

**FIRST SUPPLEMENT TO THE GIBRALTAR  
GAZETTE**

**No. 3,034 of 2nd April, 1998**

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**COMPANIES (MERGERS AND DIVISIONS) ORDINANCE 1998**

**ARRANGEMENT OF SECTIONS**

Section

1. Title and Commencement.
2. Amendment of the Companies Ordinance.
3. New Schedule 17 to the Companies Ordinance.
4. Amendment to section 218A of the Companies Ordinance.

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[No. 21 of 1998]

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I ASSENT,  
RICHARD LUCE,  
GOVERNOR.

2nd April, 1998.



**GIBRALTAR**

**No. 21 of 1998**

**AN ORDINANCE** to transpose into the law of Gibraltar Council Directives 78/855/EEC and 82/891/EEC.

**ENACTED** by the Legislature of Gibraltar.

Title and Commencement.

1. This Ordinance may be cited as the Companies (Mergers and Divisions) Ordinance 1998 and shall come into operation on a date to be appointed by the Government by notice in the Gazette.

**Amendment of the Companies Ordinance.**

2. After section 146 of the Companies Ordinance, a new section 146A is added as follows -

**“Application of sections 144 and 145 to mergers and divisions.**

146A (1) Where -

- (a) a compromise or arrangement is proposed between a public company and any such persons as are mentioned in section 145(1) for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies;
- (b) the circumstances are as specified in any of the Cases described in sub-section (2), and
- (c) the consideration for the transfer or each of the transfers envisaged in the Case in question is to be shares in the transferee company or any of the transferor companies receivable by members of the transfer company or transferor companies, with or without any cash payment to members,

sections 145 and 146 shall, as regards that compromise or arrangement, have effect subject to the provisions of this section and Schedule 17.

(2) The Cases referred to in sub-section (1) are as follows:

*Case 1*

Where under the scheme the undertaking, property and liabilities of the company in respect of which the compromise or arrangement in question is proposed are to be transferred to

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another public company, other than one formed for the purpose of, or in connection with, the scheme.

*Case 2*

Where under the scheme the undertaking, property and liabilities of each of two or more public companies concerned in the scheme, including the company in respect of which the compromise or arrangement in question is proposed, are to be transferred to a company (whether or not a public company) formed for the purpose of, or in connection with, the scheme.

*Case 3*

Where under the scheme the undertaking, property and liabilities of the company in respect of which the compromise or arrangement in question is proposed are to be divided among and transferred to two or more companies each of which is either -

- (a) a public company, or
- (b) a company (whether or not a public company) formed for the purposes of, or in connection with, the scheme.

(3) Before sanctioning any compromise or arrangement under section 145 the court may, on the application of any pre-existing transferee company or any member or creditor of it or, an administration order being in force in relation to the company, the administrator, order a meeting of the members of the company or any class of them or of the creditors of the company or any class of them to be summoned in such manner as the court directs.

(4) This section does not apply where the company in respect of which the compromise or arrangement is proposed is being wound up.

(5) This section does not apply to compromises or arrangements in respect of which an application has been made to the court for an order under section 145(1) before the date this Ordinance comes into force.

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(6) In this section and Schedule 17 -

“transferor company” means a company whose undertaking, property and liabilities are to be transferred by means of a transfer envisaged in any of the Cases specified in sub-section (2).

“transferee company” means a company to which a transfer envisaged in any of those Cases is to be made;

“pre-existing transferee company” means a transferee company other than one formed for the purpose of, or in connection with, the scheme;

“compromise or arrangement” means a compromise or arrangement to which sub-section (1) applies;

“the scheme” means the scheme mentioned in subsection (1) (a);

“Case 1 Scheme”, “Case 2 Scheme” and “Case 3 Scheme” mean a scheme of the kind described in Cases 1, 2 and 3 of sub-section (2) respectively;

“property” and “liabilities” have the same meaning as in section 146.”.

