

Jersey & Guernsey Law Review – June 2012**CHANGES TO THE COMPANY LAW
FRAMEWORK IN 2011****Paul J. Omar**

This article notes the changes to the Companies (Jersey) Law 1991 and the company law framework in a number of key areas, introduced as a result of three pieces of amending legislation adopted in the course of 2011. Major changes have been introduced in relation to merger agreements between companies and/or other bodies. The consent of the Jersey Financial Services Commission must be obtained, and the Commission may impose conditions to its consent

Introduction¹

1 The purpose of the Companies (Jersey) Law 1991 was to modernise the legal regime for corporations in Jersey, the prior legal regime, comprising the *Loi (1861) sur les sociétés à responsabilité limitée* and the Companies (Supplementary Provisions) (Jersey) Law 1968, collectively known as the Companies (Jersey) Laws 1861 to 1968, no longer being regarded as apt for the modern age. Since its enactment two decades ago, the Companies (Jersey) Law 1991 has had to be amended a number of times with view to keeping its provisions relevant to the conduct of business and needs of users of corporate law in Jersey. In 2011, three sets of changes were made in a number of areas within the administration of company law, most notably in connection with the regulation of mergers.² This article takes a look at

¹ This article is based on a CPD Lecture given on 19 May 2011 as part of a series organised by the Institute of Law, Jersey. References below to articles and Parts are to the Companies (Jersey) Law 1991 unless otherwise specified.

² The Companies (Amendment No 5) (Jersey) Regulations 2011 (“Regulations No 5”) (in force 23 February 2011), the Separate Limited Partnerships (Jersey) Law 2011 (in force 20 April 2011) and the Companies (Amendment No 6) (Jersey) Regulations 2011 (“Regulations No 6”) (in force 20 July 2011). This article will not deal with the changes that will prospectively be made by the Security Interests (Jersey) Law 201 and the Civil Partnerships (Jersey) Law 201-, which, at time of writing, were still before the Privy Council for approval.

some of the key changes introduced as a result of the amending legislation.

A—Corporate definitions, registration and prohibition on appointment as director

2 Consequent on the introduction of separate and incorporated limited partnerships in the law of Jersey, effected by the Separate Limited Partnerships (Jersey) Law 2011 and Incorporated Limited Partnerships (Jersey) Law 2011 respectively, changes have needed to be made to companies legislation. New definitions have been inserted in art 1 to refer to these new bodies and references in art 1(2) to a “body corporate” will not now include an incorporated limited partnership.³ Similarly, in relation to the appointment of auditors in Part 16, unless the context otherwise requires, references to the word “partnership” in art 102 will not include either an incorporated limited partnership or a separate limited partnership.⁴

3 In relation to incorporation, to deal with these new bodies, the details required within the memorandum by art 4(2)(e), which include the name and address of the registered office or principal office of subscribers, have been amended to remove the reference to bodies corporate and now include all bodies that are not a natural person.⁵ The art 9 reference to the consequence of registration of a company has also had its wording revised (removing the separate references to companies and cell companies) and now states generally that the Registrar is to issue a certificate stating that incorporation has taken place once the memorandum has been registered.⁶

4 The general prohibition in art 73 on directors other than natural persons, subject to tightly regulated exemptions, was extended to separate limited partnerships by the legislation introducing this body.⁷ A later amendment to include in addition incorporated limited

³ Article 2, Regulations No 6 (inserting a new sub-para (e)).

⁴ *Ibid*, art 4 (inserting a new para 1A). Two amendments have also been made to correct oversights in changes made by the Companies (Amendment No 4) Regulations 2010 to substitute in art 110(5) the words “an eligible auditor” with “a recognised auditor” and in art 127YG(1) to alter the cross-reference to art 104 (now art 105) (arts 4 and 6, Regulations No 5).

⁵ Article 4(1), Schedule to the Separate Limited Partnerships (Jersey) Law 2011.

⁶ Article 3, Regulations No 5.

⁷ Article 4(2), Schedule to the Separate Limited Partnerships (Jersey) Law 2011 (introducing a new para 4A).

partnerships has now been made, revising the text of the earlier changes.⁸

B—Mergers

5 The power to effect changes to the merger rules by regulation was made in 2009 specifically to authorise changes to the rules that would have the effect of authorising mergers with bodies incorporated in Jersey that are not companies as well as mergers with bodies incorporated outside Jersey.⁹ The new rules, introduced in 2011,¹⁰ will make wholesale changes to the mergers regime in Jersey in order to provide a framework for cross-border mergers missing from the law as it stood. Transitional provisions mean that the new rules will not apply to mergers initiated prior to the rules coming into force provided that merger approval has been given under old arts 127B or 127C and the registrar has not proceeded to record the fact of the merging companies ceasing to exist under the law under old art 127G(3). Otherwise, the new rules have effect.¹¹

6 For the purposes of the new rules, a number of definitions are provided:¹²

- (a) “merged body” means the body resulting from a merger under art 127C (“merged company” being read accordingly);
- (b) “merger agreement” means an agreement under art 127D;
- (c) “merging body” means a body that is seeking to merge with another body under Part 18B (“merging company” being read accordingly);
- (d) “new body” means a merged body that is new within the meaning of art 127C(2) (“new company” being read accordingly);
- (e) “overseas body” means a body incorporated in a jurisdiction outside Jersey;
- (f) “relevant Jersey company” means a company that is not a cell company or a cell and does not have unlimited shares or guarantor members; and

⁸ Article 3, Regulations No 6 (introducing new paras (4A) and (4B)).

