

2007 No. 2974

## COMPANIES

### The Companies (Cross-Border Mergers)

### Regulations 2007

<i>Made - - - - -</i>	<i>15th October 2007</i>
<i>Laid before Parliament</i>	<i>16th October 2007</i>
<i>Coming into force - -</i>	<i>15th December 2007</i>



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The Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972<sup>(a)</sup> in relation to the creation, operation, regulation or dissolution of companies and other forms of business organisation<sup>(b)</sup> and measures relating to employment rights and duties<sup>(c)</sup>.

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(a) 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).

(b) S.I. 2007/193.

(c) S.I. 2000/738.

In exercise of the powers conferred by section 2(2) of that Act and sections 1102(2), 1105(2)(d) and 1106(2) of the Companies Act 2006<sup>(a)</sup> the Secretary of State makes the following Regulations:

## PART 1 GENERAL

### **Citation and commencement**

1. These Regulations may be cited as the Companies (Cross-Border Mergers) Regulations 2007 and come into force on 15th December 2007.

### **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;
- (e) every transferor company is dissolved without going into liquidation, and on its dissolution transfers all its assets and liabilities to the transferee company; and
- (f) the consideration for the transfer is—
  - (i) shares or other securities representing the capital of the transferee company, and
  - (ii) if so agreed, a cash payment,receivable by members of the transferor company.

(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 is dissolved without going into liquidation, and on its dissolution 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;
- (c) the consideration for the transfer is—
  - (i) shares or other securities representing the capital of the transferee company, and
  - (ii) if so agreed, a cash payment,

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<sup>(a)</sup> 2006 c.46.

- receivable by members of the transferor company;
- (d) at least one of the transferor companies or the transferee company is a UK company.

## Interpretation

### 3.—(1) In these Regulations—

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

“the Appeal Tribunal” means the Employment Appeal Tribunal;

“the CAC” means the Central Arbitration Committee;

“the Companies Acts” has the same meaning as in section 2 of the Companies Act 2006;

“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 Article 8 (appointment of independent expert), Article 10 (issue of pre-merger certificate) or Article 11 (scrutiny of completion of merger) of the Directive;

“the court” means—

(a) in England and Wales, the High Court,

(b) in Scotland, the Court of Session, or

(c) in Northern Ireland, the High Court;

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

“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 body corporate 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 participation” means the influence of the employees and/or the employee 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;

“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

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(a) 1996 c.18.

(b) 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).

(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, 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);

“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 of employee participation” means the rules in regulation 38;

“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) other than—

- (a) a company limited by guarantee without a share capital (see section 5 of the Companies Act 2006), or
- (b) a company being wound up;

“UK employee” means an employee who has entered into or works under a contract of employment with a UK company;

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(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).

“UK members of the special negotiating body” means members of the special negotiating body, established pursuant to regulation 25, elected or appointed by UK employees; and  
“the UK register” means the register within the meaning of the Companies Acts (see section 1080 of the Companies Act 2006).

- (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.
- (3) References in these Regulations to—
- (a) “a UK merging company” are to a merging company which is a UK company;
  - (b) “a UK transferee company” are to a transferee company which is a UK company;
  - (c) “a UK transferor company” are to a transferor company which is a UK company.

### **The Companies Act 2006**

4.—(1) The following provisions of the Companies Act 2006<sup>(a)</sup> apply for the purposes of these Regulations as they apply for the purposes of the Companies Acts—

- (a) section 1081 (annotation of the register);
- (b) sections 1102 to 1104 and 1107 (language requirements for documents delivered to registrar);
- (c) section 1112 (offence of false statement to registrar);
- (d) section 1113 (enforcement of company’s filing obligations);
- (e) sections 1121 to 1123 (liability of officer in default);
- (f) section 1125 (meaning of “daily default fine”);
- (g) sections 1127 and 1128 (summary proceedings);
- (h) section 1129 (legal professional privilege);
- (i) section 1130 (proceedings against unincorporated bodies).

(2) Section 1063 of the Companies Act 2006 (fees payable to registrar) applies to the functions conferred on the registrar of companies by these Regulations as it applies to the functions conferred on the registrar of companies by the Companies Acts.

(3) Section 1105 of the Companies Act 2006 (documents that may be drawn up and delivered in other languages) applies to the documents required to be delivered to the registrar of companies under—

- (a) regulation 12(1)(b) (draft terms of merger), and
- (b) regulation 19(3) (order of competent authority of another EEA State).

(4) The facility described in section 1106 of the Companies Act 2006 (voluntary filing of translations) is available in relation to—

- (a) all official languages of EEA States, and
- (b) all documents required to be delivered to the registrar of companies under these Regulations.

(5) In article 4(1) of the Companies Act 2006 (Commencement No. 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007<sup>(b)</sup> (commencement of section 1068 of the Companies Act 2006) for the words from “any regulations made” to the end substitute “the Companies (Cross-Border Mergers) Regulations 2007”.

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<sup>(a)</sup> 2006 c.46.

<sup>(b)</sup> S.I. 2007/2194 (C. 84).



(6) Schedule 1 makes transitional modifications to provisions of these Regulations that refer to provisions of the Companies Act 2006 that are not yet in force.

### **Unregistered companies**

5.—(1) These Regulations apply to an unregistered company as they apply to a UK company.

(2) In the application of these Regulations to an unregistered company any reference to—

- (a) a UK company’s registered office shall be read as a reference to the unregistered company’s principal office in the United Kingdom;
- (b) a part of the United Kingdom in which a UK company is registered shall be read as a reference to the part of the United Kingdom in which the unregistered company’s principal office is situated and “Gazette” and “registrar of companies” shall be construed accordingly (see regulation 3(1)).

(3) In the application of these Regulations to an unregistered company, regulation 12(1)(c) applies with the omission of item (iv) (duty to state company’s registered number).

(4) In this regulation “unregistered company” means a body to which section 1043 of the Companies Act 2006 (unregistered companies) applies.

## **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 10 and 12 to 15 (pre-merger requirements) have been complied with.

#### **Draft terms of merger**

7.—(1) The directors of the UK merging company must draw up and adopt a draft of the proposed terms of the cross-border merger.