**New Schedule 17 to the Companies Ordinance.**

3. After Schedule 16 of the Companies Ordinance, a new Schedule 17 is added as follows -

**“SCHEDULE 17**

Section 146A

**PROVISIONS SUBJECT TO WHICH SECTIONS. 145-146A HAVE  
EFFECT IN THEIR APPLICATION TO MERGERS AND  
DIVISIONS OF PUBLIC COMPANIES**

**Meeting of transferee company.**

1. Subject to paragraphs 10(1), 12(4) and 14(2), the court shall not sanction a compromise or arrangement under section 145 unless a majority in number representing three-fourths in value of each class of members of every pre-existing transferee company concerned in the scheme, present and voting either in person or by proxy at a meeting, agree to the scheme.

**Draft terms of merger.**

2. (1) The court shall not sanction the compromise or arrangement under section 145 unless -

- (a) a draft of the proposed terms of the scheme (from here on referred to as the “draft terms”) has been drawn up and adopted by the directors of all the transferor and pre-existing transferee companies concerned in the scheme;
- (b) subject to paragraph 11(3), in the case of each of those companies the directors have delivered a copy of the draft terms to the registrar of companies and the registrar has published in the Gazette notice of receipt by him of a copy of the draft terms from that company; and
- (c) subject to paragraphs 10 to 14, that notice was so published at least one month before the date of any meeting of that company summoned under section 145 or for the purposes of paragraph 1.

(2) Subject to paragraph 12(2), the draft terms shall give particulars of at least the following matters -

- (a) in respect of each transferor company and transferee company concerned in the scheme, its name, the address of its registered office and whether it is a company limited by shares or a company limited by guarantee and having a share capital;
- (b) the number of shares in any transferee company to be allotted to members of any transferor company for a given number of their shares (from here on referred to as the “share exchange ratio”) and the amount of any cash payment;

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- (c) the terms relating to the allotment of shares in any transferee company;
  - (d) the date from which the holding of shares in a transferee company will entitle the holders to participate in profits and any special conditions affecting that entitlement;
  - (e) the date from which the transactions of any transferor company are to be treated for accounting purposes as being those of any transferee company;
  - (f) any rights or restrictions attaching to shares or other securities in any transferee company to be allotted under the scheme to the holders of shares to which any special rights or restrictions attach, or of other securities, in any transferor company, or the measures proposed concerning them; and
  - (g) any amount or benefit paid or given or intended to be paid or given to any of the experts referred to in paragraph 5 or to any director of a transferor company or pre-existing transferee company, and the consideration for the payment of benefit.
- (3) Where the scheme is a Case 3 scheme the draft terms shall also-
- (a) give particulars of the property and liabilities to be transferred (to the extent these are known to the transferor company) and their allocation among the transferee companies;
  - (b) make provision for the allocation among and transfer to the transferee companies of any other property and liabilities which the transferor company has or may subsequently acquire; and
  - (c) specify the allocation to members of the transferor company of shares in the transferee companies and the criteria upon which that allocation is based.

**Documents and information to be made available.**



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3. Subject to paragraphs 10 to 14, the court shall not sanction the compromise or arrangement under section 145 unless -

- (a) in the case of each transferor company and each pre-existing transferee company the directors have drawn up and adopted a report complying with paragraph 4 (from here on referred to as a “directors' report”);
- (b) where the scheme is a Case 3 Scheme, the directors of the transferor company have reported to every meeting of the members or any class of members of that company summoned under section 145 and to the directors of each transferee company, any material changes in the property and liabilities of the transferor company between the date when the draft terms were adopted and the date of the meeting in question;
- (c) where the directors of a transferor company have reported to the directors of a transferee company such a change as is mentioned in sub-paragraph (b) above, the latter have reported that change to every meeting of the members or any class of members of that transferee company summoned for the purposes of paragraph 1; or have sent a report of that change to every member who would have been entitled to receive a notice of such a meeting;
- (d) a report complying with paragraph 5 has been drawn up on behalf of each transferor company and pre-existing transferee company (from here on referred to as an “expert's report”);
- (e) the members of any transferor company or transferee company were able to inspect at the registered office of that company copies of the documents listed in paragraph 6(1) in relation to every transferor company and pre-existing transferee company concerned in the scheme during a period beginning one month before, and ending on, the date of the first meeting of the members of any class of members of the first-mentioned transferor or transferee company summoned either under section 145 or for the purposes of paragraph 1 and those members were able to obtain copies of those documents or any part of them on request during that period free of charge; and