⁹ Article 13, Companies (Amendment No 10) (Jersey) Law 2009 (introducing new art 127GA).

¹⁰ Article 5, Regulations No 5.

¹¹ *Ibid*, art 9.

¹² New art 127A(1).

- (g) “survivor body” means a merging body that becomes a merged body as provided for in art 127C(1)(a) (“survivor company” being read accordingly).

7 By way of clarifying the scope of the changes, the takeover rules in Part 18 and the scheme of arrangement rules in Part 18A of the law are not to be construed as preventing the acquisition or takeover of one merging body by another by way of merger.¹³ As a preliminary note, the law imposes liability on any person who, in connection with any application under the law, knowingly or recklessly provides to the Commission or to the Registrar any information which is false, misleading or deceptive in a material particular or any document containing any such information.¹⁴

Eligibility for merger

8 The law states that a relevant Jersey company may merge with one or more bodies that fall within the scope of the text.¹⁵ These include another relevant Jersey company¹⁶ as well as a body that is incorporated (but is not a company) in Jersey under rules that permit it to merge with a company.¹⁷ These also include an overseas body that is not prohibited under the law of the jurisdiction where it is incorporated from merging with a Jersey company, provided the Commission is satisfied this is the case and provided also that it does not fall within a class of excluded bodies designated by the Minister as excluded from the benefit of the merger rules.¹⁸ The Minister may not designate for exclusion bodies that are recognised entities under Regulation 2 of the Foundations (Mergers) (Jersey) Regulations 2009.¹⁹ The designation must be made in the form of a notice and published in a way that will bring the notice to those likely to be affected by it.²⁰

9 The new rules also state that references for the purpose of these rules to a “body incorporated” (whether in or outside Jersey) are to be construed without reference to the exclusions contained in art 1(2)(b)–(d), which exclude from the definition of body corporate an

¹³ New art 127A(4).

¹⁴ New art 127G(1).

¹⁵ New art 127B(1).

¹⁶ New art 127B(2).

¹⁷ New art 127B(3). This is taken to refer, *inter alia*, to the new foundations recently made available under the Foundations (Jersey) Law 2009.

¹⁸ New art 127B(4).

¹⁹ New art 127B(5).

²⁰ New art 127B(6).

association incorporated under the *Loi (1862) sur les teneures en fidéicommiss et l'incorporation d'associations*, a Scottish firm and a limited liability partnership registered under the Limited Liability Partnerships (Jersey) Law 1997.²¹

10 The result of a merger is that the merging bodies continue as a single merged body.²² This body must be either one of the merging bodies or a new body. In relation to new bodies, these must be one of the following: a relevant Jersey company, a body incorporated in Jersey under rules (other than those applicable to companies) that are the same as those applicable to one of the merging bodies or an overseas body incorporated under the law of the same jurisdiction as one of the merging bodies and which has not been the subject of a designated exclusion. A merged body is defined as new if it is created by the merger from which it results.²³

The merger agreement: formation and termination

11 Companies proposing to merge are required to enter into an agreement in writing with each body that is to be subject to the merger.²⁴ The merger agreement must note the terms and means of effecting the merger and contain the following information:²⁵

- (a) details of the proposed merged body, including whether it is to be a survivor body or a new body, whether it is to be a company, an overseas body or some other body;
- (b) the names and addresses of the persons who are proposed to be its directors or to manage it if it is the type of body that does not have directors;
- (c) details of any arrangements necessary to complete the merger and to provide for the management of the merged body;
- (d) details of any payment, other than of a type included in para (e) below, that is proposed to be made to a member or director of a merging company or to a person having a similar relationship to a merging body that is not a company;
- (e) in relation to any securities of a merging company, whether the securities are to be converted into securities of the merged body and, that being the case, the manner in which that conversion is to

²¹ New art 127A(3).

²² New art 127C(1).

²³ New art 127C(2).

²⁴ New art 127D(1).

²⁵ New art 127D(2).

be done or, otherwise, what the holders are to receive instead and the manner in which and the time at which they are to receive it.²⁶

12 If the merged body is to be a new company, the merger agreement must also set out the proposed memorandum and articles of the merged company and a draft of any other document or information that would be required under the law to be delivered to the registrar as if the merged company were being incorporated under the law (otherwise than through the merger procedure).²⁷ On the other hand, if the merged body is to be a survivor company, the merger agreement must state whether any amendments to the memorandum and articles of the company are proposed to take effect on the merger (together with any details of those amendments) and whether, on merger, any person will become or cease to be a director of the company (together with the name and address of any such person).²⁸

13 Where shares of a merging company are held by or on behalf of another merging company and the merged body is to be a company, the merger agreement must provide for the cancellation of those shares, without any repayment of capital, when the merger is completed and no provision may be made in the merger agreement for the conversion of those shares into securities of the merged company.²⁹

14 The termination of the merger agreement may occur if the merger agreement itself provides that, at any time before the completion of the merger, the agreement may be terminated.³⁰ Termination may be effected by any one or more of the merging companies, notwithstanding that it has been approved by the members of all or any of those companies or any of the merging bodies that are not companies. Where termination has occurred, nothing in the merger rules is to be taken as requiring or authorising any further steps to be taken to complete the merger.³¹

The approval procedure: pre-requisite resolutions and certificates

15 As part of the procedure prior to approval of the merger, the directors of a merging company must pass a resolution to the effect that the merger is in the best interests of the company prior to notice being given of a meeting to approve a merger agreement under the

²⁶ New art 127D(3).

²⁷ New art 127D(4).

²⁸ New art 127D(5).

²⁹ New art 127D(6).

