STATES OF JERSEY

CROSS-BORDER MERGERS OF JERSEY COMPANIES: GREEN PAPER FEBRUARY 2010

Presented to the States on 12th February 2010
by the Minister for Economic Development

STATES GREFFE

Economic Development Department

Green Paper

States of Jersey

Cross-border Mergers of Jersey Companies **February 2010**

PURPOSE OF CONSULTATION
The purpose of this paper is to invite comments on whether the Companies (Jersey) Law 1991 should be amended to permit Jersey companies to merge directly with a wider range of bodies, including foreign companies.

DEADLINE FOR RESPONSES
Friday 2 April 2010

PLEASE SEND RESPONSES TO:

James Mews Director, Finance Industry Development States of Jersey 3rd Floor Liberation Place St Helier Jersey JE1 1BB Telephone: 01534 440444 Facsimile: 01534 448171 e-mail: j.mews@gov.je	Robert Kirkby at Jersey Finance Limited is co-ordinating an industry response that will incorporate any matters raised by local firms or entities. His contact details are: Robert Kirkby Jersey Finance Limited 48-50 Esplanade St Helier Jersey JE2 3QB Telephone: 01534 836004 Facsimile: 01534 836001 e-mail: Robert.Kirkby@jerseyfinance.je It is the policy of Jersey Finance to make individual responses it receives available to the Economic Development Department upon request, unless a respondent specifically requests otherwise.

Introduction

At present, it is only possible to directly merge a Jersey company with another Jersey company. However, the Companies (Amendment No.10) (Jersey) Law 2009 introduced an enabling provision into the Companies (Jersey) Law 1991 ("**the Companies Law**") allowing the States to make Regulations to permit the cross-border merger of Jersey companies with companies and other bodies incorporated outside Jersey and also with bodies that are incorporated in Jersey but which are not companies.

In an increasingly globalized world, more and more business is conducted across national borders and there is a growing demand for Jersey companies to be able to merge directly with a wider range of bodies, in particular with foreign companies – something which is already permitted by some of our competitor jurisdictions such as Guernsey.

Although it is possible to merge a Jersey company with a foreign company indirectly by first bringing them into the same jurisdiction (either by continuing the Jersey company into the foreign jurisdiction or by continuing the foreign company into Jersey under Part 18C of the Companies Law) and then merging them (either under Part 18B of the Companies Law or the relevant foreign law), this procedure is more cumbersome than the direct merger process permitted in other jurisdictions and is also unsatisfactory in some circumstances for foreign fiscal purposes.

In order to ensure that Jersey's company law remains market leading, it is intended to amend Part 18B of the Companies Law so as to permit the cross-border merger of Jersey companies (subject to appropriate safeguards) with any other body corporate, wherever incorporated. This would include foreign companies, foreign incorporated bodies and also bodies that are incorporated in Jersey but are not companies, such as foundations (once corresponding amendments have been made to the foundations legislation).

With regard to tax treatment, where the resulting merged body is to be resident in Jersey and has Jersey resident shareholders, the Comptroller of Taxes has indicated that he would welcome applications from advisors prior to completion of the merger to determine the tax treatment of profits arising in the pre-merged bodies and the treatment of such profits in the hands of the Jersey resident shareholders following the merger. Where the resulting merged body is to be tax resident in another jurisdiction, domestic tax advice would have to be sought.

It is considered that the proposed amendments are necessary in order to strengthen the competitiveness of the Jersey company, one of the key tools used by the finance industry in the Island, which will help to maintain Jersey's position as one of the most progressive jurisdictions in the world.

Proposals

The Economic Development Department would welcome general comments on the proposal to allow Jersey companies to merge with a wider range of bodies and, in particular, on the following specific issues:

1. The introduction of cross-border mergers is something that in effect is already permissible in a two-step process comprising continuance (i.e. migration) of one of the companies into the same jurisdiction as the other followed by a domestic merger. However, in light of developments in other jurisdictions, it is considered that this process is cumbersome and requires streamlining.

   Do you agree that the merger process should be streamlined to permit the direct merger of Jersey companies with foreign companies?

2. Given the increasing popularity of incorporated bodies, such as foundations, that are often bodies corporate but are not companies, it is proposed that at the same time as permitting Jersey companies to merge with foreign companies, they should also be permitted to merge with any other type of body corporate (i.e. not just with other companies), wherever incorporated.

Do you agree that it is sensible to allow Jersey companies to merge with incorporated bodies other than companies?

3. It is proposed that Jersey companies would be permitted to merge with bodies which are incorporated outside Jersey. In addition, it is proposed that, as is the case for Jersey Foundations merging with foreign entities, the Minister would issue a list of 'recognized entities' with which Jersey companies are permitted to merge.

Do you agree with this approach and if so, what foreign entities do you think should be able to merge with Jersey companies?

4. In order to protect the interests of Jersey creditors, employees and the public, and to protect the Island's international reputation with regard to Anti-money Laundering/ Countering the Financing of Terrorism ("**AML/CFT**"), it is proposed that the Jersey Financial Services Commission ("**the Commission**") would supervise cross-border mergers on a similar basis to that which is applied to Continuances under Articles 127K and 127T of the Companies Law.

It is proposed that the consent of the Commission would be required for all mergers involving foreign bodies and Jersey bodies other than Jersey companies. Thus, the requirement for Commission approval would also extend to mergers between a Jersey company and another type of Jersey body corporate, such as a foundation. Mergers between two (or more) Jersey companies would not require Commission consent.

Do you agree that the approach concerning the supervision of mergers should contain protections that are broadly commensurate with those already in place for company continuances into Jersey?

