger) approving the completion of a cross-border merger, he must—

(a) 2006 c.46

(a) in relation to each transferor company which is an EEA company, give notice of that order to the register in which the company file mentioned in Article 3 of the First Company Law Directive (file for each registered company to be kept in national register) is kept; and

(b) remove from the register the material relating to every UK transferor company.

(2) Where the registrar of companies receives from the registry of another EEA State notice for the purposes of Article 13 of the Directive (notification of registries in other Member States) of an order approving the completion of a cross-border merger, he must remove from the register the material relating to every UK transferor company.

PART 4

EMPLOYEE PARTICIPATION

CHAPTER 1

APPLICATION OF THIS PART

Application of this Part

22.—(1) Chapters 2, 3 and 4 of this Part shall apply in respect of a UK merging company in circumstances where paragraph (2) applies.

(2) This paragraph shall apply where—

(a) a merging company has, in the six months before the publication of the draft terms of merger, an average number of employees that exceeds 500 and is subject to employee participation, or

(b) a merging company has a proportion of employee representatives amongst the members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company.

(3) Chapter 5 shall apply where,

(a) a merging company intends to establish a UK transferee company, or

(b) a UK transferee company is established pursuant to these regulations.

(4) Chapters 6 to 9 shall apply to a UK company to which Chapter 2, 3, 4 or 5 applies.

CHAPTER 2

MERGING COMPANIES AND THE SPECIAL NEGOTIATING BODY

Duty on merging company to provide information

23.—(1) As soon as possible after the directors have adopted the draft terms of merger (see regulation 7), each merging company shall provide information to the representatives of their employees or, if no such representatives exist, the employees themselves.

(2) The information referred to in paragraph (1) must include, as a minimum, information—

(a) identifying the companies concerned in the cross-border merger,

(b) of any decision taken pursuant to regulation 38 (application of the standard rules),

(c) giving the number of employees employed by each merging company, and

(d) giving the number of employees employed to work in each EEA State.

(3) When a special negotiating body has been formed in accordance with regulation 25, the competent organs of each merging company must provide that body with such information as is

necessary to keep it informed of the plan and progress of establishing the transferee company until the date upon which the consequences of the cross-border merger take effect (see regulation 17).

Complaint of failure to provide information

24.—(1) An employee representative or, where there is no such representative for an employee, any employee, may present a complaint to the CAC that—

- (a) the competent organ of a merging company has failed to provide the information referred to in regulation 23; or
- (b) the information provided by the competent organ of a merging company for the purpose of complying with regulation 23 is false or incomplete in a material particular.

(2) Where the CAC finds the complaint well-founded it shall make an order requiring the competent organ to disclose information to the complainant specifying—

- (a) the information in respect of which the CAC finds that the complaint is well-founded and which is to be disclosed to the complainant; and
- (b) a date (not being less than one week from the date of the order) by which the competent organ must disclose the information specified in the order.

The special negotiating body

25.—(1) The competent organs of each merging company shall make arrangements for the establishment of a special negotiating body.

(2) The task of the special negotiating body shall be to reach an employee participation agreement with the merging companies (see Chapter 3) .

(3) The special negotiating body shall be constituted in accordance with regulation 26.

Composition of the special negotiating body

26.—(1) In each EEA State in which employees of a merging company are employed to work, those employees shall be given an entitlement to elect or appoint one member of the special negotiating body, in accordance with these Regulations, for each 10% or fraction thereof which those employees represent of the total workforce. These members shall be the 'ordinary members'.

(2) If, following an election or appointment under paragraph (1), the members elected or appointed to the special negotiating body do not include at least one eligible member in respect of each relevant company the employees of any relevant company in respect of which there is no eligible member shall be given an entitlement, subject to paragraph (3), to elect or appoint an additional member to the special negotiating body.

(3) The number of additional members which the employees are entitled to elect or appoint under paragraph (2) shall not exceed 20% of the number of ordinary members elected or appointed under paragraph (1) and if the number of additional members under paragraph (2) would exceed that percentage the employees who are entitled to appoint or elect the additional members shall be:

- (a) if one additional member is to be appointed or elected, those employed by the company not represented under paragraph (2) having the highest number of employees; and
- (b) if more than one additional member is to be appointed or elected, those employed by the companies in each EEA State that are not represented under paragraph (2) having the highest number of employees in descending order, starting with the company with the highest number, followed by those employed by the companies in each EEA State that are not so represented having the second highest number of employees in descending order, starting with the company (among those companies) with the highest number.

(4) The competent organs of each merging company shall, as soon as reasonably practicable and in any event no later than one month after the establishment of the special negotiating body, inform their employees and those of their concerned subsidiaries of the identity of the members of the special negotiating body.

(5) If, following the appointment or election of members to the special negotiating body in accordance with this regulation,

- (a) changes to the merging companies result in the number of ordinary or additional members which employees would be entitled to elect or appoint under this regulation either increasing or decreasing, the original appointment or election of members of the special negotiating body shall cease to have effect and those employees shall be entitled to elect or appoint the new number of members in accordance with the provisions of these Regulations; and
- (b) a member of the special negotiating body is no longer willing or able to continue serving as such a member, the employees whom he represents shall be entitled to elect or appoint a new member in his place.

(6) In this regulation—

- (a) "eligible member" means a person who is—
 - (i) in the case of a relevant company registered in a EEA State whose legislation allows representatives of trade unions who are not employees to be elected to the special negotiating body, an employee of the relevant company or a trade union representative; and
 - (ii) in the case of a relevant company not registered in such a EEA State, an employee of the relevant company; and
- (b) "relevant company" means a merging company which has employees in the EEA State in which it is registered and which it is proposed will participate in a cross-border merger; and
- (c) "the total workforce" means the total number of employees employed by all merging companies throughout all EEA States.

Complaint about establishment of special negotiating body

27.—(1) An application may be presented to the CAC for a declaration that the special negotiating body has not been established at all or has not been established properly in accordance with regulation 25 or 26.

(2) An application may be presented under this regulation by—

- (a) a person elected or appointed to be a member of the special negotiating body;
- (b) an employee representative or, where no such representative exists in respect of a merging company, an employee of the merging company; or
- (c) the competent organ of a merging company.

(3) The CAC shall only consider an application made under paragraph (1) if it is made within a period of one month from the date or, if more than one, the last date on which the merging companies complied or should have complied with the obligation to inform their employees under regulation 26(4).

(4) Where the CAC finds the application well-founded it shall make a declaration that the special negotiating body has not been established at all or has not been established properly and the competent organs of the merging companies continue to be under the obligation in regulation 25.

CHAPTER 3

NEGOTIATION OF THE EMPLOYEE PARTICIPATION AGREEMENT

Negotiations to reach an employee participation agreement

28.—(1) In this regulation and in regulations 29 and 36 the competent organs of the merging companies and the special negotiating body are referred to as "the parties".