- (f) the memorandum and articles of association of any transferee company which is not a pre-existing transferee company, or a draft thereof, has been approved by ordinary resolution of every transferor company concerned in the scheme.

**Directors' report.**

4. (1) The directors' report shall consist of -

- (a) the statement required by section 146; and
- (b) insofar as that statement does not contain the following matters, a further statement -
  - (i) setting out the legal and economic grounds for the draft terms, and in particular for the share exchange ratio, and, where the scheme is a Case 3 Scheme, for the criteria upon which the allocation to the members of the transferor company of shares in the transferee companies was based; and
  - (ii) specifying any special valuation difficulties.

(2) Where the scheme is a Case 3 Scheme the directors' report shall also state whether a return has been made to the registrar of companies under section 42(1)(b) (return as to allotments).

**Expert's report.**

5.(1) Except where a joint expert is appointed under sub-paragraph (2) below an expert's report shall consist of a separate written report on the draft terms to the members of one transferor company or pre-existing transferee company concerned in the scheme drawn up by a separate expert appointed on behalf of that company.

(2) The court may, on the joint application of all the transferor companies and pre-existing transferee companies concerned in the scheme, approve the appointment of a joint expert to draw up a single report on behalf of all those companies.

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(3) An expert shall be independent of any of the companies concerned in the scheme, that is to say a person qualified at the time of the report to be appointed, or to continue to be, an auditor of those companies.

(4) However, where it appears to an 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 (or for him to accept such a valuation) 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 not an officer or servant of any of the companies concerned in the scheme or any other body corporate which is a subsidiary or holding company of one of those companies, or a subsidiary of the holding company of one of those companies or a partner or employee of such an officer or servant;

he may arrange for or accept such a valuation, together with a report which will enable him to make his own report under this paragraph.

(5) The reference in sub-paragraph (4) above to an officer or servant does not include an auditor.

(6) Where any valuation is made by a person other than the expert himself, the latter's report shall state that fact and shall also -

- (a) state the former's name and what knowledge and experience he has to carry out the valuation; and
- (b) describe so much of the undertaking, property and liabilities as were valued by the other person, and the method used to value them, and specify the date of the valuation.

(7) An expert's report shall -

- (a) indicate the method or methods used to arrive at the share exchange ratio proposed;

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- (b) give an opinion as to whether the method or methods used are reasonable in all the circumstances of the case; indicate the values arrived at using each such method and (if there is more than one method) give an opinion on the relative importance attributed to such methods in arriving at the value decided on;
  - (c) describe any special valuation difficulties which have arisen;
  - (d) state whether in the expert's opinion the share exchange ratio is reasonable; and
  - (e) in the case of a valuation made by a person other than himself, state that it appeared to himself reasonable to arrange for it to be so made or to accept a valuation so made.
- (8) Each expert has the right of access to all such documents of all the transferor companies and pre-existing transferee companies concerned in the scheme, and the right to require from the companies' officers all such information, as he thinks necessary for the purpose of making his report.

**Inspection of documents.**

6.(1) The documents referred to in paragraph 3(e) are, in relation to any company -

- (a) the draft terms;
- (b) the directors' report referred to in paragraph 4;
- (c) the expert's report;
- (d) the company's annual accounts, together with the relevant directors' report and auditors' report for the last three financial years ending on or before the relevant date; and
- (e) if the last of those financial years ended more than six months before the relevant date, an accounting statement in the form described in the following provisions.