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

- (a) in relation to each transferor company and transferee company—
  - (i) its name,
  - (ii) its registered office, and
  - (iii) its legal form and the law by which it is governed;
- (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;
- (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 the transferor companies 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 state—
- (a) any material interests of the trustees of any deed for securing the issue of the debentures (whether as trustees or as members or as creditors or otherwise);
  - (b) 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.
- (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) not less than 2 months

before the date of the first meeting of the members, or any class of members, of the company (see regulation 13).

(6) If the employee representatives deliver an opinion on the report to the company's registered office not less than 1 month before the date of the first meeting of the members, or any class of members, of the company, 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<sup>(a)</sup> (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 13).

(3) The documents referred to above are—

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

### **Power of court to summon meeting of members or creditors**

**11.**—(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 13 (approval of members in meeting);

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(a) 2006 c.46.

- (b) creditors or a class of creditors, for the purposes of regulation 14 (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,
- (c) any creditor of the UK merging company in the case of a meeting of creditors or a class of creditors, or
- (d) in the case of a UK merging company in administration, the administrator.

(3) Section 323 of the Companies Act 2006 (representation of corporations at meetings) applies to a meeting of the creditors summoned under this regulation as to a meeting of the company (the references in that section to a member of the company being read as references to a creditor).

### **Public notice of receipt of registered documents**

**12.—**(1) The directors of the UK merging company must deliver to the registrar of companies particulars of the date, time and place of every meeting summoned under regulation 11 (power of court to summon meeting of members or creditors) together with—

- (a) a copy of the order made under that regulation;
- (b) a copy of the draft terms of merger; 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;
  - (iv) in the case of a UK company, its registered number;
  - (v) in the case of an EEA company to which the First Company Law Directive applies, particulars of the register in which the company file mentioned in Article 3 of that 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;
  - (vi) in the case of any other EEA company, particulars, if any, of the register in which it is entered (including details of the relevant State) and its registration number in that register.

(2) The directors must deliver these documents to the registrar not less than two months before the date of the first meeting of the members, or any class of members, of the company (see regulation 13).

(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 (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 13).

(5) The notice must include—

- (a) the date of receipt of the documents;
- (b) the particulars referred to in paragraph (1)(c);
- (c) in relation to each UK merging company, a statement that information related to the company is kept in the UK register;

- (d) a statement that regulation 10 (inspection of documents) requires copies of the draft terms of merger, the directors' report and (if there is one) the independent expert's report to be kept available for inspection;
- (e) the date, time and place of every meeting summoned under regulation 11 (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 (registrar's requirements as to form, authentication and manner of delivery);
- (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);
- (f) section 1091 (certification of copies as accurate); and
- (g) section 1098 (public notice of removal of certain material from register).

### **Approval of members in meeting**

13.—(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 11 (power of court to summon meeting of members or creditors).

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

- (a) ratification of any 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 12 (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**

14. If a meeting of creditors or a class of creditors is summoned under regulation 11 (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.

### **Documents to be circulated or made available**

15.—(1) Where a meeting is summoned under regulation 11 (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 of those documents.

(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) where appropriate, any arrangements for employee participation in the transferee company have been determined in accordance with Part 4 of these Regulations (employee participation).

(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 not less than 21 days after the date on which the order is made.

(3) After the consequences of the cross-border merger have taken effect (see regulation 17), 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 10 and 12 to 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; or
- (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 the documents and particulars specified in paragraph (2) to the registrar of companies for registration not more than 7 days after the date on which it was made.

(2) The documents and particulars referred to in paragraph (1) are—

- (a) a copy of the order made under regulation 16 (court approval of merger);
- (b) in the case of a transferor company which is an EEA company to which the First Company Law Directive applies, particulars of the register in which the company file mentioned in Article 3 of that 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;
- (c) in the case of any other transferor company which is a EEA company, particulars, if any, of the register in which it is entered (including details of the relevant State) and its registration number in that register.



(3) 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.

(4) The following provisions of the Companies Act 2006<sup>(a)</sup> 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) section 1068 (registrar's requirements as to form, authentication and manner of delivery);
- (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); and
- (i) section 1098 (public notice of removal of certain material from register).

(5) 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.

(6) 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 (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.

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<sup>(a)</sup> 2006 c.46.

(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) without undue delay, in relation to each transferor company which is an EEA company to which the First Company Law Directive applies, 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;
- (b) without undue delay, in relation to any other transferor company which is a EEA company, give notice of the order to the register, if any, in which it is entered; and
- (c) on or without undue delay after the date fixed in the order for the purposes of regulation 16(2) (court approval of merger), take the steps specified in paragraph (3) in relation 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 on or without undue delay after the date fixed for the purposes of Article 12 of the Directive (entry into effect of the cross-border merger) take the steps specified in paragraph (3) in relation to every UK transferor company.

(3) The steps referred to in paragraphs (1)(c) and (2) are—

- (a) striking the name of the UK transferor company from the UK register, and
- (b) placing a note in the register stating that as from the date on which the consequences of the cross-border merger had effect (see regulation 16(2) and Article 12 of the Directive), the assets and liabilities of the UK transferor company were transferred to the transferee company.

## **PART 4**

### **EMPLOYEE PARTICIPATION**

#### **CHAPTER 1**

#### **APPLICATION OF THIS PART**

### **Application of this Part**

**22.**—(1) Subject to paragraph (2), this Part shall apply where the transferee company is a UK company and 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 has a system of employee participation, or
- (b) a UK merging company has a proportion of employee representatives amongst the directors, or
- (c) a merging company has employee representatives amongst members of the administrative or supervisory organ or their committees or of the management group which covers the profit units of the company.

(2) Chapters 4 and 6 to 9 shall apply to a UK merging company, its employees or their representatives, regardless of whether the transferee company is a UK company.

(3) This Part applies to Northern Ireland with the modifications contained in Schedule 2.

CHAPTER 2  
MERGING COMPANIES AND THE SPECIAL NEGOTIATING BODY

**Duty on merging company to provide information**

**23.**—(1) As soon as possible after adopting the draft terms of merger (see regulation 7), each merging company shall provide information to the employee representatives of that company 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 merging companies,
- (b) of any decision taken pursuant to regulation 36 (merging companies may select standard rules of employee participation), and
- (c) giving the number of employees employed by each merging company.