(2) The parties are under a duty to negotiate in a spirit of cooperation with a view to reaching an employee participation agreement.

(3) The duty referred to in paragraph (2) commences one month after the date or, if more than one, the last date on which the members of the special negotiating body were elected or appointed and applies—

- (a) for the period of six months starting with the day on which the duty commenced or, where an employee participation agreement is successfully negotiated within that period, until the completion of the negotiations;
- (b) where the parties agree before the end of that six month period that it is to be extended, for the period of twelve months starting with the day on which the duty commenced or, where an employee participation agreement is successfully negotiated within the twelve month period, until the completion of the negotiations.

The employee participation agreement

29.—(1) The employee participation agreement must be in writing.

(2) Without prejudice to the autonomy of the parties, the employee participation agreement shall specify—

- (a) the scope of the agreement;
- (b) if, during negotiations, the parties decide to establish arrangements for participation, the substance of those arrangements including (if applicable) the number of members in the transferee company's administrative or supervisory organ which the employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how these members may be elected, appointed, recommended or opposed by the employees, and their rights; and
- (c) the date of entry into force of the agreement, its duration, the circumstances, if any in which the agreement is required to be re-negotiated and the procedure for its re-negotiation.

(3) The employee participation agreement shall not be subject to the standard rules on employee participation (see regulation 37), unless it contains a provision to the contrary.

Decisions of the special negotiating body

30.—(1) Each member of the special negotiating body shall have one vote.

(2) Subject to paragraph (3) and regulation 31 (decision not to open or to terminate negotiations), the special negotiating body shall take decisions by an absolute majority vote.

(3) Where at least 25% of the employees employed to work in the EEA States by the merging companies have participation rights, any decision which would result in a reduction of participation rights must be taken by a two thirds majority vote.

(4) In paragraph (3), reduction of participation rights means that the proportion of members of the supervisory or administrative organ of the transferee company who may be elected or appointed (or whose appointment may be recommended or opposed) by virtue of participation is lower than the proportion of such members in the merging company which had the highest proportion of such members.

(5) The special negotiating body must publish the details of any decision taken under this regulation or under regulation 31 (decision not to open or to terminate negotiations) in such a manner as to bring the decision, so far as reasonably practicable, to the attention of the employees whom they represent and such publication shall take place as soon as reasonably practicable and, in any event no later than 14 days after the decision has been taken.

(6) For the purpose of negotiations, the special negotiating body may be assisted by experts of its choice.

(7) The merging companies shall pay for any reasonable expenses of the functioning of the special negotiating body and any reasonable expenses relating to the negotiations that are

necessary to enable the special negotiating body to carry out its functions in an appropriate manner; but where the special negotiating body is assisted by more than one expert the merging companies are not required to pay such expenses in respect of more than one of them.

Decision not to open or to terminate negotiations

31.—(1) The special negotiating body may decide, by a majority vote of two thirds of its members, representing at least two thirds of the employees, including the votes of members representing employees in at least two different EEA States, not to open negotiations pursuant to regulation 28 (negotiations to reach an employee participation agreement) or to terminate negotiations already opened.

(2) Any decision made under paragraph (1) shall have the following effects—

- (a) the duty in regulation 28 to negotiate with a view to establishing an employee participation agreement shall cease as from the date of the decision; and
- (b) any rules relating to employee participation in an EEA State in which employees of the transferee company are employed, other than those contained in these Regulations, shall apply to the employees of the transferee company in that State.

Complaint about decisions of special negotiating body

32.—(1) A member of the special negotiating body, an employee representative, or where there is no such representative in respect of an employee, that employee may present a complaint to the CAC if he believes that the special negotiating body has taken a decision referred to in regulation 30 or 31 and—

- (a) that the decision was not taken by the majority required by regulation 30 or 31; or
- (b) that the special negotiating body failed to publish the decision in accordance with regulation 30(5).

(2) The complaint must be presented to the CAC—

- (a) in the case of a complaint under paragraph (1)(a) (required majority), within 21 days of publication of the decision of the special negotiating body;
- (b) in the case of a complaint under paragraph (1)(b) (failure to publish decision), within 21 days of the date on which the decision should have been published .

(3) Where the CAC finds the complaint well-founded it shall make a declaration that the decision was not taken properly and that it shall have no effect.

CHAPTER 4

ELECTION OR APPOINTMENT OF UNITED KINGDOM MEMBERS OF THE SPECIAL NEGOTIATING BODY

Ballot arrangements

33.—(1) The United Kingdom members of the special negotiating body shall be elected by balloting the UK employees.

(2) The management of the participating companies that employ UK employees (“the management”) must arrange for the holding of a ballot or ballots of those employees in accordance with the requirements of paragraph (3).

(3) The requirements referred to in paragraph (2) are—

- (a) in relation to the election of ordinary members under regulation 26(1) , that—
 - (i) if the number of members which UK employees are entitled to elect to the special negotiating body is equal to the number of merging companies which have UK employees, there shall be separate ballots of the UK employees in each merging company;

- (ii) if the number of members which the UK employees are entitled to elect to the special negotiating body is greater than the number of merging companies which have UK employees, there shall be separate ballots of the UK employees in each merging company and the management shall ensure, as far as practicable, that at least one member representing each such merging company is elected to the special negotiating body and that the number of members representing each company is proportionate to the number of employees in that company;
 - (iii) if the number of members which the UK employees are entitled to elect to the special negotiating body is smaller than the number of merging companies which have employees in the United Kingdom,—
 - (aa) the number of ballots held shall be equivalent to the number of members to be elected;
 - (bb) a separate ballot shall be held in respect of each of the merging companies with the higher or highest number of employees; and
 - (cc) it shall be ensured that any employees of a merging company in respect of which a ballot does not have to be held are entitled to vote in a ballot held in respect of one of the other merging companies; and
 - (iv) if there are any UK employees employed by a concerned subsidiary or establishment of non-United Kingdom merging companies, the management shall ensure that those employees are entitled to vote in a ballot held pursuant to this regulation;
 - (b) that in relation to the ballot of additional members under regulation 26(2) the management shall hold a separate ballot in respect of each merging company entitled to elect an additional member;
 - (c) that in a ballot in respect of a particular merging company, all UK employees employed by that merging company are entitled to vote;
 - (d) that in a ballot in respect of a particular merging company, any person who is immediately before the latest time at which a person may become a candidate—
 - (i) a UK employee employed by that merging company; or
 - (ii) if the management of that merging company so permits, a representative of a trade union who is not an employee of that merging company,
 is entitled to stand as a candidate for election as a member of the special negotiating body in that ballot;
 - (e) that the management must, in accordance with paragraph (7), appoint an independent ballot supervisor to supervise the conduct of the ballot of UK employees but may instead, where there is to be more than one ballot, appoint more than one independent ballot supervisor in accordance with that paragraph, each of whom is to supervise such of the separate ballots as the management may determine, provided that each separate ballot is supervised by a supervisor;
 - (f) that after the management has formulated proposals as to the arrangements for the ballot of UK employees and before it has published the final arrangements under sub-paragraph (g) it must, so far as reasonably practicable, consult with the UK employee representatives on the proposed arrangements for the ballot of UK employees; and
 - (g) that the management must publish the final arrangements for the ballot of UK employees in such manner as to bring them to the attention of, so far as reasonably practicable, all UK employees and the UK employee representatives.
- (4) Any UK employee or UK employees' representative who believes that the arrangements for the ballot of the UK employees do not comply with the requirements of paragraph (3) may, within a period of 21 days beginning on the date on which the management published the final arrangements under sub-paragraph (g), present a complaint to the CAC.
- (5) Where the CAC finds the complaint well-founded it shall make a declaration to that effect and may make an order requiring the management to modify the arrangements it has made for the

ballot of United Kingdom employees or to satisfy the requirements in sub-paragraph (f) or (g) of paragraph (3).

