

Subsidiary Legislation made under s. 385.

**COMPANIES (CROSS-BORDER MERGERS)
REGULATIONS 2010**

(LN.2010/151)

30.9.2010

Amending enactments	Relevant current provisions	Commencement date
LN. 2010/152	<i>Corrigendum</i>	
2010/169	rr. 8(5) & (6), 10(2), 12(2) & (4)	25.11.2010
2012/028	rr. 6(3), 9(1)(b), 9A, 12(7), 12A, 13(4)(a) & (b), (5), (6) & (7)	8.3.2012
2012/061	rr. 3, 8(2A), 22(1A), 23(4), 29(2A), 37(2A) & 38(5)	26.4.2012
2014/114	r. 5A	7.7.2014
2014/189	rr. 3(1), 4, 5, 9, 11, 12, 12(6)(a), (b), 19(4)(a), (b),	1.11.2014
Act. 2016-20	rr. 3(1), (5), 24, 27(1), (4), (5), (6), 32, 33(4), (5), 41(5), (6), 42(2), (3), 45, 46(2)(a), (b), 48(2)(a), (b), 50(1), 51(1)(b), (2), (3)	13.10.2016

EU Legislation/International Agreements involved:

Directive 77/91/EEC
 Directive 78/855/EEC
 Directive 82/891/EEC
 Directive 89/666/EEC
 Directive 2005/56/EC
 Directive 2008/104/EC
 Directive 2009/101/EC
 Directive 2009/109/EC
 Directive 2012/17/EU

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In exercise of the powers conferred on him by section 385 of the Companies Act and in order to transpose into the law of Gibraltar Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, and matters connected thereto, the Minister responsible for finance has made the following Regulations>

**PART 1
GENERAL****Title and commencement.**

1. These Regulations may be cited as the Companies (Cross-Border Mergers) Regulations 2010 and come into operation on the day of publication.

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 Gibraltar 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.

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(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 Gibraltar 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 either–
 - (i) the law of a different EEA State, or
 - (ii) the laws of Gibraltar and of an 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, receivable by members of the transferor company;
- (d) at least one of the transferor companies or the transferee company is a Gibraltar company.

Interpretation.

3.(1) In these Regulations–

“the Act” means the Companies Act 2014;

“agency worker” has the same meaning as in regulation 3 of the Agency Workers Regulations 2012;

“assignment” has the same meaning as in regulation 2 of the Agency Workers Regulations 2012;

“competent authority of an EEA State” means a court or other authority designated in accordance with the law of an EEA State, including 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 the Supreme Court;

“the Directive” means Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, as amended from time to time;

“director” has the same meaning as in the Act;

“directors’ report” means a report prepared and adopted in accordance with regulation 8, 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 the Employment 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;

“EEA company” means a body corporate governed by the law of an EEA State, including 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—

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- (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
- (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), as amended from time to time;

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“Gibraltar company” means a company within the meaning of the Act other than–

- (a) a company limited by guarantee without a share capital, or
- (b) a company being wound up;

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

“Gibraltar members of the special negotiating body” means members of the special negotiating body, established pursuant to regulation 25, elected or appointed by Gibraltar employees;

“the Gibraltar register” means the Register of Companies kept and maintained by the Registrar under the Act;

““hirer” has the same meaning as in regulation 2 of the Agency Workers Regulations 2012;

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

“Employment Tribunal” means the Employment Tribunal established under rule 3 of the Employment Tribunal Rules;

“liabilities” includes duties;

“member” in relation to a Gibraltar company has the same meaning as in the Act;

“the Registrar” means the Registrar of Companies appointed under section 420 of the Act;

“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;

“suitable information relating to the use of agency workers” means–

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- (a) the number of agency workers working temporarily for and under the supervision and direction of a merging company or the transferee company (as the case may be);
- (b) the parts of the undertaking in which those agency workers are working; and
- (c) the type of work those agency workers are carrying out;

“temporary work agency” has the same meaning as in regulation 4 of the Agency Workers Regulations 2012.

“transferee company” means a Gibraltar 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 Gibraltar company or an EEA company whose assets and liabilities are to be transferred by way of a cross-border merger.

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

(4) References in these Regulations to a “summary conviction” means a summary conviction instituted against a body corporate in accordance with the laws of Gibraltar.

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(5) An appeal on points of law shall lie to the court in relation to any decision taken by the Employment Tribunal under or pursuant to these Regulations.

(6) For the avoidance of doubt, these Regulations apply between Gibraltar and the United Kingdom in the same way as they apply between Gibraltar and any other EEA State.

The Act.