(3) When a special negotiating body has been formed in accordance with regulation 25, 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 UK 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 no such representative exists, any employee may present a complaint to the CAC that—

- (a) a merging company has failed to provide information as required by regulation 23; or
- (b) the information is false or incomplete in a material particular.

(2) Where the CAC finds the complaint well-founded it shall make an order requiring the company 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 company must disclose the information specified in the order.

**The special negotiating body**

**25.**—(1) Subject to regulation 36 (merging companies may select standard rules of employee participation), 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) Employees of merging companies registered in each EEA State (including the UK) shall be given an entitlement to elect one member of the special negotiating body, in accordance with these Regulations, for each 10% or fraction thereof which employees of merging companies registered in that State represent of the total workforce of the merging companies. These members shall be the “constituent members”.

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

(3) The number of additional members which the employees of the merging companies are entitled to elect under paragraph (2) shall not exceed 20% of the number of constituent members elected under paragraph (1) and if the number of additional members under paragraph (2) would exceed that percentage the employees who are entitled to elect the additional members shall be—

- (a) if one additional member is to be elected, those employed by the merging company not represented under paragraph (1) having the highest number of employees; and
- (b) if more than one additional member is to be elected, those employed by the merging companies registered in each EEA State that are not represented under paragraph (1) having the highest number of employees in descending order, starting with the company with the highest number, followed by those employed by the companies registered 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) 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 of the outcome of any elections held under this regulation.

(5) If, following the election of members to the special negotiating body under this regulation—

- (a) changes to the merging companies result in the number of members which employees would be entitled to elect under this regulation either increasing or decreasing, the original election of members of the special negotiating body shall cease to have effect and the employees of the merging companies shall be entitled to elect 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 a new member in his place.

#### **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) Where it is alleged that the failure is attributable to the conduct of the merging company, an application may be presented under this regulation by—

- (a) a person elected under regulation 26 to be a member of the special negotiating body; or
- (b) an employee representative or, where no such representative exists in respect of the company, an employee of the company.

(3) Where it is alleged that the failure is attributable to the conduct of the employees or the employee representatives, an application may be presented under this regulation by the merging company.

(4) The CAC shall only consider an application made under this regulation 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).

(5) Where the CAC finds an application made under paragraph (2) 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 merging companies continue to be under the obligation in regulation 25.

(6) Where the CAC finds an application made under paragraph (3) 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 merging companies no longer 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 Chapters 3 and 5 the merging companies and the special negotiating body are referred to as “the parties”.

(2) Subject to regulations 31 (decision not to open or to terminate negotiations) and 36 (merging companies may select standard rules of employee participation), 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 employee participation, the substance of those arrangements including (if applicable) the number of directors of the UK transferee company which the employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how these directors 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 of employee participation (see regulation 38), 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 of 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 directors of the UK transferee company who may be elected or appointed (or whose appointment may be recommended or opposed) by virtue of employee participation is lower than the proportion of such directors or members in the merging company which had the highest proportion of such directors or 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 of the merging companies, 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) Following any decision made under paragraph (1), the duty of the parties set out in regulation 28 to negotiate with a view to establishing an employee participation agreement shall cease as from the date of the decision.

#### **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 by 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 OF UNITED KINGDOM MEMBERS OF THE SPECIAL NEGOTIATING BODY**

#### **Ballot arrangements**

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

(2) The UK merging company must arrange for the holding of a ballot 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 constituent members of the special negotiating body 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 UK merging companies, there shall be separate ballots of the UK employees in each UK 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 UK merging companies, there shall be separate ballots of the UK employees in each UK merging company and the directors 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 UK 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 UK merging companies—
    - (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;
- (b) that in relation to the election of additional members under regulation 26(2) the directors shall hold a separate ballot in respect of each UK merging company entitled to elect an additional member;
- (c) that in a ballot in respect of a particular UK merging company, all UK employees employed by that merging company are entitled to vote;
- (d) that in a ballot in respect of a particular UK 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 company; or
  - (ii) if the directors of that company so permit, a representative of a trade union who is not an employee of that company,
 is entitled to stand as a candidate for election as a member of the special negotiating body in that ballot;
- (e) that the directors 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 directors may determine, provided that each separate ballot is supervised by a supervisor;
- (f) that after the directors have formulated proposals as to the arrangements for the ballot of UK employees and before they have published the final arrangements under sub-paragraph (g) they must, so far as reasonably practicable, consult with the employee representatives on the proposed arrangements for the ballot of UK employees; and
- (g) that the directors must publish, as soon as reasonably practicable, 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 employee representatives.

(4) Any UK employee or employee representative who believes that the arrangements for the ballot of the UK employees do not comply with the requirements of paragraph (3)(a) to (e) or that there has been a failure to satisfy the requirements of sub-paragraph (f) or (g) may, within a period of 21 days beginning on the date on which the directors published, or should have 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 directors to modify the arrangements they have made for the ballot of UK 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 directors are required to make and the requirements they must satisfy.

(7) A person is an independent ballot supervisor for the purposes of paragraph (3)(e) if the directors reasonably believe that he will carry out any functions conferred on him in relation to the ballot competently and have 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 directors 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 directors; 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 directors 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 directors have satisfied the requirement specified in regulation 33(3)(g) (publication of final arrangements for ballot) 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 directors published the 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 directors 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 interference with the carrying out of his functions or a failure by the directors 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 directors 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 directors shall again be under the obligation in regulation 33(2) (directors 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 directors 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 of UK employees, including payments made to a ballot supervisor for supervising the conduct of the ballot, shall be borne by the UK merging company (whether or not an ineffective ballot report has been published).

### **Representation of employees**

**35.**—(1) Subject to paragraph (2), a 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.

(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 OF EMPLOYEE PARTICIPATION IN A UK TRANSFEREE COMPANY**

#### **Merging Companies may select standard rules of employee participation**

**36.** The merging companies may choose, without negotiating with the special negotiating body, the employee representatives or the employees, that a UK transferee company shall be subject to the standard rules of employee participation in regulation 38 (the standard rules of employee participation) from the date upon which the consequences of the cross-border merger take effect (see regulation 17).