(6) An order under paragraph (5) shall specify the modifications to the arrangements which the management is required to make and the requirements it must satisfy.

(7) A person is an independent ballot supervisor for the purposes of paragraph (3)(e) if the management reasonably believes that he will carry out any functions conferred on him in relation to the ballot competently and has no reasonable grounds for believing that his independence in relation to the ballot might reasonably be called into question.

Conduct of the ballot

34.—(1) The management must—

- (a) ensure that a ballot supervisor appointed under regulation 33(3)(e) carries out his functions under this regulation and that there is no interference with his carrying out of those functions from the management; and
- (b) comply with all reasonable requests made by a ballot supervisor for the purposes of, or in connection with, the carrying out of those functions.

(2) A ballot supervisor's appointment shall require that he—

- (a) supervises the conduct of the ballot, or the separate ballots he is being appointed to supervise, in accordance with the arrangements for the ballot of UK employees published by the management under regulation 33(3)(g) or, where appropriate, in accordance with the arrangements as required to be modified by an order made as a result of a complaint presented under regulation 33(4);
- (b) does not conduct the ballot or any of the separate ballots before the United Kingdom management has satisfied the requirement specified in regulation 33(3)(g) and—
 - (i) where no complaint has been presented under regulation 33(4), before the expiry of a period of 21 days beginning on the date on which the management published its arrangements under regulation 33(3)(g); or
 - (ii) where a complaint has been presented under regulation 33(4), before the complaint has been determined and, where appropriate, the arrangements have been modified as required by an order made as a result of that complaint;
- (c) conducts the ballot, or each separate ballot so as to secure that—
 - (i) so far as reasonably practicable, those entitled to vote are given the opportunity to vote;
 - (ii) so far as reasonably practicable, those entitled to stand as candidates are given the opportunity to stand;
 - (iii) so far as reasonably practicable, those voting are able to do so in secret; and
 - (iv) the votes given in the ballot are fairly and accurately counted.

(3) As soon as reasonably practicable after the holding of the ballot, the ballot supervisor must publish the results of the ballot in such manner as to make them available to the management and, so far as reasonably practicable, the UK employees entitled to vote in the ballot and the persons who stood as candidates.

(4) A ballot supervisor shall publish a report (“an ineffective ballot report”) where he considers (whether on the basis of representations made to him by another person or otherwise) that—

- (a) any of the requirements referred to in paragraph (2) was not satisfied with the result that the outcome of the ballot would have been different; or
- (b) there was an interference with the carrying out of his functions or a failure by management to comply with all reasonable requests made by him with the result that he was unable to form a proper judgement as to whether each of the requirements referred to in paragraph (2) was satisfied in the ballot.

(5) Where a ballot supervisor publishes an ineffective ballot report the report must be published within a period of one month commencing on the date on which the ballot supervisor publishes the results of the ballot under paragraph (3).

(6) A ballot supervisor shall publish an ineffective ballot report in such manner as to make it available to the management and, so far as reasonably practicable, the UK employees entitled to vote in the ballot and the persons who stood as candidates in the ballot.

(7) Where a ballot supervisor publishes an ineffective ballot report then—

(a) if there has been a single ballot or an ineffective ballot report has been published in respect of every separate ballot, the outcome of the ballot or ballots shall have no effect and the United Kingdom management shall again be under the obligation in regulation 33(2) (management to hold ballot for election of special negotiating body).

(b) If there have been separate ballots and sub-paragraph (a) does not apply—

(i) the management shall arrange for the separate ballot or ballots in respect of which an ineffective ballot report was published to be re-held in accordance with regulation 33 and this regulation; and

(ii) no such ballot shall have effect until it has been re-held and no ineffective ballot report has been published in respect of it.

(8) All costs relating to the holding of a ballot, including payments made to a ballot supervisor for supervising the conduct of the ballot, shall be borne by the management (whether or not an ineffective ballot report has been published).

Representation of employees

35.—(1) Subject to paragraph (2), a member elected in a ballot in accordance with regulation 26(1), shall be treated as representing the employees for the time being of the merging company whose employees were entitled to vote in the ballot in which he was elected.

(2) If an additional member is elected in accordance with regulation 26(2) and (3), he, and not any member elected in accordance with regulation 26(1), shall be treated as representing the employees for the time being of the merging company whose employees were entitled to vote in the ballot in which he was elected.

CHAPTER 5

STANDARD RULES ON EMPLOYEE PARTICIPATION

Application of the standard rules on employee participation

36.—(1) The standard rules on participation shall apply in circumstances where paragraph 2 applies and where –

(a) the parties agree that they should; or

(b) the period specified in regulation 28(3) (duty to negotiate employee participation agreement) has expired without the parties reaching an employee participation agreement and—

(i) the competent organs of each of the merging companies agree that they should; and

(ii) the special negotiating body has not taken any decision under regulation 31 either not to open or to terminate the negotiations referred to in that regulation.

(2) This paragraph applies where before registration of the transferee company, one or more forms of participation existed in at least one of the merging companies and either—

(i) that participation applied to at least one third of the total number of employees of the merging companies employed in the EEA States, or

(ii) that participation applied to less than one third of the total number of employees of the merging companies employed in the EEA States but the special negotiating body

has decided that the standard rules of participation will apply to the employees of the transferee company.

(3) Where the standard rules on participation apply and more than one form of employee participation existed in the merging companies, the special negotiating body shall decide which of the existing forms of participation shall exist in the transferee company and shall inform the competent organs of the merging companies accordingly.

(4) In circumstances where—

- (i) the standard rules on participation apply, more than one form of employee participation existed in the merging companies and the special negotiating body has failed to make a decision in accordance with paragraph (2); or
- (ii) more than one form of employee participation existed in the merging companies and the merging companies have chosen, without any prior negotiation, to be directly subject to the standard rules for employee participation; or
- (iii) one form of employee participation existed in the merging companies and the merging companies have chosen, without any prior negotiation, to be directly subject to the standard rules for employee participation

[...]