In paragraphs (d) and (e) "the relevant date" means one month before the first meeting of the company summoned under section 145 or for the purposes of paragraph 1.

(2) The accounting statement shall consist of -

- (a) a balance sheet dealing with the state of affairs of the company as at a date not more than three months before the draft terms were adopted by the directors; and
- (b) where the company would be required to prepare group accounts if that date were the last day of a financial year, a consolidated banking sheet dealing with the state of affairs of the company and its subsidiary undertakings as at that date.

(3) The requirements of this Ordinance as to balance sheets forming part of a company's annual accounts, and the matters to be included in notes thereto, apply to any balance sheet required for the accounting statement, with such modifications as are necessary by reason of its being prepared otherwise than as at the last day of a financial year.

(4) Any balance sheet required for the accounting statement shall be approved by the board of directors and signed on behalf of the board by a director of the company.

**Transferor company holding its own shares.**

7. The court shall not sanction under section 145 (2) a compromise or arrangement under which any shares in a transferee company are to be allotted to a transferor company or its nominee in respect of shares in that transferor company held by it or its nominee.

**Securities other than shares to which special rights are attached.**

8.(1) Where any security of a transferor company to which special rights are attached is held by a person other than as a member or creditor of the company, the court shall not sanction a compromise or arrangement under section 145(2) unless under the scheme that person is to receive rights in a transferee company of equivalent value.

(2) Sub-paragraph (1) above shall not apply in the case of any such security where -

- (a) the holder has agreed otherwise; or
- (b) the holder is, or under the scheme is to be, entitled to have the security purchased by a transferee company involved in the scheme on terms which the court considers reasonable.

**Date and consequences of the compromise or arrangement.**

9.(1) The following provisions of this paragraph shall apply where the court sanctions a compromise or arrangement.

(2) The court shall in the order sanctioning the compromise or arrangement or in a subsequent order under section 146 fix a date on which the transfer or transfers to the transferee company or transferee companies of the undertaking, property and liabilities of the transferor company shall take

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place; and any such order which provides for the dissolution of the transferor company shall fix the same date for the dissolution.

(3) If it is necessary for the transferor company to take any steps to ensure that the undertaking property and liabilities are fully transferred, the court shall fix a date, not later than six months after the date fixed under sub-paragraph (2) above, by which such steps must be taken and for that purpose may postpone the dissolution of the transferor company until that date.

(4) The court may postpone or further postpone the date fixed under sub-paragraph (3) above if it is satisfied that the steps there mentioned cannot be completed by the date (or latest date) fixed under that sub-paragraph.

**Exceptions.**

10.(1) The court may sanction a compromise or arrangement under section 145 (2) notwithstanding that -

- (a) any meeting otherwise required by paragraph 1 has not been summoned by a pre-existing transferee company ("the relevant company"), and
- (b) paragraph 2(1)(c) and 3(e) have not been complied with in respect of that company,

if the court is satisfied that the conditions specified in sub-paragraph (2) below have been complied with.

(2) Subject to paragraphs 11(3) and 12(3), the conditions mentioned in sub-paragraph (1) above are -

- (a) that the publication of notice of receipt of the draft terms by the registrar of companies referred to in paragraph 2(1)(b) took place in respect of the relevant company at least one month before the date of any meeting of members of any transferor company concerned in the scheme summoned under section 145;
- (b) that the members of the relevant company were able to inspect at the registered office of that company the documents listed in paragraph 6(1) in relation to every transferor company and

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transferee company concerned in the scheme during a period (“the relevant period”) beginning one month before, and ending on, the date of any such meeting, and that they were able to obtain copies of those documents or any part of them on request during that period free of charge; and

- (c) that one or more members of the relevant company, who together held not less than five per cent of the paid-up capital of that company which carried the right to vote at general meetings of the company, would have been able during the relevant period to require that a meeting of each class of members be called for the purpose of deciding whether or not to agree to the scheme but that no such requisition had been made.

