

MERGERS



The Malta Business Registry

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Local Transactions

- **Local Mergers**

The amalgamation of two or more companies whereby one company acquires another company or companies (acquisition), or the amalgamation whereby it results in the formation of a new company. The procedures laid down in Articles 343 and 344 of the Companies Act (The Act) provide a clear guideline of the operation. Some exemptions to the requirements laid down by the said articles apply in cases when the company being acquired is fully owned (article 358) or owned to the extent of 90% or more (Article 359). A publication fee is applicable and is to be paid on submission of the 'Draft Terms'. One or more publication notices apply, and the earliest the process may be finalised is three (3) months from the publication notice made by the Registrar of the merger notification. This allows creditors or other interested parties sufficient time to object to the proposed amalgamation/s. The Draft Terms shall cover amongst other, all points under Article 344 (2) of the Act with exemptions as applicable under the relevant articles as previously mentioned and as applicable to the amalgamating companies. The Draft Terms of Merger delivered to the Registrar must be signed in original by at least one director and the company secretary of each of the amalgamating companies and in line with the Articles 138 (7) and 211 (3).

- **Local Divisions**

The Division of a company (Article 360) into two or more companies effected by either a Division by Acquisition (Article 361), or a Division by Formation of new companies (article 374), or a Division by a Combination of both. The procedures laid down in article 361 of the Companies Act (The Act) refer. Attention should also be made to the consequences of division as laid down in Article 371, and in particular to sub paragraph 4 which outlines additional documentation (declaratory public deed) required to be published as well as lodged with the Registrar. A publication fee is applicable and is to be paid on submission of the 'Draft Terms'. As is the case with mergers, one or more publication notices as notifications to interested and third parties apply. The draft terms of division delivered to the Registrar must be signed in original by at least one director and the company secretary of each of the companies involved in the division and in line with the Articles 138 (7) and 211 (3).

Continuation of Companies

The Continuation of Companies Regulations (Legal Notice 344 of 2002 as amended by Legal Notice 352 of 2003 and 181 and 186 of 2006) provides for:

- a. the continuation in Malta of a foreign company; and
- b. the continuation outside Malta of a company incorporated in Malta.

Continuation of a Foreign Company in Malta

A company formed and incorporated or registered under the laws of an approved foreign country, which is similar in nature to a company as known under the laws of Malta, may request the Registrar of Companies to be registered as continued in Malta, provided the laws of the foreign country so permit, and provided the company is authorised to do so by its constitutive documents.

The request to the Registrar of Companies must be accompanied by at least the following documents:

- the resolution or equivalent document of the foreign company authorising it to be registered as being continued in Malta, and, if the instrument is not written in the English language, a translation thereof in the English language, certified to be a correct translation in such manner as may be prescribed; the resolution or equivalent document has as far as practicably possible, to be in such manner, by such constituted body and with such majority as would be the equivalent, under the laws of the country or jurisdiction of formation and incorporation or registration, and according to its constitutive document, of an extraordinary resolution under the laws of Malta;
- a copy of the revised constitutive document of the foreign company including all the requirements necessary for the registration of a company in Malta in accordance with the provisions of the Act;
- a certificate of good standing in respect of the foreign company issued by the foreign competent authority in which the company was formed or incorporated or registered or other evidence to the satisfaction of the Registrar that the foreign company is in compliance with the registration requirements of that authority, and, if the instrument is not in English language, a translation thereof in the English language, certified to be a correct translation in such manner as may be prescribed;
- a declaration signed by at least two directors of the foreign company confirming:
 - o the name of the foreign company and the name under which it proposes to be continued;
 - o the jurisdiction under which it is incorporated;
 - o the date of incorporation;

o the decision to have the foreign company registered as continuing in Malta;

o that the foreign company has given formal notice to the relevant authority of the country or jurisdiction where the foreign company was formed, incorporated or registered of its decision to be registered as continuing in Malta in accordance with the procedure laid down by law; and, together with the declaration, there shall be annexed evidence of such notification;

o that no proceedings for breach of the laws of the country or jurisdiction of incorporation have been commenced against such foreign company, unless such proceedings arise out of an event which on the date of the occurrence thereof did not constitute such a breach;

- a declaration signed by at least two directors of the company confirming the solvency of the foreign company;
- a list of directors of the foreign company as well as the company secretary, if any, or of the persons vested with the administration or the representation of the foreign company;
- any other evidence or information which the Registrar may require;
- the relative registration fees.