The standard rules for participation

37.—(1) The [...] shall have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the transferee company, such number to be equal to the number in the merging company which had the highest proportion of such members.

(2) Subject to paragraph (3), the [...] shall, taking into account the proportion of employees of the transferee company employed in each Member State, decide on the allocation of seats within the administrative or supervisory body, or on the means by which the transferee's employees may recommend or oppose the appointment of the members of these bodies.

(3) In making the decision set out in paragraph (2), if the employees of one or more EEA State is not covered by the proportional criterion set out in paragraph (2), the [...] shall appoint a member from one of those EEA States including one from the United Kingdom, if appropriate.

(4) Every member of the administrative or supervisory body of the transferee company who has been elected, appointed or recommended by the [...] shall be a full member with the same rights and obligations as the members representing shareholders, including the right to vote.

Application of the standard rules

38. The competent organs of the merging companies may choose, without any prior negotiation, to be directly subject to the standard rules for employee participation from the date upon which the consequences of the cross-border merger take effect (see regulation 17).

Limit on level of employee participation

39. Where, following prior negotiation, the standard rules for employee participation apply, the transferee company may limit the proportion of employee representatives in the supervisory or administrative organ of the company to a level—

- (a) equal to the highest proportion in force in the merging companies prior to registration, and
- (b) no greater than one third.

Subsequent domestic mergers

40. A transferee company resulting from a cross border merger that operates under an employee participation system shall ensure that employees' rights to employee participation shall extend to

any subsequent United Kingdom merger for a period of 3 years from the date of the registration of the transferee company.

CHAPTER 6 CONFIDENTIAL INFORMATION

Duty of confidentiality

41.—(1) Where a transferee company or merging company entrusts a person, pursuant to the provisions of this Part, with any information or document on terms requiring it to be held in confidence, the person shall not disclose that information or document except in accordance with the terms on which it was disclosed to him.

(2) In this regulation a person referred to in paragraph (1) to whom information or a document is entrusted is referred to as a "recipient".

(3) The obligation to comply with paragraph (1) is a duty owed to the company that disclosed the information to the recipient and a breach of the duty is actionable accordingly (subject to the defences and other incidents applying to actions for breach of statutory duty).

(4) Paragraph (3) does not affect any legal liability which any person may incur by disclosing the information, or any right which any person may have in relation to such disclosure otherwise than under this Regulation.

(5) No action shall lie under paragraph (3) where the recipient reasonably believed the disclosure to be a protected disclosure within the meaning given to that expression by section 43A of the 1996 Act(a).

(6) A recipient may apply to the CAC for a declaration as to whether it was reasonable for the company to require the recipient to hold the information or document in confidence.

(7) If the CAC considers that the disclosure of the information or the document by the recipient would not, or would not be likely to, harm the legitimate interests of the undertaking, it shall make a declaration that it was not reasonable for the company to require the recipient to hold the information or document in confidence.

(8) If a declaration is made under paragraph (7), the information or document shall not at any time thereafter be regarded as having been entrusted to any recipient on terms requiring it to be held in confidence.

Withholding of information by the competent organ

42.—(1) Neither a transferee company or merging company is required to disclose any information or document to a person for the purposes of this Part where the nature of the information or document is such that, according to objective criteria, the disclosure of the information or document would seriously harm the functioning of, or would be prejudicial to the transferee company or merging company.

(2) Where there is a dispute between the transferee company or merging company and—

(a) where a special negotiating body has been appointed or elected, a member of that body;
or

(b) where no special negotiating body has been elected or appointed, an employee,

as to whether the nature of any information or document is such as is described in paragraph (1), the transferee company or merging company or a person referred to in sub-paragraph (a) or (b) may apply to the CAC for a declaration as to whether the information or document is of such a nature.

(3) If the CAC makes a declaration that the disclosure of the information or document in question would not, according to objective criteria, be seriously harmful or prejudicial as

(a) Section 43A was inserted into the 1996 Act by the Public Interest Disclosure Act (c.23), s.1.

mentioned in paragraph (1), the CAC shall order the competent organ to disclose the information or document.

- (4) An order under paragraph (3) shall specify—
- (a) the information or document to be disclosed;
 - (b) the person or persons to whom the information or document is to be disclosed;
 - (c) any terms on which the information or document is to be disclosed; and
 - (d) the date before which the information or document is to be disclosed.

CHAPTER 7

PROTECTION FOR MEMBERS OF SPECIAL NEGOTIATING BODY, ETC.

Right to time off for members of special negotiating body, etc.

43.—(1) An employee who is—

- (a) a member of a special negotiating body;
- (b) an employee member on a supervisory or administrative organ; or
- (c) a candidate in an election in which any person elected will, on being elected, be such a member,

is entitled to be permitted by his employer to take reasonable time off during the employee's working hours in order to perform his functions as such a member or candidate.

(2) For the purpose of this regulation the working hours of an employee shall be taken to be any time when, in accordance with his contract of employment, the employee is required to be at work.

Right to remuneration for time off under regulation 43

44.—(1) An employee who is permitted to take time off under regulation 43 is entitled to be paid remuneration by his employer for the time taken off at the appropriate hourly rate.

(2) Chapter 2 of Part 14 of the 1996 Act (a week's pay) shall apply in relation to this regulation as it applies in relation to section 62 of the 1996 Act.

(3) The appropriate hourly rate, in relation to an employee, is the amount of one week's pay divided by the number of normal working hours in a week for that employee when employed under the contract of employment in force on the day when the time is taken.

(4) But where the number of normal working hours differs from week to week or over a longer period, the amount of one week's pay shall be divided instead by—

- (a) the average number of normal working hours calculated by dividing by twelve the total number of the employee's normal working hours during the period of twelve weeks ending with the last complete week before the day on which the time off is taken; or
- (b) where the employee has not been employed for a sufficient period to enable the calculation to be made under sub-paragraph (a), a number which fairly represents the number of normal working hours in a week having regard to such of the considerations specified in paragraph (5) as are appropriate in the circumstances.

(5) The considerations referred to in paragraph (4)(b) are—

- (a) the average number of normal working hours in a week which the employee could expect in accordance with the terms of his contract; and
- (b) the average number of normal working hours of other employees engaged in relevant comparable employment with the same employer.

(6) A right to any amount under paragraph (1) does not affect any right of an employee in relation to remuneration under his contract of employment.