4.(1) The following provisions of the Act apply for the purposes of these Regulations as they apply for the purposes of the Act—

- (a) section 429 (enforcement of duty of company to make returns to Registrar);
- (b) section 470 (penalty for false statement);
- (c) section 472 (provision with respect to default fines and meaning of “officer in default”);
- (d) section 474(2) (saving for privileged communications); and
- (e) all provisions that relate to unincorporated bodies.

(2) Section 426 of the Act (fees) applies to the functions conferred on the Registrar by these Regulations as it applies to the functions conferred on the Registrar by the Act.

(3) Any document required to be delivered to the Registrar under these Regulations shall be written in the English language and, if it is not written in the English language, a certified translation of it into English shall be delivered to the Registrar.

(4) In sub-regulation (3) “certified translation” means a translation which is certified to be accurate by a person authorised or qualified to make or verify translations for the purposes of court proceedings.

Unregistered companies.

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

(2) In the application of these Regulations to an unregistered company any reference to a Gibraltar company’s registered office shall be read as a reference to the unregistered company’s principal office in Gibraltar.

(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" has the same meaning as under section 15(1)(b) of the Act.

Data protection.

5A. The processing of personal data carried out in the context of these Regulations is subject to the Data Protection Act 2004.

**PART 2
PRE-MERGER REQUIREMENTS**

Court approval of pre-merger requirements.

6.(1) A Gibraltar 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 have been complied with.

(3) In a case falling within regulation 9A, the court may determine, or make provision for the determination of, the consideration to be given for securities acquired under that regulation.

Draft terms of merger.

7.(1) The directors of the Gibraltar 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;

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- (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 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;
- (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 paragraphs (b), (c) and (e) of sub-regulation (2) may be omitted in the case of a merger by absorption of a wholly-owned subsidiary.

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- (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 Gibraltar 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 Gibraltar 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.

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(2A) Where information to be provided under subregulation (2)(a) relates to the employment situation, it must include suitable information relating to the use of agency workers.

(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 sub-regulation (3).

(5) The directors of the Gibraltar merging company must deliver copies of the report to its employee representatives, or if there are no such representatives, to the employees—

- (a) not less than 1 month before the date of the first meeting (if any) of the members, or any class of members, of the company as referred to in regulation 13;
- (b) if the Gibraltar merging company is a transferor company and regulation 13(3) applies, not less than 1 month before the date of the first meeting (if any) of members of the transferee company;
- (c) if the Gibraltar merging company is an existing transferee company and regulation 13(4) applies, not less than 1 month before the date of the first meeting (if any) of members of the transferor companies; or
- (d) if no merging company is required to hold a meeting of members, or any class of members, not less than 1 month before the date of the hearing seeking the court order referred to in regulation 6(1).

(6) If the employee representatives deliver an opinion on the report to the company's registered office—

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- (a) not less than 2 weeks before the date of the first meeting (if any) of the members, or any class of members, of the company;
- (b) if the Gibraltar merging company is a transferor company and regulation 13(3) applies, not less than 2 weeks before the date of the first meeting (if any) of members of the transferee company;
- (c) if the Gibraltar merging company is an existing transferee company and regulation 13(4) applies, not less than 2 weeks before the date of the first meeting (if any) of members of the transferor companies; or
- (d) if no merging company is required to hold a meeting of members, or any class of members, not less than 2 weeks before the date of the hearing seeking the court order referred to in regulation 6(1),

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 sub-regulation (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 conditions in regulation 9A are met; 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 Gibraltar merging company by its directors;

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- (b) an independent expert who has been appointed for all the merging companies by the court in accordance with sub-regulation (3); or
- (c) a person who has been appointed for all the merging companies for the purposes of Article 8 of the Directive (independent expert's report) by a competent authority of an 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

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- (iii) as to whether the share exchange ratio is reasonable;
- (d) in the case of a valuation made by another person in accordance with sub-regulation (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 auditor of a company in accordance with section 255(3) of the Act (appointment and remuneration of auditors), and
 - (b) is independent.
- (8) For the purposes of this regulation, a person is not independent if by virtue of the application of one or more of sub-regulations (9), (10) and (11) he would not be able to act as auditor of any of the merging companies.
- (9) This sub-regulation applies if the person is–
 - (a) an officer or employee of the audited person; or
 - (b) a partner or employee of such a person, or a partnership of which such a person is a partner.
- (10) This sub-regulation applies if the person is–

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- (a) an officer or employee of an associated undertaking of the audited person; or
- (b) a partner or employee of such a person, or a partnership of which such a person is a partner.