³⁰ New art 127D(7).

³¹ New art 127D(8).

ordinary approval procedure or approval being forthcoming under the simplified approval procedure.³² The resolution must in addition state that the directors voting for the resolution are satisfied on reasonable grounds that they can properly make a solvency statement in respect of the company.³³ A solvency statement is defined for these purposes as a statement that the person making it reasonably believes that the company is, and will remain until the merger is completed, able to discharge its liabilities as they fall due, subject to their having made full inquiry into the affairs of the company.³⁴

16 Where the directors are unable to make a solvency statement, the law provides that the resolution instead state that the directors voting for it are satisfied on reasonable grounds that there is a reasonable prospect of obtaining the permission of the court for the merger.³⁵ The company must also inform the other merging bodies of the inability to make a solvency statement as soon as practicable after the passing of the resolution. Following the passing of the resolution and before notice is given for approval of the merger to take place (whether under the ordinary approval procedure or simplified approval procedure), each director who voted in favour of the resolution is required to sign a certificate containing a solvency statement or a statement that the director is satisfied on reasonable grounds that there is a reasonable prospect of obtaining the permission of the court, together with the grounds for making the relevant statement.³⁶

17 Furthermore, also before notice is given, the law requires a certificate from a prescribed list of persons to the effect that, in their opinion, the merged body will be able to continue to carry on business and discharge its liabilities as they fall due on and immediately after the completion of the merger or, if these events may happen later, that the requirements will be satisfied until 12 months after the signing of the certificate.³⁷ The grounds for that opinion must also be given, having particular regard to the prospects of the merged body, the proposals in the merger agreement with respect to the management of the merged body's business or any proposals in the special resolutions passed under the simplified approval procedure, as well as the amount and character of the financial resources that will be available to the merged body. The list of persons includes those proposed in the

³² New art 127E(1).

³³ New art 127E(3).

³⁴ New art 127E(2).

³⁵ New art 127E(4).

³⁶ New art 127E(5).

³⁷ New art 127E(6).

merger agreement or in a special resolution passed under the simplified approval procedure) to act as directors of the merged body or to manage the merged body, if it is a body that does not have directors.³⁸ Otherwise, this additional certificate must be signed by one of the directors who has voted in favour of the resolution certifying the merger to be in the best interests of the company.

18 The law contains a saving provision stating that nothing in the merger rules is to be read as preventing more than one person from signing the same certificate or preventing more than one certificate from being included within the same document.³⁹ Furthermore, a person commits an offence if he or she signs a certificate without having reasonable grounds for the opinion expressed in the certificate or for the statement made in the certificate.⁴⁰

The approval procedure: approval of the merger agreement

Ordinary approval procedure

19 The ordinary approval procedure applies in most instances to those companies (and bodies) not otherwise eligible for the simplified approval procedure. For approval of the merger agreement to take place, the directors of each merging company are to submit the merger agreement for approval by a special resolution of the company. Where there is more than one class of members, approval must be given by a special resolution of a separate meeting of each class.⁴¹ A merger will be deemed to have been approved when all of the special resolutions have been passed in respect of all of the merging bodies that are companies.⁴² In fact, a merger cannot be completed unless it is approved under these provisions or under the simplified approval procedure.⁴³

20 The notice for the meeting to approve the merger agreement must be accompanied by:⁴⁴

- (a) a copy or summary of the merger agreement;

³⁸ New art 127E(7).

³⁹ New art 127A(2).

⁴⁰ New art 127G(2).

⁴¹ New art 127F(1).

⁴² New art 127F(3).

⁴³ New art 127F(4).

⁴⁴ New art 127F(2).

- (b) copies of the proposed constitutional documents for the merged body, or a summary of the principal provisions of those documents;
- (c) where a summary is supplied, information as to how a copy of the original document may be inspected by members;
- (d) a copy of the certificates signed by the directors or other listed parties in respect of the company as well as a copy of any information that may have been provided, by the date of the notice, to the company by any other merging company unable to make a solvency statement);
- (e) a statement of the material interests in the merger of the directors of each merging body and of the persons managing any merging body that does not have directors;
- (f) any further information as a member would reasonably require to reach an informed decision on the merger; and
- (g) sufficient information to alert members to their right to apply to the court under art 143 (the unfair prejudice procedure).

Simplified approval procedure—intra-group mergers

21 The law also provides a simplified form of approval for mergers involving subsidiaries.⁴⁵ Under the law, a holding company merger or an inter-subsidiary merger may be approved by a special resolution of each merging company without approval of a merger agreement. A merger is only approved under this provision when all of the merging companies have passed the requisite special resolutions.⁴⁶ The general rules on mergers apply here, to the extent that they apply to a merger between companies of which one is a survivor, with the exception of those relating to the eligibility of bodies to merge, the merger agreement and the ordinary approval procedure.⁴⁷ In fact, the simplified procedure is wider in that it applies to any company (whether or not having unlimited shares or guarantor members) as long as it is not a cell or a cell company.⁴⁸

22 A holding company merger is defined as a merger in which the merging bodies are a holding company and one or more other companies that are its wholly-owned subsidiaries with the holding company being the merged body (thus continuing as a survivor

⁴⁵ New art 127FA(1).

⁴⁶ New art 127FA(6).

⁴⁷ New art 127FA(7).