#### **Application of the standard rules**

**37.**—(1) Notwithstanding regulation 36 (merging companies may select standard rules of employee participation), the standard rules of employee participation shall apply to a UK transferee company 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 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 UK transferee company, one or more forms of employee participation existed in at least one of the merging companies and either—

- (a) that participation applied to at least one third of the total number of employees of the merging companies, or
- (b) that participation applied to less than one third of the total number of employees of the merging companies but the special negotiating body has decided that the standard rules of employee participation should apply.

(3) Where the standard rules of employee 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 apply in the UK transferee company and shall inform the merging companies accordingly.

(4) In circumstances where—

- (a) the standard rules of employee 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 (3); or
- (b) one or more 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 of employee participation,

the merging companies shall be responsible for determining the form of employee participation in the UK transferee company.

### **The standard rules of employee participation**

**38.**—(1) The employee representatives of the UK transferee company, or if there are no such representatives, the employees, shall have the right to elect, appoint, recommend or oppose the appointment of a number of directors of the transferee company, such number to be equal to the number in the merging company which had the highest proportion of directors (or their EEA equivalent) so elected or appointed (subject to regulation 39).

(2) Subject to paragraph (3), the employee representatives, or if there are no such representatives, the employees, shall, taking into account the proportion of employees of the transferee company formerly employed in each merging company, decide on the allocation of directorships, or on the means by which the transferee's employees may recommend or oppose the appointment of directors.

(3) In making the decision set out in paragraph (2), if the employees of one or more merging company are not covered by the proportional criterion set out in paragraph (2), the employee representatives, or if there are no such representatives, the employees, shall appoint a member from one of those merging companies including one from the United Kingdom, if appropriate.

(4) Every director of the transferee company who has been elected, appointed or recommended by the employee representatives or the employees, shall be a full director with the same rights and obligations as the directors representing shareholders, including the right to vote.

### **Limit on level of employee participation**

**39.** Where, following prior negotiation, the standard rules of employee participation apply, the UK transferee company may limit the proportion of directors elected, appointed, recommended or opposed through employee participation to a level which is the lesser of—

- (a) the highest proportion in force in the merging companies prior to registration, and
- (b) one third of the directors.

### **Subsequent domestic mergers**

**40.**—(1) 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 not be affected before the end of the period of three years commencing on the date on which the consequences of the cross-border merger have effect (see regulation 17) by any order made by the court under section 899 of the Companies Act 2006(a) (court sanction for compromise or arrangement) for the purposes of—

- (a) a reconstruction of the company or the amalgamation of the company with another company (see section 900 of that Act (reconstruction or amalgamation of company)), or
- (b) a merger involving a public company (see sections 902 and 903 and Chapter 2 of Part 27 of that Act).

(2) For the purposes of this regulation, any subsequent order made by the court under section 900(2) of the Companies Act 2006 has effect as if it were an order made under section 899 of that Act.

## 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 or document 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 document, 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(b).

(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 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 transferee or merging company**

**42.**—(1) Neither a transferee company nor a merging company is required to disclose any information or document to a person for the purposes of this Part where the nature of the

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(a) 2006 c.46.

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

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 mentioned in paragraph (1), the CAC shall order the transferee company or merging company 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 EMPLOYEES AND 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) a director of a transferee company; or
  - (c) a candidate in an election in which any person elected will, on being elected, be such a director or 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, director 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 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 a director of a UK transferee company;
- (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 (e) 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 (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) 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, etc.**

47.—(1) An employee who is—

- (a) a member of a special negotiating body;
- (b) a director of a transferee company; or
- (c) a candidate in an election in which any person elected will, on being elected, be such a director or 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 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, director 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 (right to time off work) or 44 (right to remuneration for time off work).

(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 (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.

### 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—

- (a) paragraph (2) of regulation 46 of the Companies (Cross-Border Mergers) Regulations 2007 (read with paragraphs (3) and (4) of that regulation); or
- (b) paragraph (2) of regulation 47 of the Companies (Cross-Border Mergers) Regulations 2007 (read with paragraph (3) of that regulation).”

(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) 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;
- (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 a director of a UK transferee company;
- (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) It is immaterial for the purposes of paragraph (2)(a)—

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(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) 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, etc.**

**50.**—(1) An employee who is—

- (a) a member of a special negotiating body;
- (b) a director of a transferee company; or
- (c) a candidate in an election in which any person elected will, on being elected, be such a director or 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 director, 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 (right to time off work) or 44 (right to remuneration for time off work).

(3) Paragraph (1) does not apply in the circumstances set out in paragraph (2)(a) where the ground for the subsection 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.”.

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(a) Subsection (3) was amended by the Employment Rights (Dispute Resolution) Act 1998 (c.8), section 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.



CHAPTER 8  
COMPLIANCE AND ENFORCEMENT

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

53.—(1) Where—

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

a complaint may be presented to the CAC by a relevant applicant who considers that the transferee company has failed to comply with the terms of the employee participation agreement or, where applicable, the standard rules of 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
- (b) in a case where no special negotiating body has been elected or appointed, or has been dissolved, an employee representative or 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, where applicable, the standard rules of 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 such 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-paragraph (a) or (b) of paragraph (1).

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

(5) If the CAC makes a declaration under paragraph (4), the complainant under paragraph (1) 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) The provisions in regulations 53(8) to (9) and 55 shall apply to the complaint.

## **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 or 54 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 or merging 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, 54 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<sup>(a)</sup> (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”.

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

### **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 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 (protection for employees and members of special negotiating body) (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; or
- (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.

(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 practicing 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<sup>(a)</sup>); 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 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.** In the Employment Act 2002<sup>(b)</sup> at the end of each of the following Schedules—

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<sup>(a)</sup> 1990 c.41.  
<sup>(b)</sup> 2002 c.22.

- (a) Schedule 3 (tribunal jurisdictions to which section 31 applies for adjustment of awards for non-completion of statutory procedure);
- (b) Schedule 4 (tribunal jurisdictions to which section 32 applies for complaints where the employee must first submit a statement of grievance to employer); and
- (c) Schedule 5 (tribunal jurisdictions to which section 38 applies in relation to proceedings where the employer has failed to give a statement of employment particulars),

there is inserted—

“Regulation 51 of the Companies (Cross-Border Mergers) Regulations 2007 (detriment in relation to special negotiating body or employee participation)”.