(11) This sub-regulation applies if there exists between-

- (a) the person or an associate of his, and
- (b) the audited person or an associated undertaking of the audited person,

a connection of any such description as may be specified by regulations made by the Minister.

(12) An auditor of an audited person is not to be regarded as an officer or employee of the person for the purposes of sub-regulations (9) and (10).

(13) In this regulation “associated undertaking”, in relation to an audited person, means-

- (a) a parent undertaking or subsidiary undertaking of the audited person, or
- (b) a subsidiary undertaking of a parent undertaking of the audited person.

(14) Sub-regulations (9) to (13) apply in relation to all the merging companies as if they were companies in respect of which a person must be appointed as auditor under section 255 of the Act (appointment and remuneration of auditors).

(15) 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.

Circumstances in which independent expert’s report not required.

9A.(1) The requirement to draw up a report in accordance with regulation 9 does not apply if the conditions in sub-regulations (2) to (4) are met.

(2) The first condition is that 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.

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(3) The second condition is that the draft terms of merger provide that every other holder of relevant securities has the right to require the transferee company to acquire those securities.

(4) The third condition is that, if a holder of securities exercises that right, the consideration to be given for those securities is fair and reasonable.

(5) In this regulation–

“other holder” means a person who holds securities of the transferor company otherwise than on behalf of the transferee company, and does not include the transferee company itself;

“relevant securities”, in relation to a 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 Gibraltar merging company and its employee representatives (or if there are no such representatives, the employees) must be able, during the period specified in sub-regulation (2)–

- (a) to inspect at the registered office of the company copies of the documents listed in sub-regulation (3);
- (b) to obtain copies of those documents or any part of them on request free of charge.

(2) Subject to regulation 13, the period referred to in subregulation (1) is the period–

- (a) beginning one month before and ending on the date of the first meeting (if any) of the members, or any class of members, of the company;
- (b) if the Gibraltar merging company is a transferor company and regulation 13(3) applies, beginning one month before and ending on the date of the first meeting (if any) of members of the transferee company;
- (c) if the Gibraltar merging company is an existing transferee company and regulation 13(4) applies, beginning one month

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before and ending on the date of the first meeting (if any) of members of the transferor companies; or

- (d) if no merging company is required to hold a meeting of members, or any class of members, beginning one month before and ending on the date of the hearing seeking the court order referred to in regulation 6(1).

(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.

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;
- (b) creditors or a class of creditors, for the purposes of regulation 14;

to be summoned in such manner as the court directs.

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

- (a) the Gibraltar merging company;
- (b) any member of the Gibraltar merging company in the case of a meeting of members or a class of members;
- (c) any creditor of the Gibraltar merging company in the case of a meeting of creditors or a class of creditors; or
- (d) in the case of a Gibraltar merging company in administration, the administrator.

(3) Section 199 of the Act (representation of companies at meetings of other companies and of creditors) applies to a meeting of the creditors summoned under this regulation as to a meeting of the company (the

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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 Gibraltar merging company must deliver to the Registrar particulars of the date, time and place of every meeting summoned under regulation 11 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 Gibraltar 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 the documents mentioned in subregulation (1) to the Registrar not less than one month before—

- (a) the date of the first meeting (if any) of the members, or any class of members, of the company;
- (b) if the Gibraltar merging company is a transferor company and regulation 13(3) applies, the date of the first meeting (if any) of members of the transferee company;

- (c) if the Gibraltar merging company is an existing transferee company and regulation 13(4) applies, the date of the first meeting (if any) of members of the transferor companies; or
- (d) if no merging company is required to hold a meeting of members, or any class of members, the date of the hearing seeking the court order referred to in regulation 6(1).

(3) If the documents are delivered to the Registrar in accordance with sub-regulations (1) and (2), he must publish in the Gazette notice of his receipt of the documents.

(4) The notice referred to in subregulation (3) must be published by the Registrar at least one month before—

- (a) the date of the first meeting (if any) of the members, or any class of members, of the company;
- (b) if the Gibraltar merging company is a transferor company and regulation 13(3) applies, the date of the first meeting (if any) of members of the transferee company;
- (c) if the Gibraltar merging company is an existing transferee company and regulation 13(4) applies, the date of the first meeting (if any) of members of the transferor companies; or
- (d) if no merging company is required to hold a meeting of members, or any class of members, the date of the hearing seeking the court order referred to in regulation 6(1).

(5) The notice must include—

- (a) the date of receipt of the documents;
- (b) the particulars referred to in sub-regulation (1)(c);
- (c) in relation to each Gibraltar merging company, a statement that information related to the company is kept in the Gibraltar register;
- (d) a statement that regulation 10 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;

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- (e) the date, time and place of every meeting summoned under regulation 11.