⁴⁸ New art 127FA(8).

company).⁴⁹ In a holding company merger, special resolutions in relation to the merging subsidiary/subsidiaries must provide that its/their shares are to be cancelled without any repayment of capital, while the special resolution of the holding company must:

- (a) provide that the capital accounts of each merging subsidiary are to be added to the capital accounts of the holding company;
- (b) provide that no securities are to be issued and no assets distributed by it in connection with the merger (whether before, on or after the merger);
- (c) specify any changes to its memorandum and articles that are to take effect on the merger; and
- (d) state the names and addresses of the persons who are proposed to be the directors after the merger.⁵⁰

23 An inter-subsiary merger is defined as a merger in which the merging bodies are all companies that are wholly-owned subsidiaries of the same holding body (whether that holding body is incorporated in Jersey or elsewhere) and the merged body is to be one of the merging companies, continuing as a survivor company.⁵¹ In the case of an inter-subsiary merger, each special resolution of a merging company, other than the survivor company, must provide that its shares are to be cancelled without any repayment of capital and its capital accounts are to be added to the capital accounts of the survivor company. The special resolution of the survivor company must:

- (a) provide that the capital accounts of each other merging company are to be added to the capital accounts of the survivor company;
- (b) specify any changes to the memorandum and articles of the survivor company that are to take effect on the merger; and
- (c) state the names and addresses of the persons who are proposed to be the directors of the survivor company after the merger.⁵²

Objections by members

24 A right is available to object to the merger by application to court for an order under art 143 on the ground that the merger would

⁴⁹ New art 127FA(2).

⁵⁰ New art 127FA(3).

⁵¹ New art 127FA(4).

⁵² New art 127FA(5).

unfairly prejudice the interests of the member.⁵³ Applications cannot be made more than 28 days after the merger is deemed to have been approved, whether under the ordinary or simplified approvals procedure and, in any event, by a member who voted in favour of the merger under either of those procedures.⁵⁴

Notice to creditors

25 Each merging company is to send written notice to each of its creditors known to the directors to have a claim against the company exceeding £5,000. The directors are required to make reasonable enquiries to that effect to ascertain the identity of creditors.⁵⁵ Notice must be sent no later than 28 days after the merger is deemed to have been approved, whether under the ordinary or simplified approvals procedure. The threshold sum may be varied by order of the Minister.⁵⁶ The notice must be published once in a newspaper circulating in Jersey or in any other manner approved by the Registrar and published by the Commission.⁵⁷ Publication must occur no later than 28 days after the merger is deemed to have been approved, whether under the ordinary or simplified approval procedure, or as soon as practicable after the company sends the last of any notices to creditors covered by these rules, whichever is the sooner.⁵⁸

26 The notice is required to state that the company intends to merge, in accordance with the law, with one or more bodies specified in the notice, and that the merger agreement, or the company's special resolution passed under the simplified approval procedure, is available to creditors from the company on request and free of charge.⁵⁹ Where an application to court is forthcoming in a case where a solvency statement cannot be made, the notice must also:

- (a) state that a merging company has applied or will apply for the permission of the court under that provision;
- (b) state that any creditor of any of the merging bodies may request the company making the application to send a copy of the application to the creditor; and

⁵³ New art 127FB(1). The cross-reference in art 143(1) to art 127B has been updated to note this new provision (art 7, Regulations No 5).

⁵⁴ New art 127FB(2).

⁵⁵ New art 127FC(1).

⁵⁶ New art 127FC(7).

⁵⁷ New art 127FC(5).

⁵⁸ New art 127FC(6).

⁵⁹ New art 127FC(2).

- (c) set out information as to how a creditor may contact the company making the application or a person representing it in the application and the time when the application has been or is proposed to be made for the purposes of determining when the court is likely to hear it.⁶⁰

27 Where no application to the court is required, the notice must in addition state that any creditor of the company may object to the merger or require the company to notify the creditor if any other objecting creditor of the company applies to court.⁶¹

No solvency statement forthcoming—application to court by company

28 Where a merger certificate does not contain a solvency statement, the company must apply to court for an Act of the court permitting the merger to take place on the ground that the merger would not be unfairly prejudicial to the interests of any creditor of any of the merging bodies.⁶² The merger is not complete unless this is obtained.⁶³ A merging company to which the certificate relates, or all such companies if there are more than one, must apply to court (jointly in the case of plurality of companies) as soon as practicable after the merger is approved, whether under the ordinary or simplified approval procedure.⁶⁴ In addition, a copy of the application must be sent to creditors known to the directors to have a claim against the company exceeding £5,000. The directors are required to make reasonable enquiries to that effect to ascertain the identity of creditors. Notice must also be sent to any other creditor of any of the merging bodies who requests a copy from the company concerned as well as the Registrar. The court may not hear the application for at least 28 days after it is made to the court.⁶⁵

Solvency statements forthcoming—application to court by creditor

29 Where solvency statements in respect of all merging bodies have been made, an objection may still be raised by a creditor.⁶⁶ Any such creditor of a merging company who objects to the merger may give

⁶⁰ New art 127FC(3).

⁶¹ New art 127FC(4).

⁶² New art 127FD(1).

⁶³ New art 127FD(2).

⁶⁴ New art 127FD(3).

⁶⁵ New art 127FD(4).