### **Amendments to the Employment Appeal Tribunal Rules 1993**

**64.**—(1) In rule 2(1) of the Employment Appeal Tribunal Rules(a) 1993, after ““the Information and Consultation Regulations” means the Information and Consultation of Employees Regulations 2004;” insert—

““the 2007 Regulations” means the Companies (Cross-Border Mergers) Regulations 2007;”.

(2) In rules 3(1)(d), 3(3)(d), 4(1)(e), 5(c) and 7(1)(e), after “or regulation 35(6) of the Information and Consultation Regulations” insert “or regulation 57(6) of the 2007 Regulations”.

(3) In rule 16AA after “or regulation 22(6) of the Information and Consultation Regulations” insert “or regulation 53(6) of the 2007 Regulations” and after “regulation 33(4) of the 2004 Regulations or regulation 22(4) of the Information and Consultation Regulations” insert “or regulation 53(4) of the 2007 Regulations”.

(4) In rules 26 and 31(1)(c) omit “or” before “regulation 22 of the Information and Consultation Regulations” and after insert “or regulation 53 the 2007 Regulations”.

(5) In the Schedule, on the Heading of Form 1A, omit “or” before “regulation 35(6) of the Information and Consultation Regulations” and after insert “or regulation 57(6) of the Companies (Cross-Border Mergers) Regulations 2007”.

(6) In the Schedule—

- (a) on the Heading of Form 4B, in the heading, after “regulation 22 of the Information and Consultation Regulations” insert “or regulation 53 of the Companies (Cross-Border Mergers) Regulations 2007”; and
- (b) in paragraph 5, after “regulation 22 of the Information and Consultation Regulations” and before “(*delete which does not apply*).” insert “or regulation 53 of the Companies (Cross-Border Mergers) Regulations 2007”.

## **PART 5**

### **AMENDMENTS TO LEGISLATION ON INSOLVENCY**

#### **Insolvency Act 1986**

**65.**—(1) Schedule B1 to the Insolvency Act 1986(b) is amended as follows.

(2) In paragraph 73(2)(b) omit “or”.

(3) At the end of paragraph 73(2)(c) insert—

“or

- (d) a proposal for a cross-border merger within the meaning of regulation 2 of the Companies (Cross-Border Mergers) Regulations 2007.”.

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(a) S.I. 1993/2854.

(b) 1986 c.45. Schedule B1 was inserted by section 248(2) of, and Schedule 16 to, the Enterprise Act 2002 (c.40).

- (4) In paragraph 74(6)(b) after “(compromise with creditors and members)” omit “or”.
- (5) After paragraph 74(6)(b) insert—
  - “(ba) a cross-border merger within the meaning of regulation 2 of the Companies (Cross-Border Mergers) Regulations 2007, or”.

#### **Insolvency (Northern Ireland) Order 1989**

**66.**—(1) Schedule B1 to the Insolvency (Northern Ireland) Order 1989(a) is amended as follows.

- (2) In paragraph 74(2)(b) omit “or”.
- (3) At the end of paragraph 74(2)(c) insert—
  - “or
  - (d) a proposal for a cross-border merger within the meaning of regulation 2 of the Companies (Cross-Border Mergers) Regulations 2007.”.
- (4) In paragraph 75(6)(b) after “(compromise with creditors and members)” omit “or”.
- (5) After paragraph 75(6)(b) insert—
  - “(ba) a cross-border merger within the meaning of regulation 2 of the Companies (Cross-Border Mergers) Regulations 2007, or”.

15th October 2007

*Stephen Timms*  
Minister of State for Competitiveness,  
Department for Business, Enterprise and Regulatory Reform

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(a) S.I. 1989/2405 (N.I. 19). Schedule B1 was inserted by Article 3(2) of, and Schedule 1 to, the Insolvency (Northern Ireland) Order 2005 (S.I. 2005/1455 (N.I. 10)).

## Transitional modifications where provisions of Companies Act 2006 not in force

### Regulation 3(1)

1.—(1) Regulation 3(1) is modified as follows.

(2) In the definition of “member”, until the entry into force of section 112 of the Companies Act 2006 for “section 112 of the Companies Act 2006” substitute “section 22 of the Companies Act 1985(a) or Article 32 of the Companies (Northern Ireland) Order 1986(b)”.

(3) In the definition of “registrar of companies”, until the entry into force of section 1060 of the 2006 Act for “section 1060 of the Companies Act 2006” substitute “section 744 of the Companies Act 1985(c) or Article 2 of the Companies (Northern Ireland) Order 1986(d)”.

(4) In the definition of “treasury shares”, until the entry into force of section 724 of the Companies Act 2006 for “section 724 of the Companies Act 2006” substitute “section 162A of the Companies Act 1985(e) or Article 172A of the Companies (Northern Ireland) Order 1986(f)”.

(5) In the definition of “UK company”, until the entry into force of section 1 of the Companies Act 2006 for “section 1 of the Companies Act 2006” substitute “section 735 of the Companies Act 1985 or Article 3 of the Companies (Northern Ireland) Order 1986”.

### Regulation 4

2.—(1) Regulation 4 is modified as follows.

(2) Until the entry into force of section 1081 of the Companies Act 2006 (annotation of the register), omit paragraph (1)(a).

(3) Until the entry into force of section 1112 of the Companies Act 2006 (offence of false statement to registrar), omit paragraph (1)(c).

(4) Until the entry into force of section 1113 of the Companies Act 2006 (enforcement of a company’s filing obligations)—

(a) omit paragraph (1)(d); and

(b) after paragraph (4) insert—

“(4A) Section 713 of the Companies Act 1985 or Article 662 of the Companies (Northern Ireland) Order 1986 (enforcement of company’s duty to make returns) applies for the purposes of these Regulations as it applies for the purposes of the Companies Acts.”.

(5) Until the entry into force of sections 1121 to 1123 of the Companies Act 2006 (liability of officer in default)—

(a) omit paragraph (1)(e); and

(b) after paragraph (4A) insert—

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(a) 1985 c.6.