(7) Any contractual remuneration paid to an employee in respect of a period of time off under regulation 43 goes towards discharging any liability of the employer to pay remuneration under paragraph (1) in respect of that period, and conversely, any payment of remuneration under

paragraph (1) in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

Right to time off: complaints to employment tribunals

- 45.**—(1) An employee may present a complaint to an employment tribunal that his employer—
- (a) has unreasonably refused to permit him to take time off as required under regulation 43; or
 - (b) has failed to pay the whole or any part of any amount to which the employee is entitled under regulation 44.
- (2) An employment tribunal shall not consider a complaint under this regulation unless it is presented—
- (a) before the end of the period of three months beginning with the day on which the time off was taken or on which it is alleged the time off should have been permitted; or
 - (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
- (3) Where an employment tribunal finds a complaint under this regulation well-founded, the tribunal shall make a declaration to that effect.
- (4) If the complaint is that the employer has unreasonably refused to permit the employee to take time off, the tribunal shall also order the employer to pay to the employee an amount equal to the remuneration to which he would have been entitled under regulation 44 if the employer had not refused.
- (5) If the complaint is that the employer has failed to pay the employee the whole or part of any amount to which he is entitled under regulation 44, the tribunal shall also order him to pay to the employee the amount which it finds is due to him.

Unfair dismissal of employee

- 46.**—(1) An employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part 10 of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is one reason specified in paragraph (2).
- (2) The reasons are that the employee—
- (a) took, or proposed to take, any proceedings before an employment tribunal to enforce any right conferred on him by these Regulations;
 - (b) exercised, or proposed to exercise, any entitlement to apply or complain to the CAC or the Appeal Tribunal conferred by these Regulations or exercised or proposed to exercise the right to appeal in connection with any rights conferred by these Regulations;
 - (c) acted with a view to securing that a special negotiating body did or did not come into existence;
 - (d) indicated that he did or did not support the coming into existence of a special negotiating body;
 - (e) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body or an employee member on a supervisory or administrative organ;
 - (f) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;
 - (g) voted in such a ballot;
 - (h) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or

- (i) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (h).

(3) Paragraph 1 does not apply where the reason (or principal reason) for the dismissal is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 41, unless the employee reasonably believed the disclosure to be a protected disclosure within the meaning given to that expression by section 43A of the 1996 Act.

(4) For the purposes of paragraph 2(a) it is immaterial –

- (a) whether or not the employee has the right or entitlement; or
- (b) whether or not the right has been infringed,

but for that sub-paragraph to apply, the claim to the right and, if applicable, the claim that it has been infringed must be made in good faith.

Unfair dismissal of member of special negotiating body or supervisory organ

47.—(1) An employee who is—

- (a) a member of a special negotiating body;
- (b) an employee member of a supervisory or administrative organ; or
- (c) a candidate in an election in which any person elected will, on being elected, be such a member,

who is dismissed shall be regarded as unfairly dismissed for the purposes of Part 10 of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is one reason specified in paragraph (2)

(2) The reasons are that—

- (a) the employee performed or proposed to perform any functions or activities as such a member or candidate; or
- (b) the employee or a person acting on his behalf made or proposed to make a request to exercise an entitlement conferred on the employee by regulation 43 or 44.

(3) Paragraph (1) does not apply in the circumstances set out in paragraph (2)(a) where the reason (or principal reason) for the dismissal is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 41, unless the employee reasonably believed the disclosure to be a protected disclosure within the meaning given to that expression by section 43A of the 1996 Act.

Subsidiary provisions relating to unfair dismissal

48.—(1) In section 105 of the 1996 Act (redundancy as unfair dismissal) in subsection (1)(c) (which requires one of a specified group of subsections to apply for a person to be treated as unfairly dismissed)**(a)**—

- (a) for "(2A) to (7J)" substitute "(2A) to (7K)", and
- (b) after subsection (7J) insert—

“(7K) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in regulation 46 or 47 of the Companies (Cross-Border Mergers) Regulations 2007.”.

(2) In section 108**(b)** of the 1996 Act (exclusion of right: qualifying period of employment) in subsection (3) (cases where no qualifying period of employment is required)**(c)**—

-
- (a) Section 105 has been amended on a number of occasions to specify additional circumstances in which an employee dismissed by reason of redundancy is to be regarded as unfairly dismissed.
 - (b) Section 108(1) was amended by S.I. 1999/1436, article 3.
 - (c) Section 108(3) has been amended on a number of occasions to specify additional cases in which no qualifying period of employment is required.

- (a) omit the word "or" at the end of paragraph (n); and
- (b) after paragraph (o) insert—
 - “or
 - (p) regulation 46 or 47 of the Companies (Cross-Border Mergers) Regulations 2007 applies.”.

Detriment

49.—(1) An employee has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer, done on a ground specified in paragraph (2).

- (2) The grounds are that the employee —
 - (a) took, or proposed to take, any proceedings before an employment tribunal to enforce any right conferred on him by these Regulations exercised, or proposed to exercise, any entitlement to apply or complain to the CAC or the Appeal Tribunal conferred by these Regulations or exercised or proposed to exercise the right to appeal in connection with any rights conferred by these Regulations;
 - (b) acted with a view to securing that a special negotiating body did or did not come into existence;
 - (c) indicated that he did or did not support the coming into existence of a special negotiating body;
 - (d) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body or an employee member of a supervisory or administrative organ;
 - (e) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;
 - (f) voted in such a ballot;
 - (g) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or
 - (h) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (h).
- (3) It is immaterial for the purposes of paragraph (2)(a)—
 - (a) whether or not the employee has the right or entitlement; or
 - (b) whether or not the right has been infringed,

but for that sub-paragraph to apply, the claim to the right and, if applicable, the claim that has been infringed must be made in good faith.

- (4) This regulation does not apply where the detriment in question amounts to dismissal.

Detriment for member of special negotiating body or supervisory organ

- 50.**—(1) An employee who is –
- (a) a member of a special negotiating body;
 - (b) an employee member of a supervisory or administrative organ; or
 - (c) a candidate in an election in which any person elected will, on being elected, be such a member,

has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer, done on a ground specified in paragraph (2).

- (2) The ground is that—
 - (a) the employee performed or proposed to perform any functions or activities as such a member or candidate; or

- (b) the employee or person acting on his behalf made or proposed to make a request to exercise an entitlement conferred on the employee by regulation 43 or 44.
- (3) Paragraph (1) does not apply in the circumstances set out in paragraph (2)(a) where the ground for the subjection to detriment is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 41 (duty of confidentiality), unless the employee reasonably believed the disclosure to be a protected disclosure within the meaning given to that expression by section 43A of the 1996 Act.
- (4) This regulation does not apply where the detriment in question amounts to a dismissal.

Detriment: enforcement and subsidiary provisions

51.—(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of regulation 49 or 50.

(2) The provisions of section 49(1) to (5)(a) of the 1996 Act shall apply in relation to a complaint under this regulation.

Conciliation

52. In section 18 of the Employment Tribunals Act 1996 (conciliation), in subsection (1) (which specifies the proceedings and claims to which the section applies)(b)—

- (a) omit the word "or" at the end of paragraph (r); and
- (b) after paragraph (s) insert

“or

(t) under regulation 45 or 51 of the Companies (Cross-Border Mergers) Regulations 2007.”.