⁶⁶ New art 127FE(1).

notice of the creditor's objection to the company within 28 days of the date of the publication of the notice to creditors. The creditor may also, if the creditor's claim against the company has not been discharged, apply to the court for an order restraining the merger or modifying the merger agreement, this to be accomplished within 28 days of the date of the notice of objection.⁶⁷ Where a creditor makes an application to court, the company must send a copy of it within a reasonable time, after it has received a copy of the application, to a creditor to whom a notice was sent, a creditor who has required notification, a creditor who has given notice of objection and a creditor to whom the court orders a copy to be sent.⁶⁸

30 Where on an application made to court, the court is satisfied that the merger would unfairly prejudice the interests of the applicant, or of any other creditor of the company, the court may make any order it thinks fit in relation to the merger, including, but not limited to, an order restraining the merger or modifying the merger agreement in any manner specified in the order.⁶⁹ Where a merger agreement does not already contain a termination clause, the court may not make any order unless it inserts such a provision in the agreement and the court is satisfied that each merging body will have an adequate opportunity to reconsider whether to proceed with the merger following the modification.⁷⁰ References to a merger agreement are to be read as references to the special resolutions in the case of the simplified approval procedure being used.⁷¹

Commission consents to mergers

Ordinary application and information procedure

31 For mergers involving bodies other than companies, the law requires the consent of the Commission to be sought. Where any of the merging bodies is not a company, they must apply jointly to the Commission for consent to be forthcoming and the merger may not be completed unless the Commission gives consent and any conditions attached to the consent have been complied with.⁷² The consent application may only be made once the date of the last publication of a notice to creditors has passed.⁷³

⁶⁷ New art 127FE(2).

⁶⁸ New art 127FE(3).

⁶⁹ New art 127FE(4).

⁷⁰ New arts 127FE(5)–(6).

⁷¹ New art 127FE(7).

⁷² New art 127FF(1).

⁷³ New art 127FF(2).

32 The application must be accompanied by the following information:⁷⁴

- (a) a copy of the merger agreement and the special resolutions passed under the ordinary approval procedure);
- (b) in respect of each merging company, a copy of the directors' resolution stating that the merger is in the best interests of the company, together with a list identifying the directors who voted in favour of that resolution (if that information is not already contained in the resolution);
- (c) the signed art 127E certificates (solvency statement/application to court; future prospects statement);
- (d) in respect of each merging company, a copy of the notice to creditors (with the date of its publication); and
- (e) information, as at the time of the application under this provision, as to any application made by a member to the court or, if no such application has been made to the court, the date on which the time for doing so has elapsed or will elapse.

33 In the absence of a solvency statement and where an application to court by the company is forthcoming, the consent application must be accompanied by information, as at the time of the consent application on the application made, or to be made, to the court. The applicants must also keep the Commission informed of the progress of the court application as well as provide, when it is available, a copy of the Act of the court permitting the merger.⁷⁵ Where solvency statements have been made and no court application is forthcoming, the consent application must also be accompanied by information, as at the time of the consent application, as to any notice of objection given by a creditor or, if no such notice has been given, the date on which the time for doing so has elapsed or will elapse. The consent application must further include evidence satisfactory to the Commission that the merger would not be unfairly prejudicial to the interests of any creditor of any of the merging bodies.⁷⁶

34 General requirements as to documents, information or evidence to be provided are contained in the rules. Under these, authentication may be required in any manner published by the Commission or, where no manner of authentication in relation to that document, information or evidence has been specified, in any manner appearing reasonable to

⁷⁴ New art 127FF(3).

⁷⁵ New art 127FF(4).

⁷⁶ New art 127FF(5).

the Commission.⁷⁷ Documents, information or evidence not in either English or French must be accompanied by a translation into English or French, which is certified to be a correct translation in the form approved by the Commission.⁷⁸

Supplementary information—merger type dependent

35 Supplementary information is required depending on the components of the merger. If the merged body is to be a company, the consent application must also be accompanied by the consents of its proposed directors to act as such and a copy of its proposed memorandum and articles, unless it is to be a survivor company without any amendment to its memorandum or articles. In this case, the Commission will inform the Registrar of the name proposed in the merger agreement for the merged company. The Registrar will subsequently inform the Commission whether that name is in his or her opinion in any way misleading or otherwise undesirable.⁷⁹

36 Where one or more of the merging bodies is an overseas body, the consent application is accompanied by evidence satisfactory to the Commission, in respect of each overseas body, that the laws of the jurisdiction in which the overseas body is incorporated do not prohibit either or both of the proposed merger or the incorporation, as the result of the merger, of the merged body as a new body in that jurisdiction. Where authorisation is necessary for the application or for the merger under the laws applicable to or the constitution of the overseas body, evidence that the authorisation has been given must also be provided. Furthermore, if the overseas body is not to be a survivor body, evidence must also be provided that the overseas body will, after completion of the merger, cease to be a body incorporated under the laws of the jurisdiction of incorporation.⁸⁰

37 Where the merged body is to be an overseas body, the consent application must be accompanied by evidence satisfactory to the Commission that the laws of the jurisdiction in which the merged body is to be incorporated provide that, upon the merger:

- (a) the property and rights to which the merging bodies were entitled immediately before the merger will become the property and rights of the merged body;

⁷⁷ New art 127FF(14).

⁷⁸ New art 127FF(15).

⁷⁹ New art 127FF(6).

⁸⁰ New art 127FF(7).