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

(c) Section 744 has been amended on a number of occasions, but none of the amendments are relevant to these Regulations.

(d) Article 2 has been amended on a number of occasions, but none of the amendments are relevant to these Regulations.

(e) Section 162A was inserted by regulation 3 of the Companies (Acquisition of Own Shares) (Treasury Shares) Regulations 2003 (S.I. 2003/1116).

(f) Article 172A was inserted by regulation 3 of the Companies (Acquisition of Own Shares) (Treasury Shares) Regulations (Northern Ireland) 2004 (S.R. 2004/275).



“(4B) Section 730A of the Companies Act 1985(a) or Article 678(5) of the Companies (Northern Ireland) Order 1986(b) (meaning of “officer in default”) applies to offences under these Regulations as it applies to offences under that Act or that Order.”.

(6) Until the entry into force of section 1125 of the Companies Act 2006 (meaning of “daily default fine”)—

- (a) omit paragraph (1)(f); and
- (b) after paragraph (4B) insert—

“(4C) Section 730(4) of the Companies Act 1985 or Article 678(4) of the Companies (Northern Ireland) Order 1986 (meaning of daily default fine) applies for the purposes of these Regulations as it applies for the purposes of Schedule 24 to that Act or Schedule 23 to that Order.”.

(7) Until the entry into force of sections 1127 and 1128 of the Companies Act 2006 (summary proceedings)—

- (a) omit paragraph (1)(g); and
- (b) after paragraph (4C) insert—

“(4D) Section 731 of the Companies Act 1985(c) or Article 679 of the Companies (Northern Ireland) Order 1986(d) (summary proceedings) applies to offences under these Regulations as it applies to offences under that Act or that Order.”.

(8) Until the entry into force of section 1129 of the Companies Act 2006 (legal professional privilege)—

- (a) omit paragraph (1)(h); and
- (b) after paragraph (4D) insert—

“(4E) Section 732(3) of the Companies Act 1985(e) or Article 680(3) of the Companies (Northern Ireland) Order 1986(f) (legal professional privilege) applies to proceedings for an offence under these Regulations as it applies to proceedings instituted under the Companies Acts by the Director of Public Prosecutions or by or on behalf of the Secretary of State or the Lord Advocate, or proceedings instituted under the 1986 Order by the Director of Public Prosecutions for Northern Ireland or by or on behalf of the Department of Economic Development.”.

(9) Until the entry into force of section 1130 of the Companies Act 2006 (proceedings against unincorporated bodies)—

- (a) omit paragraph (1)(i); and
- (b) after paragraph (4E) insert—

“(4F) Section 734 of the Companies Act 1985(g) or Article 680B of the Companies (Northern Ireland) Order 1986(h) (summary proceedings) applies to offences under these Regulations as it applies to offences under that Act or that Order.”.

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- (a) Section 730A was inserted by paragraph 13 of Schedule 4 to the Companies Act 2006 (Commencement No. 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007 (S.I. 2007/2194 (C. 84)).
  - (b) Article 678(5) was amended by Article 78 of and paragraph 16 of Schedule 5 to the Companies (No. 2) (Northern Ireland) Order 1990 (S.I. 1990/1504 (N.I. 10)).
  - (c) Section 731 was amended by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40), section 5 and Schedule 4, paragraph 56(3).
  - (d) Article 679 was amended by regulation 4 of and Part I of Schedule 2 to the Limited Liability Partnerships Regulations (Northern Ireland) 2004 (S.R. 2004/307).
  - (e) Section 732(3) was amended by the Companies (Audit, Investigations and Community Enterprise) Act 2004 (c.27), section 25 and Schedule 2, paragraphs 16 and 22(c).
  - (f) Article 680(3) was amended by regulation 4 of and Part I of Schedule 2 to the Limited Liability Partnerships Regulations (Northern Ireland) 2004 (S.R. 2004/307).
  - (g) Section 734 has been amended on a number of occasions, most recently by the Companies (Audit, Investigations and Community Enterprise) Act 2004 (c.27), section 25 and Schedule 2, paragraphs 5 and 9(a).
  - (h) Article 680B was amended by regulation 4 of and Part I of Schedule 2 to the Limited Liability Partnerships Regulations (Northern Ireland) 2004 (S.R. 2004/307) and by sections 11 and 25 of and Schedule 2 to the Companies (Audit, Investigations and Community Enterprise) Act 2004 (c.27).

## Regulations 7 and 20

3. Until the entry into force of Chapter 2 of Part 3 of the Companies Act 2006 (a company's articles of association), the references in regulations 7 and 20 to a company's articles include the company's memorandum of association.

## Regulation 9

4.—(1) Until the entry into force of Part 42 of the Companies Act 2006 (statutory auditors), regulation 9 is modified as follows.

(2) For paragraph (7)(a) substitute—

“(a) is eligible for appointment as a company auditor in accordance with section 25 of the Companies Act 1989(a) or Article 28 of the Companies (Northern Ireland) Order 1990(b);”.

(3) For paragraph (8)(a) and (b) substitute—

“(a) a person is not independent if, by virtue of section 27 of the Companies Act 1989 or Article 30 of the Companies (Northern Ireland) Order 1990, he would not be able to act as company auditor of all the merging companies; and

(b) section 27 of the Companies Act 1989 or Article 30 of the Companies (Northern Ireland) Order 1990 applies in relation to all the merging companies as if they were companies within the meaning of Part 2 of that Act or Part 3 of that Order.”.

## Regulations 12 and 19

5. Until the entry into force of section 1098 of the Companies Act 2006 (public notice of removal of certain material from register)), omit regulation 12(6)(g) and regulation 19(4)(i).

## Regulation 40

6.—(1) Until the entry into force of Part 26 (arrangements and reconstructions) and Part 27 (mergers and divisions of public companies) of the Companies Act 2006, regulation 40 is modified as follows.

