

# Corporate Restructuring

## The Cross-Border Mergers Directive



The simplification or consolidation of corporate group structures by reducing the number of group entities in different jurisdictions could significantly reduce annual compliance costs. Traditionally such simplification or consolidation has been effected by way of company liquidation or strike off but the transposition of the Cross-Border Mergers Directive into Irish law in May 2008 presents new alternatives to Irish companies with related entities in different jurisdictions to explore simplification proposals without the need to go down the often costly and time consuming liquidation route.

On 20 September 2005, the European Council adopted Directive 2005/56/EC on cross-border mergers of limited liability companies (the "Directive"). This aims to facilitate the carrying-out of cross-border mergers between various types of limited liability companies governed by the laws of different countries within the European Economic Area (i.e. the EU Member States together with Iceland, Liechtenstein and Norway). The Directive was transposed into Irish law on 27 May 2008 by the European Communities (Cross-Border Mergers) Regulations, 2008 (S.I. 157 of 2008) (the "Irish Regulations").

Under the Directive a cross-border merger can be effected in one of three different ways:

1. A merger whereby an existing company acquires all of the assets and liabilities of one or more other companies in return for the issue of shares by the acquiring company to the shareholders of those other companies.
2. A merger whereby two or more existing companies transfer all of their assets and liabilities to a newly formed company in exchange for the issue to their members of shares in that new company.
3. A merger whereby a subsidiary company transfers all of its assets and liabilities to its parent and is dissolved without going into liquidation.

### Steps involved in a cross-border merger from an Irish company's perspective

A number of steps must be carried out in order to effect a cross-border merger involving an Irish company. These include the following:

- Drawing up and adoption of common draft terms of merger by the directors of the Irish company together with the management of each of the other merging companies.

- Preparation by the directors of the Irish merging company of an explanatory report for the members of that company.
- Appointment of an independent person to prepare a report on the cross-border merger proposals for the members of the Irish merging company (although in certain circumstances this report will not be required).
- Approval of the common draft terms of merger by special resolution passed by the members of the Irish merging company.
- Application by the Irish merging company to the High Court for a certificate of compliance with the pre-merger requirements required of that company.
- A joint application by all of the merging companies to the competent authority in the country where the company resulting from the merger will be registered for an order confirming the completion of the merger (where the company resulting from the cross-border merger is to be an Irish company this application is made to the High Court).
- Notification of the completion of the merger to the Companies Registration Office for either the registration of the merger or the de-registration of an Irish merging company where the company resulting from the merger is not Irish

### **Employee participation in a cross-border merger**

The Irish Regulations set out certain provisions in relation to addressing the participation rights of employees in the cross-border merger process. Participation rights allow employees to participate in the management of a company by, for example, nominating members to the board of directors. There is currently no statutory entitlement to employee participation in Ireland. Consequently, employee participation and the relevant provisions in the Irish Regulations will only apply if a system of employee participation previously exists in any of the other merging companies or if a specific employee participation arrangement is in place in a company (e.g. Works Council).

Where employee participation does exist in one of the merging companies then all of the merging companies will be obliged to provide certain information to employees in relation to the cross-border merger and to reach a written agreement with employees in relation to the level of employee participation in the new or surviving company resulting from the merger.

Negotiations with employees can continue for up to a maximum of 12 months (although of course these might be concluded much sooner in practice) which has the potential to significantly prolong the time taken to implement the cross-border merger.

### **Consequences of a cross-border merger**

The consequences of a cross-border merger include:

- The transfer to the company resulting from the merger of all of the assets and liabilities of the merging companies.
- The issuing of shares in the company resulting from the merger to the shareholders of the merging companies.
- The company or companies being acquired in the merger being dissolved.
- Every contract, agreement or instrument to which a merging company is a party being construed and having effect as if the company resulting from the merger had been a party thereto instead of the merging company.

The Directive and the Irish Regulations present important new structuring options for Irish companies which bring with them additional commercial advantages for Irish businesses. For the first time Irish companies are able to effect mergers on an equal footing with their European counterparts. They can now formulate international group structures more simply and cost effectively.

When two or more companies merge in this way one company, the surviving entity, takes over all of the assets and liabilities of the other entity or entities and those other entities are, in effect, dissolved without going into liquidation and cease to exist.

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