(6) The following provisions of the Act apply to the documents delivered to the Registrar in accordance with sub-regulation (1) in the same way as they apply to documents subject to the disclosure requirements set out in Article 3 of the First Company Law Directive—

- (a) section 423 (delivery to the Registrar of documents);
- (b) section 424 (delivery of documents);
- (c) section 425 (keeping of company records by the Registrar);
- (d) section 426 (fees);
- (e) section 427 (inspection, production and evidence of documents kept by Registrar);
- (f) section 429 (enforcement of duty of company to make returns to Registrar);
- (g) section 430 (official notification);
- (h) Schedule 24 (Table of fees to be paid to the Registrar).

(7) The requirements in sub-regulations (1) to (4), so far as they relate to the draft terms of the merger, are subject to regulation 12A.

Publication of draft terms of merger on company website.

12A.(1) The following requirements of regulation 12 do not apply where the conditions in sub-regulations (2) to (6) are met—

- (a) the requirement in sub-regulation (1)(b); and
- (b) the requirement in sub-regulation (3), so far as it relates to the draft terms of merger.

(2) The first condition is that the draft terms of merger are made available on a website which—

- (a) is maintained by or on behalf of the Gibraltar merging company; and
- (b) identifies the company.

(3) The second condition is that neither access to the draft terms of merger on the website nor the supply of a hard copy of them from the website is conditional on payment of a fee or otherwise restricted.

(4) The third condition is that the directors of the company deliver to the Registrar a notice giving details of the website.

(5) The fourth condition is that the Registrar publishes the notice in the Gazette at least one month before the date of the first meeting of the members, or any class of members, of the company pursuant to regulation 13.

(6) The fifth condition is that the draft terms of merger remain available on the website throughout the period beginning one month before, and ending not earlier than the conclusion of the first meeting of members of the transferor company.

(7) A failure to make the draft terms available on the website throughout the period specified in sub-regulation (6) is to be disregarded if–

- (a) they are made available on the website for part of that period; and
- (b) the failure to make them available throughout that period is wholly attributable to circumstances that it would not be reasonable to have expected the company to prevent or avoid.

Approval of members in meeting.

13.(1) Except as provided in sub-regulations (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 Gibraltar merging company, present and voting either in person or by proxy at a meeting summoned under regulation 11.

(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;
- (b) an order of a competent authority of an 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).

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(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 or 12A 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) sub-regulations (5) or (6) is satisfied for each of the documents listed in regulation 10(3) in relation to all the merging companies; 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, 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.

(5) This sub-regulation is satisfied for a document if the members of the transferee company were able during the period beginning one month before, and ending not earlier than the conclusion of any such meeting–

- (a) to inspect at the registered office of the transferee company a copy of the document; and
- (b) to obtain copies of it or any part of it on request.

(6) This sub-regulation is satisfied for a document if–

- (a) the document is made available on a website which is maintained by or on behalf of the transferee company and identifies the company;
- (b) access to it on the website is not conditional on the payment of a fee or otherwise restricted;

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- (c) it remains available on the website throughout the period beginning one month before, and ending not earlier than the conclusion of the first meeting of members of the transferor company; and
- (d) members of the transferee company were able, during that period, to obtain copies of it or any part of it on request.

(7) A failure to make a document available on the website throughout the period specified in sub-regulation (6)(c) is to be disregarded if-

- (a) the document is made available on the website for part of that period; and
- (b) the failure to make it available throughout that period is wholly attributable to circumstances that it would not be reasonable to have expected the company to prevent or avoid.”.

Approval of creditors in meeting.

14. If a meeting of creditors or a class of creditors is summoned under regulation 11, 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, every notice summoning the meeting that is given by advertisement or that is sent to a member or creditor, must—

- (a) include copies of the documents referred to in regulation 10(3), or
- (b) state where and how members or creditors may obtain or inspect copies of the documents referred to in regulation 10(3).

(2) Where a notice given by advertisement states that copies of the documents referred to in regulation 10(3) 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 Gibraltar company;
- (b) an order has been made under regulation 6 in relation to each Gibraltar merging company;
- (c) an order has been made by a competent authority of an 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 paragraph (b) or (c);
- (e) the draft terms of merger approved by every order referred to in 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.

(2) Where the court makes such an order, it must in the order specify a date on which the consequences of the cross-border merger are to have effect.

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

- (a) the conditions set out in sub-regulation (1) have been satisfied; and
- (b) the requirements of regulations 7 to 10 and 12 to 15 have been complied with.