Declaration on Beneficial Owners in terms of Regulation 3 - FORM BO1

In the case where anyone of the shareholders of the proposed company is a body corporate, then a Form BO (1) must be filed together with the memorandum and articles of association. Details on the beneficial owner must include: name and surname of the beneficial owner, date of birth, nationality, country of residence, official identification number and country of issue. A certified true copy of the identification documents should also be provided.

Declaration of compliance with article 139 made by persons applying to become directors of a proposed company - FORM K (1)

In accordance with Article 139 (1) & (5) of the Companies Act, each of the proposed director of the company needs to declare in writing that he or she shows explicit consent to be appointed as a director. Furthermore, when a person is being appointed director, such person is required to declare to the Registrar whether he or she is aware of circumstances which could lead to disqualification from holding the office of director. Such circumstances need to take into consideration company law provisions in Malta, particularly the disqualification provisions as contained in the Act as well as any other disqualification arising from other Member States. The Form K (1) needs to be dated not more than one (1) month preceding the date of filing of the Form.

The documents referred to above shall be delivered for registration to the Registrar who, being satisfied that they comply with the provisions of these regulations and the Act shall provisionally register them and certify under his hand that the company is

provisionally registered as continuing in Malta as from the date of registration, which date shall be indicated in the Provisional Certificate of Continuation. Upon the issue of such Provisional Certificate of Continuation the company shall be deemed thereafter to be a company provisionally registered under the Act.

Within a period of six months from the date of the issue by the Registrar of the Provisional Certificate of Continuation, the company shall submit documentary evidence to the Registrar that it has ceased to be a company registered in the country or jurisdiction where it had been initially formed and incorporated or registered.

Once the Registrar receives proof that the company has ceased to be a company registered in the country or jurisdiction where it had been initially formed and incorporated or registered and upon the surrender to the Registrar of the Provisional Certificate of Continuation, the Registrar shall issue a Certificate of Continuation confirming that the company has been registered as continuing in Malta.

Continuation of a Foreign Company Outside Malta

Subsidiary Legislation 386.05 – Continuation of Companies Regulations provides the framework whereby a Malta registered company may request the consent of the Registrar in Malta to be continued under the laws of an approved country or jurisdiction outside Malta. Regulations 11 to 16 provide for the full process and attention must be made to Regulations 12 to 14 when drafting the requested documents to be submitted at the Registry of Companies. A publication as notification to the public of the intention of the company to continue its existence outside Malta gives right to the creditors of the company to oppose such re-domiciliation, if good cause is shown in line with Regulation 15. Upon expiry of the publication notice and in being satisfied that Regulation 14 has been complied with, the Registrar will issue the consent of the continuation process to the company. An instrument of continuation is to be delivered to the Registrar in Malta as proof of the continuation, and the company shall be deemed to have ceased to be a company incorporated in Malta from the date when its continuation in that other country or jurisdiction takes effect. Upon necessary verifications, the Registrar will proceed to strike the name of the company off the Register.

It is important to note that these regulations are applicable for all companies wishing to continue their existence in all approved countries or jurisdictions bar those countries where the Mobility Directive of 2019 has been transposed and implemented.

Cross-Border Transactions

6.1 - Cross-Border Divisions (CBD)

Non-Applicability –

The CBD Regulations (S.L. 386.26) are **not** applicable in cases where any condition under Regulation 4(5) is present.

Part I – Procedures and formalities to be applied when the Company being Divided is registered in Malta

Filing with the Registrar - Regulation 10(1) – A Maltese Company being Divided is required to file:

- Draft terms of CBD as per Regulation 6;
- Declaration of solvency as per Regulation 8 (Not applicable if the Maltese Company being Divided is a company undergoing any one of the procedures referred to in Regulation 4 (4)); and
- A copy of the Notice informing the creditors, members, and employees or their representatives about the right to submit comments relating to the Draft Terms
- ✓ This filing is **not** required when the same information is published by the company on its website and is made available free of charge - Regulation 10(3). In such case, the company is to submit to the Registrar the details and information specified under Regulation 10(4)

Publication by Registrar – A statement is published in the Gazette or on the Registrar's website in terms of Regulation 10(2) and 10(5), as applicable. Another publication will be made in a daily newspaper in terms of Regulation 10 (6).

