

# THE TAKEOVER PANEL

## PRACTICE STATEMENT NO. 18

### CROSS-BORDER MERGERS

On 15 December 2007, the Companies (Cross-Border Mergers) Regulations 2007 (the “Regulations”) came into force. The Regulations implement Directive 2005/56/EC on cross-border mergers of limited liability companies. This Practice Statement considers the application of the Takeover Code to transactions to be effected pursuant to the Regulations.

#### *The Regulations*

The Regulations introduced a new type of statutory merger, a “Cross-Border Merger”, which must involve at least one company within the meaning of section 1 of the Companies Act 2006 and at least one company governed by the law of an EEA State other than the United Kingdom. In a Cross-Border Merger, all the assets and liabilities of one or more “transferor companies” are transferred by way of the transaction to a “transferee company”.

Under the Regulations, a Cross-Border Merger may take one of three forms, as follows:

- (a) a “merger by absorption”, in which a transferor company transfers all its assets and liabilities to an existing transferee company in exchange for securities in the transferee company (or securities and cash) receivable by the members of the transferor company;
- (b) a “merger by formation of a new company”, in which two or more transferor companies transfer all their assets and liabilities to a transferee company formed for the purposes of the Cross-Border Merger in exchange for securities

in the transferee company (or securities and cash) receivable by the members of the transferor companies; or

- (c) a “merger by absorption of a wholly-owned subsidiary”, in which a transferor company which is a wholly-owned subsidiary transfers all its assets and liabilities to its parent company.

### *The Introduction to the Code*

Section 3 of the Introduction to the Takeover Code describes the companies, transactions and persons that are subject to the Code. The first sentence of section 3(b) of the Introduction states as follows:

“... [T]he Code is concerned with regulating takeover bids and merger transactions of the relevant companies, however effected, including by means of a statutory merger or scheme of arrangement ...”.

The Panel Executive considers that certain Cross-Border Merger transactions will be subject to the Code, as described below.

### *Mergers by way of absorption*

The Executive will regard a Cross-Border Merger effected by means of a “merger by way of absorption” to be subject to the Code if the transferor company (or one or more of the transferor companies) is a company to which the Code applies by virtue of paragraphs (a)(i) or (ii) of section 3 of the Introduction to the Code (a “Code Company”). Any such transferor company will be treated as an “offeree company” for the purposes of the Code and the transferee company will be treated as the “offeror”.

The Executive will not regard a “merger by way of absorption” to be subject to the Code where the transferee company is a Code Company but the transferor company is not a Code Company (or, where there is more than one transferor company, none of the transferor companies are Code Companies). This will be the case even in a transaction where the size of one or more of the transferor companies is greater than

that of the transferee company, and even if the transferee company (i.e. the Code Company) will, upon completion of the transaction, increase its issued share capital by more than 100%. (However, a Rule 9 “whitewash” may be required if, for example, as a result of a “merger by way of absorption”, a person, together with persons acting in concert with him, will come to be interested in shares in a transferee company to which the Code applies carrying 30% or more of the voting rights - see Note 1 of the Notes on Dispensations from Rule 9.)

#### *Mergers by formation of a new company*

The Executive will normally regard a Cross-Border Merger effected by means of a “merger by formation of a new company” to be subject to the Code if one or more of the transferor companies is a Code Company. Any such transferor company will be treated as an “offeree company” for the purposes of the Code and the transferee company will be treated as the “offeror”.

However, even in such circumstances, if it can be established to the satisfaction of the Executive that the substance of the transaction is the acquisition by the Code Company of the company which is not a Code Company, the Executive may agree that the transaction should not be treated as an offer subject to the Code. This is consistent with the position described in paragraph 5.5.4 of PCP 11 dated 26 April 2002.

#### *Mergers by absorption of a wholly-owned subsidiary*

Consistent with its current practice in relation to companies which are technically companies to which the Code applies but which have only one shareholder, the Executive does not consider that the Code should be applied to a Cross-Border Merger effected by means of a “merger by absorption of a wholly-owned subsidiary”, even if the transferor company is technically a company to which the Code applies.

The Executive should be consulted at an early stage whenever parties are considering a Cross-Border Merger which may be subject to the Code.

*Practice Statements are issued by the Panel Executive to provide informal guidance to companies involved in takeovers and practitioners as to how the Executive normally interprets and applies relevant provisions of the Takeover Code in certain circumstances. Practice Statements do not form part of the Code. Accordingly, they are not binding on the Executive or the Panel and are not a substitute for consulting the Executive to establish how the Code applies in a particular case. All Practice Statements issued by the Executive are available on the Panel's website at [www.thetakeoverpanel.org.uk](http://www.thetakeoverpanel.org.uk).*

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