Consequences of a cross-border merger.

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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, on the date fixed in that order; or
- (b) where an order has been made by a competent authority of an 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 an 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 approving the completion of a cross-border merger, the Gibraltar 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.

19.(1) Where an order is made under regulation 16–

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

must deliver the documents and particulars specified in sub-regulation (2) to the Registrar for registration not more than 7 days after the date on which it was made.

(2) The documents and particulars referred to in sub-regulation (1) are—

- (a) a copy of the order made under regulation 16;
- (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 an 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 an 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 Gibraltar company must deliver a copy of the order to the Registrar for registration not more than 14 days after the date on which it was made.

(4) The following provisions of the Act apply to the documents delivered to the Registrar in accordance with sub-regulations (1) or (2) in the same way as they apply to documents subject to the disclosure requirements set out in Article 3 of the First Company Law Directive—

- (a) section 344 (delivery to the Registrar of documents);
- (b) section 345 (delivery of documents);
- (c) section 346 (keeping of company records by the Registrar);
- (d) section 347 (fees);

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- (e) section 348 (inspection, production and evidence of documents kept by Registrar);
- (f) section 349 (enforcement of duty of company to make returns to Registrar);
- (g) section 350 (official notification);
- (h) Schedule 8 (Table of fees to be paid to the Registrar).

(5) If a Gibraltar merging company makes default in complying with sub-regulation (1) or (3), 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 Gibraltar transferee company, or
- (b) any resolution or agreement in relation to the Gibraltar transferee company to which section 206 of the Act (registration and copies of certain resolutions and agreements) applies,

the copy of the order delivered to the Registrar by the Gibraltar transferee company under regulation 19 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—

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- (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 Gibraltar transferee company makes default in complying with this regulation, an offence is committed by—

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

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

Notification of registration.

21.(1) Where the Registrar receives a copy of an order made under regulation 16 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 an 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), take the steps specified in sub-regulation (3) in relation to every Gibraltar transferor company.

(2) Where the Registrar receives from the registry of an 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 sub-regulation (3) in relation to every Gibraltar transferor company.

- (3) The steps referred to in sub-regulations (1)(c) and (2) are—
- (a) striking the name of the Gibraltar transferor company from the Gibraltar 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, the assets and liabilities of the Gibraltar 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 sub-regulation (2), this Part shall apply where the transferee company is a Gibraltar 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 Gibraltar 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.

(1A) For the purposes of subregulation (1)(a), agency workers whose contract within regulation 3(1)(b) of the Agency Workers Regulations 2012 was not a contract of employment with one or more temporary work agencies that were merging companies at the relevant time, are to be treated as having been employed by such a temporary work agency or agencies for the duration of their assignment with a hirer.

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

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, 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 sub-regulation (1) shall include, as a minimum, information—

- (a) identifying the merging companies;
- (b) of any decision taken pursuant to regulation 36; 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 shall provide that body with such information as is necessary to keep it informed of the plan and progress of establishing the Gibraltar transferee company until the date upon which the consequences of the cross-border merger take effect.

(4) Where under the provisions of this regulation a merging company is to provide information, such information must include suitable information relating to the use of agency workers (if any) in that company.

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 Employment Tribunal 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 Employment Tribunal finds the complaint well-founded it shall make an order requiring the company to disclose information to the complainant specifying—

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- (a) the information in respect of which the Employment Tribunal 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 shall disclose the information specified in the order.

The special negotiating body.

25.(1) Subject to regulation 36, 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.

(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 or Gibraltar 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 or in Gibraltar represent of the total workforce of the merging companies. These members shall be the “constituent members”.

(2) If, following an election under sub-regulation (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 sub-regulation (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 sub-regulation (2) shall not exceed 20% of the number of constituent members elected under sub-regulation (1) and if the number of additional members under sub-regulation (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 sub-regulation (1) having the highest number of employees; and

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- (b) if more than one additional member is to be elected, those employed by the merging companies registered in each EEA State or Gibraltar that are not represented under sub-regulation (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 or Gibraltar which 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 Employment Tribunal 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 Employment Tribunal 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 Employment Tribunal finds an application made under sub-regulation (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 Employment Tribunal finds an application made under sub-regulation (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 this Chapter and in Chapter 5 the merging companies and the special negotiating body are referred to as “the parties”.

(2) Subject to regulations 31 and 36 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 sub-regulation (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 shall 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 Gibraltar 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.

(2A) Where under the employee participation agreement the transferee company is to provide information on the employment situation in that company, such information must include suitable information relating to the use of agency workers (if any) in that company.