Approval by a General Meeting – Regulation 11(1) - The approval of the Draft Terms by the general meeting shall not be valid unless the extraordinary resolution is approved in accordance with the requirements of the Act and is adopted at least one (1) month after the publication of the statement referred to in Regulations 10 (2) and (5), as may be applicable.

Filing and Registration of the Extraordinary Resolution – It is to be delivered to the Registrar within fourteen (14) days from approval, and the Registrar, being satisfied that the requirements of Regulation 11 have been complied with, shall register the resolution – Regulation 14(1)

Publication - The Registrar shall cause a statement to be published in the Gazette or on the Registrar's website

Request for Pre-CBD Certificate – The Maltese Company being Divided is to submit to the Registrar the Form – DIVISION upon the lapse of one (1) month from the last (aforementioned) publication – Regulation 17(1) and accompanied by the documents referred to in Regulation 17(2). It is suggested that a covering letter signed by the

same directors signing the Form – DIVISION is filed stating whether Regulations 17 (2) (c), (d), (e), (g), (h) & (i) are applicable or not

Issue of Pre-CBD Certificate – This is issued following a review by the Registrar. **No** Pre-CBD Certificate can be issued prior the lapse of three (3) months from the publication under Regulation 10

Issue of Certificate of Completion – For the purposes of Regulation 20, when the Registrar is notified by the registry in the country or jurisdiction of each recipient company, that each respective Recipient Company has been registered, the Registrar shall:

- Issue a Certificate of Completion of CBD
- Cause a statement to be published in the Gazette or on the Registrar’s website
- In the event of a Full Division, strike the name of the Company being Divided off the register and register such date of striking-off, applying Article 401(1)(e) of the Act
- Inform the registers in the country or jurisdiction of each Recipient Company that the CBD has taken effect

Part II – Procedure and formalities to be applied when Malta is the jurisdiction of a Recipient Company

Malta as the jurisdiction of Recipient Company

For the purposes of Regulation 21 (1), when a company carrying out a CBD indicates Malta as the jurisdiction of a Recipient Company, the Registrar shall review the legality of the CBD as regard that part of the procedure which concerns the completion and approval of the CBD. In particular, the Registrar shall ensure that the Maltese Recipient Company complies with the provisions of the Act on the incorporation and registration of companies and, where appropriate, that arrangements for employee participation have been determined

The company shall submit to the Registrar the documents indicated in Regulation 21(2).

Approval by Registrar – Following a review and attestation that all conditions and formalities have been adhered to, as required by law, the Registrar shall:

- Approve the CBD by not later than ten (10) working days from the submission of documents in Regulation 21(2)
- Register the Recipient Company as a Maltese company
- Notify the register in the country or jurisdiction of the company being divided that the Maltese Recipient Company has been registered

6.2 – Cross – Border Conversions

The subsidiary Legislation 386.27 – Cross Border Conversions of Limited Liability Companies Regulations provides for:

Part I – Procedure and formalities to be applied when Malta is the departure jurisdiction

Part II – Procedure and formalities to be applied when Malta is the destination jurisdiction

Part I – Procedure and formalities to be applied when Malta is the departure jurisdiction

Non-Applicability –

The CBC Regulations (S.L. 386.27) are not applicable in cases where any condition under Regulation 4(4) is present.

Filing with the Registrar - Regulation 10(1) – A company is required to file:

- Draft terms of CBC as per Regulation 6
- Declaration of Solvency as per Regulation 8 (Not applicable if the Maltese registered converting company is a company undergoing any one of the procedures referred to in Regulation 4 (3)); and
- A copy of the notice informing the creditors, members, and employees or their representatives about the right to submit comments relating to the Draft Terms
- ✓ This filing is not required when the same information is published by the company on its website and is made available free of charge - Regulation 10(3). In such case, the company is to submit to the Registrar the details and information specified under Regulation 10(4)

Publication by Registrar – A statement is published in the Gazette or on the Registrar's website in terms of Regulation 10(2) and 10(5), as applicable. Another publication will be made in a daily newspaper in terms of Regulation 10 (6).