CHAPTER 8

COMPLIANCE AND ENFORCEMENT

Disputes about operation of an employee participation agreement or the standard rules on employee participation

53.—(1) Where—

- (a) an employee participation agreement has been agreed; or
- (b) the standard rules on employee participation apply,

a complaint may be presented to the CAC by a relevant applicant who considers that the competent organ of a merging company or of the transferee company has failed to comply with the terms of the employee participation agreement or, as the case may be, the standard rules on employee participation.

(2) A complaint brought under paragraph (1) must be brought within a period of 3 months commencing with the date of the alleged failure, or where the failure takes place over a period, the last day of that period.

(3) In this regulation—

"failure" includes failure by means of an act or omission,

"relevant applicant" means—

- (a) a special negotiating body; or

(a) Subsection (3) was amended by the Employment Rights (Dispute Resolution) Act 1998, s.1(2)(a).

(b) 1996 c.17. Section 18(1) has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.

(b) in a case where no special negotiating body has been elected or appointed, or has been dissolved, an employee of the transferee company.

(4) Where the CAC finds the complaint well-founded it shall make a declaration to that effect and may make an order requiring the transferee company to take such steps as are necessary to comply with the terms of the employee participation agreement or, as the case may be, the standard rules on employee participation.

(5) An order made under paragraph (4) shall specify—

- (a) the steps which the transferee company is required to take;
- (b) the date of the failure; and
- (c) the period within which the order must be complied with.

(6) If the CAC makes a declaration under paragraph (4), the relevant applicant may, within the period of three months beginning with the day on which the decision is made, make an application to the Appeal Tribunal for a penalty notice to be issued.

(7) Where such an application is made, the Appeal Tribunal shall issue a written penalty notice to the transferee company requiring it to pay a penalty to the Secretary of State in respect of the failure unless satisfied, on hearing representations from the transferee company, that the failure resulted from a reason beyond its control or that it has some other reasonable excuse for its failure.

(8) Regulation 55 (penalties) shall apply in respect of a penalty notice issued under this regulation.

(9) No order of the CAC under this regulation shall have the effect of suspending or altering the effect of any act done or of any agreement made by the transferee company or merging company.

Misuse of procedures

54.—(1) If an employee representative, or where there is no such representative in relation to an employee, an employee, believes that a transferee company or merging company is misusing or intending to misuse the transferee company or the powers in these Regulations for the purpose of—

- (a) depriving the employees of that merging company or the transferee company of their rights to employee participation; or
- (b) withholding rights from any of the people referred to in sub-paragraph (a),

he may make a complaint to the CAC.

(2) A complaint must be made to the CAC under paragraph (1) before the date upon which the consequences of the cross-border merger take effect (see regulation 17) or within a period of 12 months after that date.

(3) The CAC shall uphold the complaint unless the respondent proves that it did not misuse or intend to misuse the transferee company or the powers in these Regulations for either of the purposes set out in sub-paragraphs (a) or (b) of paragraph (1).

(4) If the CAC finds the complaint to be well founded—

- (a) it shall make a declaration to that effect and may make an order requiring the transferee company or merging company to take such action as is specified in the order to ensure that the employees referred to in paragraph (1)(a) are not deprived of their rights to employee participation or that such rights are not withheld from them; and
- (b) the provisions in regulations 53(6) to (9) and 55 shall apply to the complaint.

(5) If the CAC makes a declaration under paragraph (4), the relevant applicant may, within the period of three months beginning with the day on which the decision is made, make an application to the Appeal Tribunal for a penalty notice to be issued.

(6) Where such an application is made, the Appeal Tribunal shall issue a written penalty notice to the transferee company or merging company requiring it to pay a penalty to the Secretary of State in respect of the failure unless satisfied, on hearing representations from the transferee

company or merging company, that the failure resulted from a reason beyond its control or that it has some other reasonable excuse for its failure.

(7) Regulation 55 (penalties) shall apply in respect of a penalty notice issued under this regulation.

(8) No order of the CAC under this regulation shall have the effect of suspending or altering the effect of any act done or of any agreement made by the transferee company or merging company.

Penalties

55.—(1) A penalty notice issued under regulation 53 (disputes) or 54 (misuse of procedures) shall specify—

- (a) the amount of the penalty which is payable;
- (b) the date before which the penalty must be paid; and
- (c) the failure and period to which the penalty relates.

(2) No penalty set by the Appeal Tribunal under this regulation may exceed £75,000.

(3) When setting the amount of the penalty, the Appeal Tribunal shall take into account—

- (a) the gravity of the failure;
- (b) the period of time over which the failure occurred;
- (c) the reason for the failure;
- (d) the number of employees affected by the failure; and
- (e) the number of employees employed by the undertaking.

(4) The date specified under paragraph (1)(b) above must not be earlier than the end of the period within which an appeal against a decision or order made by the CAC under regulation 53 may be made.

(5) If the specified date in a penalty notice has passed and—

- (a) the period during which an appeal may be made has expired without an appeal having been made; or
- (b) such an appeal has been made and determined,

the Secretary of State may recover from the transferee company, as a civil debt due to him, any amount payable under the penalty notice which remains outstanding.

(6) The making of an appeal suspends the effect of the penalty notice.

(7) Any sums received by the Secretary of State under regulation 53 or this regulation shall be paid into the Consolidated Fund.

Exclusivity of remedy

56. Where these Regulations provide for a remedy of infringement of any right by way of application or complaint to the CAC, and provide for no other remedy, no other remedy is available for infringement of that right.

CHAPTER 9 MISCELLANEOUS

CAC proceedings

57.—(1) Where under these Regulations a person presents a complaint or makes an application to the CAC the complaint or application must be in writing and in such form as the CAC may require.

(2) In its consideration of a complaint or application under these Regulations, the CAC shall make such enquiries as it sees fit and give any person whom it considers has a proper interest in the complaint or application an opportunity to be heard.

(3) Where a transferee company or merging company has its registered office in England and Wales—

- (a) a declaration made by the CAC under these Regulations may be relied on as if it were a declaration or order made by the High Court in England and Wales; and
- (b) an order made by the CAC under these Regulations may be enforced in the same way as an order of the High Court in England and Wales.

(4) Where a transferee company or merging company has its registered office in Scotland—

- (a) a declaration or order made by the CAC under these Regulations may be relied on as if it were a declaration or order made by the Court of Session; and
- (b) an order made by the CAC under these Regulations may be enforced in the same way as an order of the Court of Session.

(5) A declaration or order made by the CAC under these Regulations must be in writing and state the reasons for the CAC's findings.

(6) An appeal lies to the Appeal Tribunal on any question of law arising from any declaration or order of, or arising in any proceedings before, the CAC under these Regulations.