(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 sub-regulation (3) and regulation 31, the special negotiating body shall take decisions by an absolute majority vote.

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(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 shall be taken by a two thirds majority vote.

(4) In sub-regulation (3), reduction of participation rights means that the proportion of directors of the Gibraltar 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 shall publish the details of any decision taken under this regulation or under regulation 31 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 which 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 or to terminate negotiations already opened.

(2) Following any decision made under sub-regulation (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.

(3) For the purposes of sub-regulation (1), the reference to “at least two different EEA States” includes a reference to Gibraltar and an EEA State.

Complaint about decisions of special negotiating body.

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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 Employment Tribunal 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 shall be presented to the Employment Tribunal–

- (a) in the case of a complaint under sub-regulation (1)(a), within 21 days of publication of the decision of the special negotiating body;
- (b) in the case of a complaint under sub-regulation (1)(b), within 21 days of the date by which the decision should have been published.

(3) Where the Employment Tribunal 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 Gibraltar members of the special negotiating body

Ballot arrangements.

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

(2) The Gibraltar merging company shall arrange for the holding of a ballot of those employees in accordance with the requirements of sub-regulation (3).

(3) The requirements referred to in sub-regulation (2) are–

- (a) in relation to the election of constituent members of the special negotiating body under regulation 26(1), that–

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- (i) if the number of members which Gibraltar employees are entitled to elect to the special negotiating body is equal to the number of Gibraltar merging companies, there shall be separate ballots of the Gibraltar employees in each Gibraltar merging company;
- (ii) if the number of members which the Gibraltar employees are entitled to elect to the special negotiating body is greater than the number of Gibraltar merging companies, there shall be separate ballots of the Gibraltar employees in each Gibraltar 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 Gibraltar merging company is proportionate to the number of employees in that company;
- (iii) if the number of members which the Gibraltar employees are entitled to elect to the special negotiating body is smaller than the number of Gibraltar 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 Gibraltar merging company entitled to elect an additional member;
- (c) that in a ballot in respect of a particular Gibraltar merging company, all Gibraltar employees employed by that merging company are entitled to vote;

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- (d) that in a ballot in respect of a particular Gibraltar merging company, any person who is immediately before the latest time at which a person may become a candidate—
- (i) a Gibraltar 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,

shall be entitled to stand as a candidate for election as a member of the special negotiating body in that ballot;

- (e) that the directors shall, in accordance with sub-regulation (7), appoint an independent ballot supervisor to supervise the conduct of the ballot of Gibraltar employees but may instead, where there is to be more than one ballot, appoint more than one independent ballot supervisor in accordance with that sub-regulation, 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 Gibraltar employees and before they have published the final arrangements under paragraph (g) they shall, so far as reasonably practicable, consult with the employee representatives on the proposed arrangements for the ballot of Gibraltar employees; and
- (g) that the directors shall publish, as soon as reasonably practicable, the final arrangements for the ballot of Gibraltar employees in such manner as to bring them to the attention of, so far as reasonably practicable, all Gibraltar employees and the employee representatives.

(4) Any Gibraltar employee or employee representative who believes that the arrangements for the ballot of the Gibraltar employees do not comply with the requirements of sub-regulation (3)(a) to (e) or that there has been a failure to satisfy the requirements of sub-regulation (3)(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-regulation (3)(g), present a complaint to the Employment Tribunal.

(5) Where the Employment Tribunal 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

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Gibraltar employees or to satisfy the requirements in sub-regulation (3)(f) or (g).

(6) An order under sub-regulation (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 sub-regulation (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 shall—

- (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 Gibraltar 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) 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

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(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 shall publish the results of the ballot in such manner as to make them available to the directors and, so far as reasonably practicable, the Gibraltar 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 sub-regulation (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 sub-regulation (2) was satisfied in the ballot.

(5) Where a ballot supervisor publishes an ineffective ballot report the report shall be published within a period of one month commencing on the date on which the ballot supervisor publishes the results of the ballot under sub-regulation (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

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practicable, the Gibraltar 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);
 - (b) if there have been separate ballots and 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 Gibraltar employees, including payments made to a ballot supervisor for supervising the conduct of the ballot, shall be borne by the Gibraltar merging company (whether or not an ineffective ballot report has been published).

Representation of employees.

35.(1) Subject to sub-regulation (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
Gibraltar transferee company

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

Application of the standard rules.

37.(1) Notwithstanding regulation 36, the standard rules of employee participation shall apply to a Gibraltar transferee company in circumstances where sub-regulation (2) applies and where—

- (a) the parties agree that they should; or
- (b) the period specified in regulation 28(3) 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 sub-regulation applies where before registration of the Gibraltar 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.