5. Where Commission consent is required, the merging entities would have to apply providing sufficient information for the Commission to make a decision (or at least to determine what further information is required to make a decision), e.g. a copy of the merger agreement, copies of the directors' certificates (see paragraph 10 below), details of any objectives and such other information and documents as the Commission may reasonably require.

   In addition, the application would have to include evidence (satisfactory to the Commission) that the merger would be recognised in any relevant overseas jurisdiction and that, where the merged entity is to be an overseas body, any such jurisdiction would recognise the merged entity as having the rights and liabilities of the merging entities.

   Do you agree with the proposed approach with regard to applying for Commission consent?

6. On an application for consent to merge, the Commission would either permit the application, permit the application subject to conditions, reject the application or request further information. In reaching its decision the Commission would have regard to all the relevant circumstances and in particular the interests of creditors of the merging bodies and the need to protect the public from financial loss due to dishonesty, incompetence and malpractice, AML/CFT considerations and the reputation of Jersey.

If the Commission does not grant permission, or grants permission only subject to conditions, it must give reasons. A merging body would have the right to appeal certain decisions of the Commission to the court.

Do you agree with the proposed approach with regard to the basis for Commission consent?

7. It is important to ensure that shareholders of merging companies are able to make an informed decision when deciding whether to vote for the special resolution required to approve the merger. It is therefore proposed that the companies in question should be required to provide shareholders with a copy or summary of the merger agreement and relevant directors' certificates (see paragraph 10 below), a copy or summary of the merged body's constitutional documents, a statement of the material interests of the directors/managers of each merging entity, and such further information as a reasonable member would require to reach an informed decision.

Are you satisfied with the proposed measures for the protection of shareholders of merging companies?

8. In considering cross-border mergers it is also important to ensure that the interests of creditors of the merging companies are adequately safeguarded. Thus, it is intended to retain the existing requirement for notice to be given to creditors of the merging companies and the right of creditors to apply to the court to restrain the merger (on grounds of unfair prejudice).

In addition, to ensure that creditors are able to make an informed decision as to whether to apply to court to restrain the merger, it is also proposed that the merger agreement should be made available to creditors, free of charge, on request.

Are you satisfied with the proposed measures for the protection of creditors of merging companies?

9. It is proposed that on an application by a dissatisfied creditor, the court should have more flexibility than currently exists under Article 127D(4) of the Companies Law. It is therefore proposed that, in line with the recent changes to company law in Guernsey, where the court is satisfied that a creditor would be unfairly prejudiced by the proposed merger, as well as having the power to restrain the merger, the court should also have the power to modify the merger proposal. However, each of the merging parties would be able to terminate the merger agreement following any such modification if they so wished.

Do you agree that the court should have this additional flexibility?

10. It is proposed that (whether or not the merger has a cross-border element) the directors of each merging entity would be required to resolve and sign a certificate confirming that the merger is in the best interests of that entity and it will remain solvent until the merger is completed. Each director voting in favour of such a resolution and each proposed director/manager of the merged body would also have to sign a further certificate confirming the solvency of the merged body.

Do you agree with the proposed approach with regard to the approval of mergers by the directors?

11. Where one of the merging bodies is insolvent (and its directors are therefore unable to make the required solvency statement in relation to the merging body) it may still be commercially desirable for a merger to go ahead – for example, an insolvent body may have cash flow difficulties and be unable to discharge its liabilities in the short term but may still have considerable assets (e.g. tangible property, goodwill, or intellectual property) that are attractive to a solvent body.

It is therefore proposed that a merger where one or more of the merging bodies is insolvent should still be permitted but only where the court has specifically consented to this on the ground that the merger would not be prejudicial to the interests of any creditors of the merging bodies. It is considered that this safeguard (in addition to the notification requirements and the power for creditors to apply to the court) would offer appropriate protection to creditors.

Do you agree that an insolvent company should be permitted to merge subject to court approval?

12. Whereas at present the law provides that the merged entity must be a new body corporate, it is considered that in order to provide greater flexibility, the parties should be able to chose whether the body resulting from the merger should be either a new body corporate or one of the existing merging entities.

Where the merged body is to be a new body, it must be of the same type and incorporated in the same jurisdiction as one of the merging entities. For example, in a merger between a Jersey company and a UK LLP, the merged entity must be either a Jersey company or a UK LLP and cannot be, for example, a Jersey LLP.

Do you agree with the proposal to allow greater flexibility with regard to the status of the merged entity?

13. It has been suggested that following the proposed amendments with regard to company mergers, Jersey should consider the introduction of demerger provisions permitting companies to separate underlying assets without creating a disposal. Such a separation would provide for two outcomes, one which results in the shares in the resulting companies being held by the shareholders in the same proportion as the shares in the demerged company were held prior to the demerger,

and the other resulting in differing proportions (subject to certain consents for example by a special resolution or by unanimous shareholder approval). A demerger would be permitted without the consent of the court unless the demerger was an insolvent demerger or a creditor or shareholder objected.

Introducing demerger rules could be beneficial to the management of companies in that it would simplify the cumbersome existing processes and assist companies to restructure in order to enable the management of demerged companies to concentrate on core business. Equally, demergers are also sometimes demanded in order to make companies easier for investors to analyse (by simplifying the business) and demonstrating a management focus on increasing shareholder value.

Do you agree that the introduction of demergers should be investigated? If so, what factors should be taken into account?

Please submit responses to the address above by:

Friday 2 April 2010

Public submissions - Please note that responses submitted to all States public consultations may be made public (sent to other interested parties on request, sent to the Scrutiny Office, quoted in a final published report, reported in the media, published on a States of Jersey website, listed on a consultation summary etc). If a respondent has a particular wish for confidentiality, such as where the response may concern an individual's private life, or matters of commercial confidentiality, please indicate this clearly when submitting a response.