- (b) the merged body will become subject to any criminal and civil liabilities, and any contracts, debts and other obligations, to which the merging bodies were subject immediately before merger; and
- (c) any actions and other legal proceedings that, immediately before the merger, were pending by or against any of the merging bodies may be continued by or against the merged body.⁸¹

Continuing obligation to provide information

38 Unless no objection to the merger has been made or the time for making any objection has elapsed, there is a continuing obligation to provide information in relation to objections, here defined to mean a member's application to court in respect of any merging company (objections by members) and where a creditor of any merging company has given notice of objection.⁸²

39 Applicants in a consent application must notify the Commission of any objection of which they become aware after the application, notify the Commission of the result once any objection, whenever made, has been disposed of, and provide to the Commission any further information or document reasonably required by the Commission in connection with any objection.⁸³ Until compliance with these requirements is made, the Commission must not make any decision on the application other than to refuse consent on grounds unconnected to an objection. It may also take any other action short of making a decision or take no further action.⁸⁴ Where any further information or document reasonably required by the Commission is not provided within a reasonable time, the Commission may give the applicants a warning notice stating that the application will be refused unless the document or information is provided within a period specified in the notice. This period may not be less than 14 days.⁸⁵

Fees, expenses and security

40 The rules on Registrar's fees and expenses in art 201 are applied to the Commission's function of considering consent applications.⁸⁶ Where a consent application has been received, the Commission may

⁸¹ New art 127FF(8).

⁸² New arts 127FF(9)-(10).

⁸³ New art 127FF(11).

⁸⁴ New art 127FF(12).

⁸⁵ New art 127FF(13).

⁸⁶ New art 127FG(1).

estimate the likely amount of its expenses in dealing with the application.⁸⁷ Where the estimate exceeds any fee chargeable under art 201, the Commission may require the applicants to give it security to its satisfaction for any excess.⁸⁸ If during the course of examining the application, the Commission subsequently forms the view that its expenses will be of a higher amount, it may require the applicants to give it security to its satisfaction for any difference.⁸⁹ If this security is not forthcoming, the Commission need take no further action in respect of the application until the security has been given.⁹⁰ In fact, until payment of the fees chargeable under art 201 or the provision of any security that may be required within a reasonable time from the making of the application or the imposition of the requirement for security, the Commission may give the applicants a warning notice stating that the application will be refused unless the fee is paid, or the security given, within a period specified in the notice, not to be less than 14 days.⁹¹

41 Where the Commission has required security to be given, the Commission shall ascertain the actual amount of its expenses on determining the application. If the actual amount exceeds any fee payable under art 201, the Commission may require the applicants to pay the excess by serving them notice in writing.⁹² Any excess the subject of notification is treated as a debt jointly and severally due and payable by the applicants to the Commission.⁹³ If the excess is not paid by the applicants on demand, the Commission may recover that excess by realising any security given, this being without prejudice to any other mode of recovery available to the Commission.⁹⁴

Further information

42 The law authorises the Commission to request further information to be supplied. Following receipt of a consent application, the Commission may by notice require the applicants to supply to the Commission any other document or information as the Commission may reasonably require to determine whether to accept the

⁸⁷ New art 127FG(2).

⁸⁸ New art 127FG(3).

⁸⁹ New art 127FG(4).

⁹⁰ New art 127FG(5).

⁹¹ New art 127FG(6).

⁹² New art 127FG(7).

⁹³ New art 127FG(8).

⁹⁴ New art 127FG(9).

application.⁹⁵ Special mention is made of the facility to require documents and information to include any reasonably required to assess the solvency, and interests of any creditors, of any merging body that is not a company.⁹⁶ Documents or information must be authenticated in any manner reasonably required by the Commission.⁹⁷ Where notice for the provision of further information or documents has been served, the Commission need take no further action in respect of the application until the document or information has been supplied and it may give the applicants a warning notice stating that the application will be refused unless the document or information is supplied within a period specified in the notice (of not less than 14 days), where the document or information is not supplied within a reasonable time after the notice is issued.⁹⁸

Decisions and appeals

43 In relation to a consent application, after consideration is given to the application, the Commission may give its consent with or without conditions or refuse its consent.⁹⁹ As part of the decision process, the law requires the Commission to consider all the relevant circumstances and to have particular regard to the interests of creditors of the merging bodies. In addition, it must have regard to the matters specified under art 7 (Guiding Principles) of the Financial Services Commission (Jersey) Law 1998, which are:

- (a) the reduction of the risk to the public of financial loss due to dishonesty, incompetence or malpractice by or the financial unsoundness of persons carrying on the business of financial services in or from within Jersey;
- (b) the protection and enhancement of the reputation and integrity of Jersey in commercial and financial matters;
- (c) the best economic interests of Jersey; and
- (d) the need to counter financial crime both in Jersey and elsewhere.¹⁰⁰

⁹⁵ New art 127FH(1).

⁹⁶ New art 127FH(2).

⁹⁷ New art 127FH(3).

⁹⁸ New art 127FH(4).

⁹⁹ New art 127FI(1).

¹⁰⁰ New art 127FI(2).

44 The law also stipulates that the Commission may refuse its consent, or impose conditions on its consent, on any grounds. These grounds may include:

- (a) the view taken that the merger would unfairly prejudice the interests of a creditor of a merging body;
- (b) the opinion that the merger would be undesirable with regard to any matter required to be considered as part of the decision-making process;
- (c) the fact that the applicants have not complied with a warning notice in respect of the provision of document/information within a reasonable time, paying fees or giving security or in relation to the supply of further documents or information within the period specified in the relevant notice; and
- (d) the failure to meet any other requirement under the law in respect of the merger.¹⁰¹

45 Where the merged body is to be an overseas body, the Commission must impose on any consent a condition that the consent is subject to the merging bodies complying with the pre-registration steps and the merged body complying with the giving of pre-registration notices/information, unless it is satisfied that it would be preferable in the circumstances not to do so.¹⁰² Where the merged body is to be a new company, a further ground for refusal of consent by the Commission may include those grounds included in Part 2 of the law, *ie* any ground on which the incorporation or registration of that company could be prevented under the law, whether by the Registrar, the Commission or the court.¹⁰³

46 When the application has been determined, the Commission is required to inform the applicants in writing of its decision, the terms of any condition (if consent is given subject to any condition) and the reasons for that refusal or condition (if consent is refused or given subject to any condition).¹⁰⁴ The decision must also refer to the right of appeal, under which the applicant(s) may, within one month after being informed of the decision, appeal to the court on the ground that the decision was unreasonable having regard to all the circumstances of the case.¹⁰⁵ On hearing any appeal that may be brought, the court

¹⁰¹ New art 127FI(3).