(2A) For the purposes of subregulation (2), agency workers whose contract within regulation 3(1)(b) of the Agency Workers Regulations 2012 was not a contract of employment with one or more temporary work agencies that were merging companies at the relevant time, are to be treated as having been employed by such a temporary work agency or agencies for the duration of their assignment with a hirer.

(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 Gibraltar 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 sub-regulation (3); or
- (b) one or more forms 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 Gibraltar transferee company.

The standard rules of employee participation.

38.(1) The employee representatives of the Gibraltar 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 sub-regulation (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 sub-regulation (2), if the employees of one or more merging companies are not covered by the proportional criterion set out in sub-regulation (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 Gibraltar, if appropriate.

(4) Every director of the transferee company who has been elected, appointed or recommended by the employee representatives or the

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employees, shall be a full director with the same rights and obligations as the directors representing shareholders, including the right to vote.

(5) Where under the standard rules of employee participation the transferee company is to provide information on the employment situation in that company, such information must include suitable information relating to the use of agency workers (if any) in that company.

Limit on level of employee participation.

39. Where, following prior negotiation, the standard rules of employee participation apply, the Gibraltar 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. 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 by any order made by the court pursuant to sections 295 to 325 of the Act for the purposes of—

- (a) a reconstruction of the company or the amalgamation of the company with another company; or
- (b) a merger involving a public company.

**Chapter 6
Confidential information****Duty of confidentiality.**

41.(1) Where a transferee company or a merging company entrusts a person ("the recipient"), 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) The obligation to comply with sub-regulation (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).

(3) Sub-regulation (2) shall 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.

(4) No action shall lie under sub-regulation (2) where the recipient reasonably believed the disclosure to be a protected disclosure within the meaning given to that expression by regulation 2 of the Employment (Information and Consultation of Employees) Regulations 2005.

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

(6) If the Employment Tribunal 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 company, 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.

(7) If a declaration is made under sub-regulation (6), 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 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

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

(3) If the Employment Tribunal 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 sub-regulation (1), the Employment Tribunal shall order the transferee company or merging company to disclose the information or document.

(4) An order under sub-regulation (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
- (c) 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,

shall be 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.

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) The appropriate hourly rate, in relation to an employee, shall be 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.

(3) 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 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 sub-regulation (4) as are appropriate in the circumstances.

(4) The considerations referred to sub-regulation (3)(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.

(5) A right to any amount under sub-regulation (1) shall not affect any right of an employee in relation to remuneration under his contract of employment.

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(6) 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 sub-regulation (1) in respect of that period, and conversely, any payment of remuneration under sub-regulation(1) in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

(7) Regulation 28 of the Employment (Information and Consultation of Employees) Regulations 2005 shall apply to this regulation as it applies to those Regulations.

Right to time off: complaints to Employment Tribunal.

45.(1) An employee may present a complaint to the 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) The 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 the Employment Tribunal finds a complaint under this regulation well-founded, it 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

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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 the Employment Act if the reason (or, if more than one, the principal reason) for the dismissal is one specified in sub-regulation (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 Employment Tribunal or the court 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 Gibraltar 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 paragraphs (e) to (h).

(3) Sub-regulation (1) shall not apply where the reason (or principal reason) for the dismissal is that in the performance, or purported

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performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 41, unless the employee reasonably believed the disclosure to be a protected disclosure within the meaning given to that expression by regulation 2 of the Employment (Information and Consultation of Employees) Regulations 2005.

(4) For the purposes of sub-regulation (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-regulation 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 the Employment Act if the reason (or, if more than one, the principal reason) for the dismissal is one specified in sub-regulation (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 or 44.

(3) Sub-regulation (1) does not apply in the circumstances set out in sub-regulation(2)(a) where the reason (or principal reason) for the dismissal is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 41, unless the employee reasonably believed the disclosure to be a protected disclosure within the meaning given to that

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expression by regulation 2 of the Employment (Information and Consultation of Employees) Regulations 2005.

Detriment.

48.(1) An employee shall have 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 sub-regulation (2).

(2) The grounds are that the employee—

- (a) took, or proposed to take, any proceedings before the 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 Employment Tribunal or the court 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 Gibraltar 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 paragraphs (d) to (h).

(3) It is immaterial for the purposes of sub-regulation (2)(a)—

- (a) whether or not the employee has the right or entitlement; or

- (b) whether or not the right has been infringed,

but for that sub-regulation 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 a dismissal.