11.(1) The following sub-paragraphs apply where the scheme is a Case 3 Scheme.

(2) Sub-paragraphs (a) to (d) of paragraph 3 shall not apply and sub-paragraph (e) of that paragraph shall not apply as regards the documents listed in paragraph 6(1)(b), (c) and (e), if all members holding shares in, and all persons holding other securities of, any of the transferor companies and pre-existing transferee companies concerned in the scheme on the date of the application to the court under section 145, being shares or securities which as at that date carry the right to vote in general meetings of the company, so agree.

(3) The court may by order direct in respect of any transferor company or pre-existing transferee company that the requirements relating to -

- (a) delivering copies of the draft terms and publication of notice of receipt of the draft terms under paragraph 2(1)(b) and (c), or
- (b) inspection under paragraph 3(e),

shall not apply, and may by order direct that paragraph 10 shall apply to any pre-existing transferee company with the omission of sub-paragraph (2)(a) and (b) of that paragraph.



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(4) The court shall not make any order under sub-paragraph (3) above unless it is satisfied that the following conditions will be fulfilled -

- (a) that the members of the company will have received or will have been able to obtain free of charge copies of the documents listed in paragraph 6(1) in time to examine them before the date of the first meeting of the members or any class of members of the company summoned under section 145 or for the purposes of paragraph 1;
- (b) in the case of a pre-existing transferee company, where in the circumstances described in paragraph 10 no meeting is held, that the members of that company will have received or will have been able to obtain free of charge copies of those documents in time to require a meeting under paragraph 10(2)(c);
- (c) that the creditors of the company will have received or will have been able to obtain free of charge copies of the draft terms in time to examine them before the date of meeting of the members or any class of members of the company, or, in the circumstances referred to in paragraph (b) above, at the same time as the members of the company; and
- (d) that no prejudice would be caused to the members or creditors of any transferor company or transferee company concerned in the scheme by making the order in question.

**Transferee company or companies holding shares in the transferor company.**

12.(1) Where the scheme is a Case 1 Scheme and in the case of every transferor company concerned -

- (a) the shares in that company; and
- (b) such securities of that company (other than shares) as carry the right to vote at general meetings of that company,

are all held by or on behalf of the transferee company, section 146A and this Schedule shall apply subject to the following sub-paragraphs.

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(2) The draft terms need not give particulars of the matters mentioned in paragraph 2(2)(b), (c) or (d).

(3) Section 146 of the Ordinance and sub-paragraphs (a) and (d) of paragraph 3 shall not apply, and sub-paragraph (e) of that paragraph shall not apply as regards the documents listed in paragraph 6(1)(b) and (c).

(4) The court may sanction the compromise or arrangement under section 145 notwithstanding that -

- (a) any meeting otherwise required by section 145 or paragraph 1 has not been summoned by any company concerned in the scheme; and
- (b) paragraphs 2(1)(c) and 3(e) have not been complied with in respect of that company,

if it is satisfied that the conditions specified in the following sub-paragraphs have been complied with.

(5) The conditions mentioned in the previous sub-paragraph are -

- (a) that the publication of notice of receipt of the draft terms by the registrar of companies referred to in paragraph 2(1)(b) took place in respect of every transferor company and transferee company concerned in the scheme at least one month before the date of the order under section 145 (“the relevant date”);
- (b) that the members of the transferee company were able to inspect at the registered office of that company copies of the documents listed in paragraphs 6(1)(a), (d) and (e) in relation to every transferor company or transferee company concerned in the scheme during a period (“the relevant period”) beginning one month before, and ending on, the relevant date and that they were able to obtain copies of those documents or any part of them on request during that period free of charge; and

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- (c) that one or more members of the transferee company who together held not less than five per cent 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 the relevant period to require that a meeting of each class of members be called for the purpose of deciding whether or not to agree to the scheme but that no such requisition has been made.