Approval by a General Meeting – Regulation 11(1) - The approval of the Draft Terms by the general meeting shall not be valid unless the extraordinary resolution is approved in accordance with the requirements of the Act and is adopted at least one (1) month after the publication of the statement referred to in Regulations 10 (2) and (5), as may be applicable.

Filing and Registration of the Extraordinary Resolution – It is to be delivered to the Registrar within fourteen (14) days from approval, and the Registrar, being satisfied that the requirements of Regulation 11 have been complied with, shall register the resolution – Regulation 14(1)

Publication - The Registrar shall cause a statement to be published in the Gazette or on the Registrar's website.

Request for Pre-CBC Certificate – The Maltese converting company is to submit to the Registrar the Form CBC1 - CONVERSION upon the lapse of one (1) month from the last (aforementioned) publication – Regulation 17(1) and accompanied by the documents referred to in Regulation 17(2). It is suggested that a covering letter signed by the same directors signing the Form CBC1 – Conversion is filed stating whether Regulations 17 (2) (c), (d), (e), (g), (h) & (i) are applicable or not

Issue of Pre-CBC Certificate – This is issued following a review by the Registrar. **No** Pre-CBC Certificate can be issued prior the lapse of three (3) months from the publication under Regulation 10

Striking-off – When the Registrar is notified of the effective date of the CBC by the registry in the destination jurisdiction to whose jurisdiction the Maltese registered converting company is subject, a notice is to be published in the Gazette or on the Registrar's website indicating that the CBC has been completed and the company shall be struck-off from the Maltese register – Regulation 20

Part II - Procedure and formalities to be applied when Malta is the destination jurisdiction

The foreign converting company shall submit to the Registrar:

- a. the draft terms of the cross-border conversion approved by the company's general meeting, which shall include at least the following:
 - i. the legal form and name of the company and the location of its registered office in the departure jurisdiction;
 - ii. the legal form and name proposed for the converted company in Malta and the proposed address of its registered office in Malta;
 - iii. the memorandum and the articles of association of the company, where applicable, as proposed for the converted company in Malta;
 - iv. the proposed indicative time-line for the cross-border conversion;
 - v. the rights conferred by the converted company on members enjoying special rights or on holders of securities other than shares representing the company capital, or the proposed measures concerning them;
 - vi. any safeguards offered to creditors, such as guarantees or pledges;
 - vii. any special advantages granted to members of the administrative, management, supervisory or controlling bodies of the company;
 - viii. whether any incentives or subsidies were received by the company in the departure jurisdiction, in the preceding five (5) years;
 - ix. details of the offer of cash compensation for members in accordance with regulation 12;
 - x. the electronic address intended to be used by members for the purposes of exercising their right in the departure jurisdiction in accordance with regulation 12(2);
 - xi. the likely repercussions of the cross-border conversion on employment;

xii. where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the converted company are determined

- the pre-conversion certificate issued by the departure jurisdiction;
- the memorandum and articles of association of the foreign converting company drawn up in accordance with the requirements of the Act;
- in those cases where the departure jurisdiction is not a Member State or EEA State, a reasoned opinion by one or more practising advocates confirming that the proposed cross-border conversion is permitted by the laws of the departure jurisdiction;
- a copy of the extraordinary resolution approving the cross-border conversion;
- a declaration of solvency, drawn up in the same manner as referred to in regulation 8;
- any other documents and information required for the purposes of registering the converting company as a Maltese company.

Declaration on Beneficial Owners in terms of Regulation 3 - FORM BO1

In the case where anyone of the shareholders of the proposed company is a body corporate, then a Form BO (1) must be filed together with the memorandum and articles of association. Details on the beneficial owner must include: name and surname of the beneficial owner, date of birth, nationality, country of residence, official identification number and country of issue. A certified true copy of the identification documents should also be provided.

Declaration of compliance with article 139 made by persons applying to become directors of a proposed company - FORM K (1)

In accordance with Article 139 (1) & (5) of the Companies Act, each of the proposed director of the company needs to declare in writing that he or she shows explicit consent to be appointed as a director. Furthermore, when a person is being appointed director, such person is required to declare to the Registrar whether he or she is aware of circumstances which could lead to disqualification from holding the office of director. Such circumstances need to take into consideration company law provisions in Malta, particularly the disqualification provisions as contained in the Act as well as any other disqualification arising from other Member States. The Form K (1) needs to be dated not more than one (1) month preceding the date of filing of the Form.