(2) In paragraph (1)—

(a) in the opening words, for “section 899 of the Companies Act 2006” substitute “section 425(2) of the Companies Act 1985(c) or Article 418(2) of the Companies (Northern Ireland) Order 1986(d);

(b) in sub-paragraph (a), for “section 900 of that Act” substitute “section 427 of that Act or Article 420 of that Order”;

(c) in sub-paragraph (b), for “sections 902 and 903 and Chapter 2 of Part 27 of that Act” substitute “section 427A(1) and Cases 1 and 2 in section 427A(2) of that Act(e) or Article 420A(1) and Cases 1 and 2 in Article 420A(2) of that Order(f)”.

(3) In paragraph (2)—

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(a) 1989 c.40.

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

(c) Section 425 has been amended on a number of occasions, most recently by the Enterprise Act 2002 (c.40), section 248(3) and Schedule 17, paragraphs 3 and 5.

(d) Article 418 has been amended on a number of occasions, most recently by Regulation 4 of and Part I of Schedule 2 to the Limited Liability Partnerships Regulations (Northern Ireland) 2004 (S.R. 2004/307).

(e) Section 427A was inserted by regulation 2(a) of and the Schedule to the Companies (Mergers and Divisions) Regulations 1987 (S.I. 1987/1991) and has been amended on a number of occasions, most recently by the Enterprise Act 2002 (c.40), section 248(3) and Schedule 17, paragraphs 3 and 6.

(f) Article 420A was inserted by regulation 3 of the Companies (Mergers and Divisions) Regulations (Northern Ireland) 1987 (S.R. 1987/442) and has been amended on a number of occasions, most recently by Article 3(3) of and paragraph 15 of Schedule 2 to the Insolvency (Northern Ireland) Order 2005 (S.I. 2005/1455 (N.I. 10)).

- (a) for “section 900(2) of the Companies Act 2006” substitute “section 427(2) of the Companies Act 1985 or Article 420(2) of the Companies (Northern Ireland) Order 1986”;
- (b) for “section 899 of that Act” substitute “section 425(2) of that Act or Article 418(2) of that Order”.

## Application of the Regulations in relation to Northern Ireland

1. Regulations 24, and 33 shall apply in relation to any complaint by a Northern Ireland employee or any representative appointed or elected to act in Northern Ireland as if the reference to the CAC were a reference to the Industrial Court.

2. Regulation 27 shall apply in relation to any application by—

- (a) a Northern Ireland member of the special negotiating body;
- (b) a Northern Ireland employee or any representative appointed or elected to act in Northern Ireland; or
- (c) a competent organ of a merging company with its registered office (or principal place of business if not a body corporate) in Northern Ireland,

as if any reference to the CAC were a reference to the Industrial Court.

3. Regulation 32 shall apply in relation to a complaint by—

- (a) a Northern Ireland member of the special negotiating body; or
- (b) a Northern Ireland employee or a representative appointed or elected to act in Northern Ireland,

as if the reference to the CAC were a reference to the Industrial Court.

4. Regulation 41 shall apply in relation to a recipient to whom a merging company or transferee company registered in Northern Ireland has entrusted information or documents as if the reference to the CAC were a reference to the Industrial Court.

5. Where there is a dispute to which paragraph (2) of regulation 42 applies, that regulation shall apply in relation to—

- (a) any application made by a merging company or transferee company registered in Northern Ireland; or
- (b) a Northern Ireland employee, a member of a special negotiating body elected or appointed to act in Northern Ireland,

as if the reference to the CAC were a reference to the Industrial Court.

6. Regulation 45 shall apply in relation to a complaint by a Northern Ireland employee as if the reference to an employment tribunal were a reference to an Industrial Tribunal.

7. Regulation 46 shall apply in relation to any Northern Ireland employee as if—

- (a) a reference to an employment tribunal included a reference to an Industrial Tribunal;
- (b) a reference to an entitlement to apply or complain included an entitlement to apply or complain to the Industrial Court or the High Court in Northern Ireland;
- (c) a reference to a right to appeal included a right to appeal to the High Court in Northern Ireland.

8. For regulation 48 there shall be substituted the following regulation—

### **“Subsidiary provisions relating to unfair dismissal: Northern Ireland**

**48.—(1) In Article 137 of the Employment Rights (Northern Ireland) Order 1996(a)—**

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(a) S.I. 1996/1919 (N.I. 16). Article 137 has been amended on a number of occasions to specify additional circumstances in which the employee dismissed by reason of redundancy is to be regarded as unfairly dismissed.

- (a) in paragraph (1)(c) (which requires one of a specified group of paragraphs to apply for a person to be treated as unfairly dismissed) for “7G” substitute “7H”; and
- (b) after paragraph (7G) insert—

“(7H) This paragraph 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 Article 140 of that Order(a) (exclusion of right: qualifying period of employment) in paragraph (3) (cases where no qualifying period of employment is required)(b)—

- (a) omit the word “or” at the end of sub-paragraph (o); and
- (b) after sub-paragraph (p) insert—

“or

- (q) regulation 46 or 47 of the Companies (Cross-Border Mergers) Regulations 2007 applies.”.

9. Regulation 49 shall apply in relation to any Northern Ireland employee as if—

- (a) any reference to an employment tribunal included a reference to an Industrial Tribunal;
- (b) any reference to an entitlement to apply or complain included an entitlement to apply or complain to the Industrial Court or the High Court in Northern Ireland; and
- (c) any reference to a right to appeal included a right of appeal to the High Court in Northern Ireland.

10. Regulation 51 shall apply in relation to a Northern Ireland employee as if reference to an employment tribunal were a reference to an Industrial Tribunal.

11. For regulation 52 there shall be substituted—

“52. In Article 20 of the Industrial Tribunals (Northern Ireland) Order 1996(c) (Conciliation) in paragraph (1) (which specifies the proceedings and claims to which the Article applies) after sub-paragraph (n) omit the word “or” and after sub-paragraph (o), insert—

“or

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

12.—(1) Regulation 53 shall apply in relation to a complaint made by—

- (a) a Northern Ireland employee;
- (b) a member of a special negotiating body elected or appointed to act in Northern Ireland,

as if any reference to the CAC were a reference to the Industrial Court.