¹⁰² New art 127FI(4).

¹⁰³ New art 127FI(5).

¹⁰⁴ New art 127FI(6).

¹⁰⁵ New art 127FI(7).

may confirm, reverse or vary the decision of the Commission and may make such order as to the costs of the appeal as it thinks fit.¹⁰⁶

Registration requirements—pre-registration steps

Option 1—All merging bodies are companies

47 Where all the merging bodies in a merger are companies, they must apply jointly to the Registrar to complete the merger using any published form and manner.¹⁰⁷ The application may not be made until after the last of the following dates (where applicable) has passed:¹⁰⁸

- (a) if any application was made to the court by a member objecting to the merger, the last date on which such an application is disposed of otherwise than by an order restraining the merger;
- (b) if no solvency statement was made and court approval is required, the date of the Act of court permitting the merger;
- (c) where solvency statements are made:
 - (i) 28 days after the last date on which a notice was published to creditors, if by then no creditor has given notice of objection;
 - (ii) 28 days after the last date on which the last notice of objection by a creditor was given, if by then no creditor has applied to the court; or
 - (iii) if any application was made to the court, the last date on which such an application is disposed of otherwise than by an order restraining the merger.

48 The application must be accompanied by:¹⁰⁹

- (a) a copy of the merger agreement, unless the merger was approved under the simplified approval procedure;
- (b) a copy of its memorandum and articles (if the merged company is to be a new company);
- (c) alternatively, any amendment to its memorandum or articles provided for under the terms of the merger agreement or a special resolution of the holding company) (if the merged company is to be a survivor company);

¹⁰⁶ New art 127FI(8).

¹⁰⁷ New arts 127FJ(1)–(2).

¹⁰⁸ New art 127FJ(3).

¹⁰⁹ New art 127FJ(4).

- (d) a copy, in respect of each merging company, of the resolution stating the merger to be in the best interests of company), together with a list identifying the directors who voted in favour of that resolution (if that information is not contained in the resolution) and the signed art 127E certificates (solvency statement/ application to court; future prospects statement);
- (e) a further certificate, signed by each director who is a signatory to any such certificate, stating that the director, and the merging company of which he or she is a director, have complied with the requirements of the law in respect of the merger and that in the director's opinion the merger will not unfairly prejudice any interests of any creditor of that merging company (*ie* where the rules on company applications to court do not apply to this merger);¹¹⁰
- (f) a copy of any Act of the court in relation to an application where a member has objected, where the company has made an application to court where a solvency statement is not forthcoming or where an objection by a creditor has been made despite there being a solvency statement; and
- (g) any other document or information required by the Registrar to establish that the requirements in relation to the passing of time have been met.

49 The Registrar may proceed to registration of the merger notices in accordance only if satisfied that the application complies with the requirements as to the published form and permissible time as well as the fact that the documents accompanying the application comply with the law and the provisions it mentions. Furthermore, where the merger agreement provides for the merged company to be a new company, the Registrar may only proceed to registration if he or she would have registered the memorandum and articles of the company under art 8 if it had been incorporated otherwise than by merger.¹¹¹

Option 2—Merged body not a company

50 The law states that special rules will apply where the proposed merged body is not a company, the Commission has given its consent to the merger and any conditions attached to the consent have been met to the satisfaction of the Commission (with the exception of the

¹¹⁰ Note that it is an offence to sign a certificate without having reasonable grounds for the opinion expressed in the certificate or for the statement made in the certificate.

¹¹¹ New art 127FJ(5).

pre-registration notices/information requirements).¹¹² Under the law, the merging bodies are to take whatever steps are necessary to complete the merger in accordance with the merger agreement under the laws governing the merged body and those merging bodies that are not companies.¹¹³ As soon as is reasonably practical after the completion of the merger, the merged body must inform the Commission that it has been completed (including the date of completion), provide any document or information that the Commission may reasonably require to establish the fact and date of the completion and authenticate any such document or information in any manner that the Commission may reasonably require.¹¹⁴

51 Once the Commission is satisfied that the merger has been completed, it will provide the registrar with copies of the merger agreement, the signed art 127E certificates (solvency statement/application to court; future prospects statement), any Act of court provided to the Commission under an application for consent or where further information was required and the documents provided to the Commission to prove completion. The Commission will then instruct the registrar to register the merger.¹¹⁵ The Registrar will register the merger notices as soon as practicable after receipt of the documents and instruction from the Commission.¹¹⁶

Option 3—All other cases

52 The law also provides for where the merger does not fall under either of the above options, including where:

- (a) one or more of the merging bodies in a merger is not a company;
- (b) the merged body provided for in the merger agreement is to be a company;
- (c) the Commission has given its consent to the merger; and
- (d) if any conditions were attached to that consent, those conditions have been met to the satisfaction of the Commission.¹¹⁷

53 In these cases, the Commission must provide the registrar with copies of the merger agreement, the signed art 127E certificates (solvency statement/application to court; future prospects statement),

¹¹² New art 127FK(1).

¹¹³ New art 127FK(2).

¹¹⁴ New art 127FK(3).

¹¹⁵ New art 127FK(4).

¹¹⁶ New art 127FK(5).