Detriment for member of special negotiating body, etc.

49.(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 sub-regulation (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 or 44.

(3) Sub-regulation (1) shall not apply in the circumstances set out in sub-regulation (2)(a) where the ground for the subjection to detriment is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 41, unless the employee reasonably believed the disclosure to be a protected disclosure within the meaning given to that expression by regulation 2 of the Employment (Information and Consultation of Employees) Regulations 2005.

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

Detriment: enforcement and subsidiary provisions.

50.(1) An employee may present a complaint to the Employment Tribunal that he has been subjected to a detriment in contravention of regulation 48 or 49.

(2) The provisions of sections 71 and 72 of the Employment Act shall apply in relation to a complaint under this regulation, save that references to the dismissal of the complainant in those sections shall be construed as references to the detriment suffered by the complainant under regulations 48 and 49.

Chapter 8 Compliance and enforcement

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

51.(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 Employment Tribunal 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 sub-regulation (1) shall 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) Where the Employment Tribunal 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.

(4) An order made under sub-regulation (3) 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.

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(5) If the Employment Tribunal makes a declaration under sub-regulation (3), 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 court for a penalty notice to be issued.

(6) Where such an application is made, the court shall issue a written penalty notice to the transferee company requiring it to pay a penalty to the Minister 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.

(7) Regulation 53 shall apply in respect of a penalty notice issued under this regulation.

(8) No order of the Employment Tribunal 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.

(9) 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.

Misuse of procedures.

52.(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 paragraph (a),

he may make a complaint to the Employment Tribunal.

(2) A complaint shall be made to the Employment Tribunal under sub-regulation (1) before the date upon which the consequences of the cross-border merger take effect or within a period of 12 months after that date.

(3) The Employment Tribunal 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-regulation (1)(a) or (b).

(4) If the Employment Tribunal 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 sub-regulation (1)(a) are not deprived of their rights to employee participation or that such rights are not withheld from them.

(5) If the Employment Tribunal makes a declaration under sub-regulation (4), the complainant under sub-regulation (1) may, within the period of three months beginning with the day on which the decision is made, make an application to the court for a penalty notice to be issued.

(6) Where such an application is made, the court shall issue a written penalty notice to the transferee company or merging company requiring it to pay a penalty to the Minister 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 51(7) to (8) and 53 shall apply to the complaint.

Penalties.

53.(1) A penalty notice issued under regulation 51 or 52 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) When setting the amount of the penalty, the court 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.

(3) The date specified under sub-regulation (1)(b) shall not be earlier than the end of the period within which an appeal against a decision or order made by the Employment Tribunal under regulation 51 or 52 may be made.

(4) 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 Minister 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.

(5) The making of an appeal shall suspend the effect of the penalty notice.

(6) Any sums received by the Minister under regulation 51, 52 or this regulation shall be paid into the Consolidated Fund.

Exclusivity of remedy.

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

Chapter 9 Miscellaneous

Restrictions on contracting out.

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

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- (a) to exclude or limit the operation of any provision of this Part other than a provision of Chapter 7; or
- (b) to preclude a person from bringing any proceedings before the Employment Tribunal, under any provision of this Part (other than a provision of that Chapter).

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

(3) The exclusion relating to Chapter 7 in sub-regulation (1)(a) is without prejudice to regulation 56.

Restrictions on contracting out: Chapter 7 of this Part.

56.(1) Any provision in any agreement (whether an employee's contract or not) shall be 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 the Employment Tribunal under that Chapter.

(2) Sub-regulation (1) does not apply to any agreement to refrain from instituting or continuing proceedings before the Employment Tribunal where a conciliator, board of conciliation or arbitration tribunal has taken action under the Trade Union and Trade Disputes Act.

(3) Sub-regulation (1) does not apply to any agreement to refrain from instituting or continuing before the Employment Tribunal proceedings which may be subject to a conciliation or arbitration procedure under the Trades Union and Trades Disputes Act if the conditions regulating compromise agreements under these Regulations are satisfied in relation to the agreement.

(4) For the purposes of sub-regulation (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

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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 paragraphs (a) to (e) are satisfied.

(5) A person is a relevant independent adviser for the purposes of sub-regulation (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 sub-regulation (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 sub-regulation (5)(b) or (c), if the trade union or advice centre is the employer or an associated employer.

(7) In sub-regulation (5)(a), a “qualified lawyer” means any barrister or solicitor who is entitled to practise in Gibraltar in accordance with the provisions of the Supreme Court Act.

(8) For the purposes of sub-regulation (6) any two employers shall be treated as associated if–

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- (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.