13.(1) Where the scheme is a Case 3 Scheme and -

- (a) the shares in the transferor company; and
- (b) such securities of that company (other than shares) as carry the right to vote at general meetings of that company,

are all held by or on behalf of one or more transferee companies, section 146A and this Schedule shall apply subject to the following paragraphs.

(2) The court may sanction a compromise or arrangement under section 145 notwithstanding that -

- (a) any meeting otherwise required by section 145 has not been summoned by the transferor company; and
- (b) paragraphs 2(1)(c) and 3(b) and (e) have not been complied with in respect of that company,

if it is satisfied that the conditions specified in the following sub-paragraph have been complied with.

(3) The conditions referred to in the previous sub-paragraph are -

- (a) the conditions set out in paragraph 12(5)(a) and (c);
- (b) that the members of the transferor company and every transferee company concerned in the scheme were able to inspect at the registered office of the company of which they were members copies of the documents listed in paragraph 6(1) in relation to every such company during a period beginning one month before, and ending on, the date of the order under section 145 (“the relevant date”), and that they

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were able to obtain copies of those documents or any part of them on request during that period free of charge; and

- (c) that the directors of the transferor company have sent to every member who would have been entitled to receive a notice of the meeting (had it been called), and to the directors of each transferee company, a report of any material changes in the property and liabilities of the transferor company between the date when the draft terms were adopted and a date one month before the relevant date.

14.(1) Where the scheme is a Case 1 Scheme and in the case of every transferor company concerned ninety per cent or more (but not all) of -

- (a) the shares in that company; and
- (b) such securities in that company (other than shares) as carry the right to vote at general meetings of that company,

are held by or on behalf of the transferee company, section 146A and this Schedule shall apply subject to the following sub-paragraphs.

(2) The court may sanction a compromise or arrangement under section 145 notwithstanding that -

- (a) any meeting otherwise required by paragraph 1 has not been summoned by the transferee company, and
- (b) paragraphs 2(1)(c) and 3(e) have not been complied with in respect of that company,

if the court is satisfied that the conditions specified in the following sub-paragraph have been complied with.

(3) The conditions referred to in the previous sub-paragraph are the same conditions as those specified in paragraph 10(2), save that for this purpose the condition contained in paragraph 10(2)(b) shall be treated as referring only to the documents listed in paragraph 6(1)(a), (d) and (e).

**Liabilities of transferee companies for the default of another.**

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15.(1) Where the scheme is a Case 3 Scheme, each transferee company shall be jointly and severally liable, subject to sub-paragraph (2) below, for any liability transferred to any other transferee company under the scheme to the extent that that other company has made default in satisfying that liability, but so that no transferee company shall be so liable for an amount greater than the amount arrived at by calculating the value at the time of the transfer of the property transferred to it under the scheme less the amount at that date of the liabilities so transferred.

(2) If a majority in number representing three-fourths in value of the creditors or any class of creditors of the transferor company present and voting either in person or by proxy at a meeting summoned under section 145 so agree, sub-paragraph (1) above shall not apply in respect of the liabilities of the creditors or that class of creditors.”.

**Amendment to section 218A of the Companies Ordinance.**

4. Section 218A of the Companies Ordinance is amended by adding at the end of sub-section (1) the following paragraphs -

- “(l) a copy of the draft of the terms of the scheme delivered to the registrar under paragraph 2(1) of Schedule 17;
- (m) any copy of an order under section 145 or 146 in respect of a compromise or arrangement to which section 146A(1) applies.”.

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Passed by the Gibraltar House of Assembly on the 23rd day of March, 1998.

D J REYES,  
Clerk to the Assembly.

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