On the registration of all the mentioned documentation, the Registrar shall issue a certificate of Cross -Border Conversion which shall include the name, legal form and registration number of the converted company, a reference to the fact that the converted company has completed a cross-border conversion and the date on which the cross-border conversion takes effect. Such registration is conclusive evidence that the company has come into existence and is authorised to commence business as from the date of registration indicated in the certificate.

6.3 - Cross-Border Mergers (CBM)

Applicability

The CBM Regulations (S.L. 386.28) are not applicable in cases where any condition under Regulation 4(5) is present.

Filing with the Registrar - Regulation 10(1)

A company is required to file:

- Common Draft Terms of CBM as per Regulation 6;
- Declaration of Solvency as per Regulation 8 (Not applicable if the Maltese merging company is a company undergoing any one of the procedures referred to in Regulation 4 (4); and
- A copy of the Notice informing the creditors, members, and employees or their representatives about the right to submit comments relating to the Common Draft Terms at the latest five (5) working days before the date of the general meeting

This filing is **not** required when the same information is published by the company on its website and is made available free of charge - Regulation 10 (3). In such case, the company is to submit to the Registrar the details and information specified under Regulation 10 (4)

Publication by Registrar

A statement is published in the Gazette or on the Registrar's website in terms of Regulation 10 (2) and 10 (6), as applicable. Another publication will be made in a daily newspaper in terms of Regulation 10 (7).

Approval by a General Meeting – Regulation 11 (1)

The approval of the Common Draft Terms by the general meeting shall not be valid unless the extraordinary resolution is approved in accordance with the requirements of the Act and is adopted at least one (1) month after the publication of the statement referred to in Regulations 10 (2) and 10 (6), as may be applicable.

If the Maltese acquiring company satisfies the conditions of Article 345(6) of the Companies Act, the general meeting of such company is not required;

- ✓ The company or companies being acquired are exempt from holding a general meeting, if satisfying the conditions under Regulation 27 - Simplified Procedure
- ✓ When all the laws of the jurisdictions involved in the CBM provide for an exemption from the general meeting, Regulation 29 applies

Filing and Registration of the Extraordinary Resolution

It is to be delivered to the Registrar within fourteen (14) days from approval, and the Registrar, being satisfied that the Requirements of Regulation 11 have been complied with, shall register the resolution – Regulation 14 (1)

Publication

The Registrar shall cause a statement to be published in the Gazette or on the Registrar's website.

Request for Pre-CBM Certificate

Upon the lapse of one (1) month from the last (aforementioned) publication following the registration referred to in Regulation 14, or where the approval by the general meeting is not required in accordance with these regulations, upon the lapse of one (1) month from the publication referred to in Regulation 10 (7), each Maltese merging company shall submit to the Registrar an application in the Form - MERGER for registration, to obtain a pre-merger certificate – Regulation 17(1) and accompanied by the documents referred to in Regulation 17(2). It is suggested that a covering letter signed by the same directors signing the Form - MERGER is filed stating whether Regulations 17 (2) (c), (d), (e), (f), (g), (h) & (i) are applicable or not

Issue of Cross-Border Pre-Merger Certificate

This is issued following a review by the Registrar. No Pre-CBM Certificate can be issued prior the lapse of three (3) months from the publication under Regulation 10

Issue of Certificate of Completion

When the resulting company has or is to have its registered office in Malta, the Registrar shall ensure that the merging companies have approved the Common Draft Terms of CBM on the same terms and where, appropriate, that arrangements for employee participation have been determined – Regulation 20 (1).

For the purposes of Regulation 20 (1), each merging company is to submit to the Registrar the documents referred to in Regulation 20 (2). Following a review and validity assertion, the Registrar shall:

- Without delay, and in any event, not later than ten (10) working days from the submission of the documents referred to in Regulation 20 (2), issue a Certificate of Completion of CBM
- Cause a statement to be published in the Gazette or on the Registrar's website
- Notify the registers of each merging company that the CBM has taken effect

Striking-off

When the Maltese merging company is to cease to exist as a result of the CBM, the Registrar is notified of the effective date of the CBM by the respective registry in the jurisdiction of the resulting company, resulting in the immediate striking-off of the Maltese merging company – Regulation 21. A notice is to be published in the Gazette or on the Registrar's website.

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