Appeal Tribunal: location of certain proceedings under these Regulations

58.—(1) Any proceedings before the Appeal Tribunal under these Regulations, other than appeals under paragraph (u) of section 21(1) of the Employment Tribunals Act 1996^(a) (appeals from employment tribunals on questions of law), shall—

- (a) where the registered office of the transferee company or merging company is situated in England and Wales, be held in England and Wales; and
- (b) where the registered office of the transferee company or merging company is situated in Scotland, be held in Scotland.

(2) In section 20(4) of the Employment Tribunals Act 1996 (the Appeal Tribunal)—

- (a) for “2004 and” substitute “2004,”; and
- (b) after “Regulations 2006” insert “and regulation 58(1) of the Companies (Cross-Border Mergers) Regulations 2007”.

Appeal Tribunal: appeals from employment tribunals

59. In section 21(1) of the Employment Tribunals Act 1996 (circumstances in which an appeal lies to the Appeal Tribunal from an employment tribunal)—

- (a) omit the word “or” at the end of paragraph (s); and
- (b) after paragraph (t), insert—

“ or

(u) the Companies (Cross-Border Mergers) Regulations 2007.”.

ACAS

60.—(1) If on receipt of an application or complaint under these Regulations the CAC is of the opinion that it is reasonably likely to be settled by conciliation, it shall refer the application or complaint to the Advisory, Conciliation and Arbitration Service (“ACAS”) and shall notify the applicant or complainant and any persons whom it considers have a proper interest in the

(a) Section 21(1) has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.

application or complaint accordingly, whereupon ACAS shall seek to promote a settlement of the matter.

(2) If an application or complaint so referred is not settled or withdrawn and ACAS is of the opinion that further attempts at conciliation are unlikely to result in a settlement, it shall inform the CAC of its opinion.

(3) If—

- (a) the application or complaint is not referred to ACAS; or
- (b) ACAS informs the CAC of its opinion that further attempts at conciliation are unlikely to result in a settlement,

the CAC shall proceed to hear and determine the application or complaint.

Restrictions on contracting out: general

61.—(1) Any provision in any agreement (whether an employee's contract or not) is void in so far as it purports—

- (a) to exclude or limit the operation of any provision of this Part of these Regulations other than a provision of Chapter 7 (but see regulation 62); or
- (b) to preclude a person from bringing any proceedings before the CAC, under any provision of this Part (other than a provision of that Chapter).

(2) Paragraph (1) does not apply to any agreement to refrain from continuing any proceedings referred to in sub-paragraph (b) of that paragraph made after the proceedings have been instituted.

Restrictions on contracting out: Chapter 7 of this Part

62.—(1) Any provision in any agreement (whether an employee's contract or not) is void in so far as it purports—

- (a) to exclude or limit the operation of any provision of Chapter 7 of this Part of these Regulations; or
- (b) to preclude a person from bringing any proceedings before an employment tribunal under that Chapter.

(2) Paragraph (1) does not apply to any agreement to refrain from instituting or continuing proceedings before an employment tribunal where a conciliation officer has taken action under section 18 of the Employment Tribunals Act 1996 (conciliation).

(3) Paragraph (1) does not apply to any agreement to refrain from instituting or continuing before an employment tribunal proceedings within section 18(1) of the Employment Tribunals Act 1996 if the conditions regulating compromise agreements under these Regulations are satisfied in relation to the agreement.

(4) For the purposes of paragraph (3) the conditions regulating compromise agreements are that—

- (a) the agreement must be in writing;
- (b) the agreement must relate to the particular proceedings;
- (c) the employee must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal;
- (d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the employee in respect of loss arising in consequence of the advice;
- (e) the agreement must identify the adviser; and
- (f) the agreement must state that the conditions in sub-paragraphs (a) to (e) are satisfied.

(5) A person is a relevant independent adviser for the purposes of paragraph (4)(c)—

- (a) if he is a qualified lawyer;
- (b) if he is an officer, official, employee or member of an independent trade union who has been certified in writing by the trade union as competent to give advice and authorised to do so on behalf of the trade union; or
- (c) if he works at an advice centre (whether as an employee or as a volunteer) and has been certified in writing by the centre as competent to give advice and authorised to do so on behalf of the centre.

(6) But a person is not a relevant independent adviser for the purposes of paragraph (4)(c) in relation to the employee—

- (a) if he is, is employed by or is acting in the matter for the employer or an associated employer;
- (b) in the case of a person within paragraph (5)(b) or (c), if the trade union or advice centre is the employer or an associated employer; or
- (c) in the case of a person within paragraph (5)(b) or (c), if the trade union or advice centre is the employer or an associated employer; or

(7) In paragraph (5)(a), a "qualified lawyer" means—

- (a) as respects England and Wales, a barrister (whether in practice as such or employed to give legal advice), a solicitor who holds a practising certificate, or a person other than a barrister or solicitor who is an authorised advocate or authorised litigator (within the meaning of the Courts and Legal Services Act 1990(a)) and
- (b) as respects Scotland, an advocate (whether in practice as such or employed to give legal advice) or a solicitor who holds a practising certificate.

(8) A person shall be treated as being a qualified lawyer within sub-paragraph (7)(a) if he is a Fellow of the Institute of Legal Executives employed by a solicitors' practice.

(9) For the purposes of paragraph (6) any two employers shall be treated as associated if—

- (a) one is a company of which the other (directly or indirectly) has control; or
- (b) both are companies of which a third person (directly or indirectly) has control;

and "associated employer" shall be construed accordingly.

Amendments to the Employment Act 2002

63. At the end of each of Schedules 3, 4 and 5 to the Employment Act 2002(b) (tribunal jurisdictions to which section 31 (non-completion of statutory dispute resolution procedures), section 32 (complaints about grievances) and section 38 (failure to give statement of employment particulars) apply) insert—

“ Regulation 51 of the Companies (Cross-Border Mergers) Regulations 2007 (detriment)”.

Ian McCartney

Minister of State for Trade, Investment and Foreign Affairs
Department of Trade and Industry

[Date]

(a) 1990 c.41.
(b) 2002 c.22.

SCHEDULE

Regulation 5

Transitional provisions

1. Before the entry into force of—

- (a) section 1125 of the Companies Act 2006^(a) (meaning of “daily default fine”), the reference in regulation 4(1)(g) to that section shall be treated as a reference to section 730(4) of the 1985 Act as it applies in relation to Schedule 24 to that Act, or article 678(4) of the 1986 Order as it applies in relation to Schedule 23 to that Order;
- (b) section 1212 of the Companies Act 2006 (eligibility for appointment as a statutory auditor), the reference in regulation 9(7) to a person eligible for appointment as a statutory auditor in accordance with that section shall be treated as a reference to a person eligible for appointment as a company auditor in accordance with section 25 of the 1989 Act or article 28 of the 1990 Order;
- (c) section 1214 of the Companies Act 2006 (independence requirement for statutory auditor), the references in regulation 9(7)(a) and (b) to the independence requirements for a statutory auditor in that section shall be treated as references to the independence requirements for a company auditor in section 27 of the 1989 Act or article 30 of the 1990 Order;

2. The references in the provisions of these Regulations indicated in column 1 of the table below to the provisions of the Companies Act 2006 indicated in column 2 that are not yet fully in force are to be read as references to the corresponding provisions of companies legislation indicated in column 3 that are in force.