¹¹⁷ New art 127FL(1).

the memorandum and articles of the merged company, if they were provided to the Commission in a consent application, and any Act of court provided to the Commission in that application or subsequent to further information being requested.¹¹⁸ The Commission will then instruct the registrar to register the merger. The Registrar will register the merger notices as soon as practicable after receipt of the documents and instruction from the Commission.¹¹⁹

Registration of merger notices

54 The law sets out the procedure for registration of merger notices following one of the events outlined in Options 1–3 above.¹²⁰ For these purposes, the completion date of a merger is deemed to be the date notified (where the merged body is not a company) or the date the last entry on the register is made under this provision in relation to the merger (if the merged body is a company).¹²¹ The notice to be entered by the Registrar in the register, in respect of each merging company that is not a survivor body, states that the company has ceased to be incorporated as a separate company because it has merged with a body or bodies specified in the notice, so that they have together continued as a merged body and specifies the name of the merged body. In relation to the merged body, it also refers to the enactment under which it is incorporated in Jersey or the jurisdiction outside Jersey in which it is incorporated.¹²²

55 Where the merged body is a survivor company, the notice to be entered by the Registrar will state that the company has merged with a body or bodies specified in the notice, so that they have together continued as the merged survivor company, and refer to any change in the company's memorandum and articles that takes effect on the merger.¹²³ Where the merged body is a new company, the Registrar will register the memorandum and articles of the new company under art 8, and issue a certificate of its incorporation under art 9 as if the registrar had received an application for the creation of the company under the law with the memorandum and articles provided for in the merger agreement. This is provided that the Registrar would have registered the company under the law if it had been incorporated otherwise than as the result of a merger. The Registrar will also enter a notice that states that the company is the result of a completed merger

¹¹⁸ New art 127FL(2).

¹¹⁹ New art 127FL(3).

¹²⁰ New art 127FM(1).

¹²¹ New art 127FM(2).

¹²² New art 127FM(3).

¹²³ New art 127FM(4).

between the former bodies specified in the notice, which have together continued as the new company.¹²⁴

56 For the purposes of registration of merger notices, all entries required to be inserted in the register must include a note specifying the completion date of the merger to which it relates and may, in addition, include a note of any further information that the Registrar considers useful in relation to the merger.¹²⁵ Where a notice relates to an overseas body, the Registrar must also send a copy of the notice to the appropriate official or public body in the jurisdiction in which that body is or was incorporated.¹²⁶ The notice must be sent immediately and by electronic means or some other means of instantaneous transmission or, if no such means are practicable, means that are believed likely to be acceptable to that official or public body.¹²⁷ Finally, the law stipulates that entries made on the register are conclusive evidence that on the completion date specified in the entry the merging bodies merged and continued as the merged body and that the requirements of the law have been complied with in respect of the merger of the merging bodies as well as all matters precedent to and incidental to the merger.¹²⁸

Completion of merger—effects

57 On the completion date of the merger, all merging bodies are merged and continue as one merged body as provided in the merger agreement or in the special resolutions passed under the simplified approval procedure. Furthermore, any merging company that is not a survivor company ceases to be incorporated as a separate company and any merging body that is a Jersey entity (but not a Jersey company) that is not a survivor body ceases to be incorporated as a separate body.¹²⁹ A merger in which the merged body is a company or a Jersey entity (but not a Jersey company) entails, on its completion, the following things:

- (a) all property and rights to which each merging body was entitled immediately before the merger was completed become the property and rights of the merged body;
- (b) the merged body becomes subject to all criminal and civil liabilities, and all contracts, debts and other obligations, to which

¹²⁴ New art 127FM(5).

¹²⁵ New art 127FM(6).

¹²⁶ New art 127FM(7).

¹²⁷ New art 127FM(8).

¹²⁸ New art 127FN(3).

¹²⁹ New art 127FN(1).

each of the merging bodies was subject immediately before the merger was completed; and

- (c) all actions and other legal proceedings which, immediately before the merger was completed, were pending by or against any of the merging bodies may be continued by or against the merged body.¹³⁰

58 The law also provides that the operation of this provision is not to be regarded as a breach of contract or confidence or otherwise as a civil wrong, nor is it to be seen as a breach of any contractual provision prohibiting, restricting or regulating the assignment or transfer of rights or liabilities. Furthermore, it is not to be treated as giving rise to any remedy by a party to a contract or other instrument, as an event of default under any contract or other instrument or as causing or permitting the termination of any contract or other instrument, or of any obligation or relationship.¹³¹

Summary

59 The changes that have been introduced in 2011 have been mostly needed to deal with the impact of the introduction of new bodies as well as to introduce major changes to the merger framework, which has necessitated the drafting of a mostly new Part 18 of the law. The purpose of this has been to enable mergers, particularly at the cross-border level for which the law did not hitherto provide. The effect has been to ensure that the legal regime for companies in Jersey remains as up-to-date as possible and relevant to its users, although the position will certainly not remain static, given the prospective changes to be introduced by the Security Interests (Jersey) Law 201- and the Civil Partnerships (Jersey) Law 201- as well as those to be introduced by further laws and regulations in the corporate field intimated as soon to come. This will have a tremendous impact on the Jersey corporate and legal sector, where practitioners have driven many of the proposals for amendments that are being seen and undoubtedly those to come. The result will certainly be to keep the legislators and draftsmen busy with the changes that will be required over the course of the next few years, pending a full-scale reassessment of the law that may perhaps become necessary before too long.

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¹³⁰ New art 127FN(2).

¹³¹ New art 127FN(4).