(2) In relation to a complaint to the Industrial Court to which sub-paragraph (1) relates—

- (a) regulations 53(6) and (7) and 55(2) and (3) shall apply as if any reference to the Appeal Tribunal were a reference to the High Court in Northern Ireland;
- (b) regulations 53(7) and 55(5) and (7) shall apply as if any reference to the Secretary of State were a reference to the Department for Employment and Learning and any reference to the Consolidated Fund were a reference to the Consolidated Fund of Northern Ireland; and
- (c) regulation 55(4) shall apply as if a reference to the CAC were a reference to the Industrial Court.

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(a) Article 140(1) was amended by S.R. 1999/277.

(b) Article 140(3) has been amended on a number of occasions to specify additional cases in which no qualifying period of employment is required.

(c) S.I. 1996/1921. Article 20(1) has been amended on a number of occasions to specify additional proceedings and claims to which the Article applies.

- 13.**—(1) Regulation 54 shall apply in relation to a complaint made by—
- (a) a Northern Ireland employee;
  - (b) a member of a special negotiating body elected or appointed to act in Northern Ireland,
- as if any reference to the CAC were a reference to the Industrial Court.
- (2) In relation to a complaint to the Industrial Court to which sub-paragraph (1) relates—
- (a) regulation 54(5) and (6) shall apply as if any reference to the Appeal Tribunal were a reference to the High Court in Northern Ireland; and
  - (b) regulation 54(6) shall apply as if any reference to the Secretary of State were a reference to the Department for Employment and Learning.
- 14.** Regulation 56 shall have effect as if the reference to the CAC included a reference to the Industrial Court.
- 15.** Regulation 57 shall have effect as if for the heading there were substituted “Industrial Court Proceedings” and as if—
- (a) in paragraphs (1) and (2) the reference to the CAC included a reference to the Industrial Court;
  - (b) after paragraph (4) there were inserted—
    - “(4A) Where a transferee company or merging company has its registered office (or principal place of business if not a body corporate) in Northern Ireland—
- (a) a declaration made by an Industrial Court under these Regulations may be relied upon as if it were a declaration or order made by the High Court in Northern Ireland; and
  - (b) an order made by the Industrial Court under these Regulations may be enforced in the same way as an order of the High Court in Northern Ireland.”; and
- (c) paragraphs (5) and (6) shall apply as if a reference to the CAC were a reference to the Industrial Court and a reference to the Appeal Tribunal were a reference to the High Court in Northern Ireland.
- 16.** Regulation 60 shall have effect as if for the heading there were substituted “Labour Relations Agency” and as if—
- (a) a reference to an application or complaint received by the CAC included a reference to an application or complaint received by the Industrial Court under these Regulations (as modified by this Schedule) and in relation to such an application or complaint;
  - (b) any reference to ACAS was a reference to the Labour Relations Agency; and
  - (c) any other reference in the regulation to the CAC were a reference to the Industrial Court.
- 17.** Regulation 61 shall apply in relation to any agreement on contract enforceable under the law of Northern Ireland as if the reference to the CAC included a reference to the Industrial Court.
- 18.**—(1) Regulation 62 shall apply in relation to any Northern Ireland employee as if—
- (a) a reference to an employment tribunal were a reference to an Industrial Tribunal; and
  - (b) a reference to a conciliation officer were a reference to the Labour Relations Agency.
- (2) Regulation 62(2) and (3) shall have effect as if for the reference to section 18(1) of the Employment Tribunals Act 1996 there were a reference to Article 20(1) of the Industrial Tribunals (Northern Ireland) Order 1996.
- (3) After regulation 62(7)(b) there shall be inserted—
- “and
  - (c) as respects Northern Ireland, a barrister (whether in practice as such or employed to give legal advice) or a solicitor who holds a practising certificate.”.

19. Regulation 63 shall have effect as if for the heading there were substituted “Amendments to the Employment (Northern Ireland) Order 2003(a)” and for regulation 63 there shall be substituted—

“63. At the end of each of the following Schedules to the Employment (Northern Ireland) Order 2003—

- (a) Schedule 2 (tribunal jurisdictions to which Article 17 applies);
- (b) Schedule 3 (tribunal jurisdictions to which Article 19 applies); and
- (c) Schedule 4 (tribunal jurisdictions to which Article 27 applies),

insert—

“Regulation 51 of the Companies (Cross-Border Mergers) Regulations 2007 (detriment: enforcement and subsidiary provisions).”.

20. For any reference in these Regulations to a provision of the Employment Rights Act 1996 in column (1) of the following table there shall be substituted a reference to the provision in the Employment Rights (Northern Ireland) Order 1996(b) specified opposite thereto in column (2).

**Table**

<i>Column (1)</i>	<i>Column (2)</i>
<i>Employment Rights Act 1996</i>	<i>Employment Rights (Northern Ireland) Order 1996</i>
Part 10	Part XI
Section 43A	Article 67A
Chapter 2 of Part 14	Chapter IV of Part I
Section 48(2) to (4)	Article 71(2) to (14)
Section 48	Article 71
Section 49(1) to (5)	Article 72(1) to (5)
Section 62	Article 90

21. For the purposes of this Schedule—

“Industrial Court” means the Industrial Court constituted under Article 91 of the Industrial Relations (Northern Ireland) Order 1992(c);

“Industrial Tribunal” means a tribunal established under Article 3 of the Industrial Tribunal (Northern Ireland) Order 1996(d);

“Northern Ireland employee” means an employee employed to work in Northern Ireland; and

“Northern Ireland member of the special negotiating body” means a member of the special negotiating body elected or appointed by Northern Ireland employees.

(a) S.I. 2003/3902.

(b) S.I. 1996/1919 (N.I. 16).

(c) S.I. 1992/807 (N.I. 5).

(d) S.I. 1996/1921 (N.I. 18).

## 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<sup>(a)</sup>. They come into force on 15th 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 10 and 12 to 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 12 requires that the draft terms of merger must be registered and published. Regulation 13 requires that the draft terms of merger must be approved by the company’s members. Regulation 14 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.

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 of employee participation including

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(a) 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).



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 of 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 for Business, Enterprise and Regulatory Reform, Bay 565, 1 Victoria Street, London, SW1H 0ET or on [www.berr.gov.uk](http://www.berr.gov.uk). Copies have also been placed in the libraries of both Houses of Parliament.