<i>Column 1:</i> <i>Provision of these Regulations containing reference</i>	<i>Column 2:</i> <i>Provision of Companies Act 2006 not in force</i>	<i>Column 3:</i> <i>Corresponding provisions of companies legislation in force</i>
Regulation 3(1)	Section 112 (meaning of “member”)	Section 22 of 1985 Act, article 32 of 1986 Order
Regulation 3(1)	Section 1060 (meaning of “registrar of companies”)	Section 744 of 1985 Act, article 2 of the 1986 Order
Regulation 3(1)	Section 724 (meaning of “treasury shares”)	Section 162A of 1985 Act, article 172A of the 1986 Order
Regulation 3(1)	Section 1 (meaning of “company”)	Section 735 of 1985 Act, article 3 of the 1986 Order
Regulation 4(1)(e)	Section 1113 (enforcement of company’s filing obligations)	Section 713 of 1985 Act, article 662 of the 1986 Order
Regulation 4(1)(f)	Sections 1121 to 1123 (liability of officer in default)	Section 730(5) of 1985 Act, article 678(5) of the 1986 Order
Regulation 4(1)(g)	Section 1125 (meaning of “daily default fine”)	Section 730(4) of 1985 Act, article 678(4) of the 1986 Order
Regulation 4(1)(h)	Sections 1127 to 1130 (general provisions relating to offences)	Sections 731, 732(3) and 734 of the 1985 Act, articles 679, 680A and 680B of the 1986 Order
Regulation 9(8)(b)	Part 16 (audit of companies)	Chapter 5 of Part 11 of the 1985 Act, Chapter 5 of Part 12 of the 1986 Order
Regulation 20(1)	Chapter 3 of Part 3	Section 380 of the 1985 Act,

(a) 2006 c.46

3. For the purposes of this Schedule—

“the 1985 Act” means the Companies Act 1985(a);

“the 1986 Order” means the Companies (Northern Ireland) Order 1986(b);

“the 1989 Act” means the Companies Act 1989(c); and

“the 1990 Order” means the Companies (Northern Ireland) Order 1990(d).

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement Directive 2005/56/EC on cross-border mergers of limited liability companies(e). They come into force on 15 December 2007.

The Regulations provide a framework whereby companies may engage in a cross-border merger. The term “cross-border merger” is defined in regulation 2 by reference to three categories: a merger by absorption, a merger by absorption of a wholly-owned subsidiary, and a merger by formation of a new company. The merger must involve at least one company formed and registered in the United Kingdom (a “UK company”), and at least one company formed and registered in an EEA State other than the United Kingdom (an “EEA company”).

Regulation 16 requires that each UK company involved in a cross-border merger must obtain a court order under regulation 6 certifying that the pre-merger requirements in regulations 7 to 13 and 15 have been complied with. Regulations 7, 8 and 9 respectively specify requirements as to the content of the proposed terms of the merger, the directors’ report explaining the effect and grounds of the merger, and the independent expert’s report. Regulation 10 requires that these documents be available for inspection by the company’s members for a period of one month, and regulation 11 requires that the draft terms of merger must be registered and published. Regulation 12 requires that the draft terms of merger must be approved by the company’s members. Regulation 13 provides that, if a meeting of the company’s creditors is summoned, the draft terms of merger must be approved by them.

Regulation 16 provides that a United Kingdom court may make an order approving the completion of a cross-border merger, if the company to which the assets and liabilities of other companies concerned are transferred as a consequence of the merger is a UK company. Regulation 17 defines the consequence of the cross-border merger, which include the dissolution of, and the transfer of assets and liabilities of, all but one of the companies involved. Regulations 19 to 21 lay down requirements relating to the registration of the merger in the United Kingdom and in other EEA States.

Part 4 of the Regulations implements the employee participation provisions of the Directive and is divided into nine chapters. Regulation 22 sets out the respective application of each of the chapters, including the provision at paragraph (2) that the obligation to provide for employee participation in the transferee company only applies where a merging company is a large company and operates employee participation, or where employee representatives participate in an administrative or supervisory organ of a merging company.

(a) 1985 c.6

(b) S.I. 1986/1032 (N.I. 6)

(c) 1989 c.40

(d) S.I. 1990/593 (N.I. 5)

(e) OJ L 310, 25.11.2005, p.1. The Directive extends to the European Economic Area by virtue of Decision of the EEA Joint Committee No. 127/2006 of 22 September 2006 amending Annex XXII (Company law) to the EEA Agreement (OJ L 333, 30.11.2006, p.59).

Chapter 2 imposes certain pre-merger requirements on a UK merging company, including the provision of relevant information to employees or their representatives (regulation 23), creation of a special negotiating body (regulation 25) and how that body should be composed (regulation 26). Regulations 24 and 27 are enforcement provisions in respect of those obligations.

Chapter 3 prescribes the procedural arrangements whereby an employee participation agreement can be settled. Regulation 28 provides that the relevant parties must negotiate in a spirit of co-operation and that negotiations shall last up to 6 months, with potential to extend that time to 12 months. Regulation 29 lays down the minimum content of an employee participation agreement. Regulation 30 concerns the operation of the special negotiating body. Regulation 31 describes the circumstances in which the special negotiating body may choose not to open or terminate negotiations and the consequences of that choice. Regulation 32 is an enforcement provision in respect of duties imposed on the special negotiating body.

Chapter 4 prescribes the arrangements for election or appointment of UK members of the special negotiating body. Chapter 5 provides for the standard rules on employee participation including regulation 36 which sets out where the standard rules should apply and regulation 37 which sets out the effect of the standard rules applying.

Chapter 6 concerns the handling and disclosure of confidential material, pursuant to provisions of Part 4. Chapter 7 confers a broad range of rights and entitlements on employees and their representatives in the context of a cross-border merger, including the right not to be subject to unfair treatment on grounds of their activities in connection with the merger. Chapter 7 also provides for the enforcement of those rights and entitlements, making amendment to primary legislation as required.

Chapter 8 concerns disputes about the operation of an employee participation agreement or the standard rules on participation, including, at regulation 55, any penalties that may be imposed in this context. Chapter 9 sets out certain procedural requirements and jurisdictional matters for enforcement of rights and entitlements under the regulations, including amendments to primary legislation as required.

A Transposition Note and a full Regulatory Impact Assessment of the effect that this instrument will have on the costs to business are available from the Company Law and Governance Directorate, Department of Trade and Industry, Bay V565, 1 Victoria Street, London, SW1H 0ET. Copies have also been placed in the libraries of both Houses of Parliament.