

## GUIDE TO TAKEOVERS AND MERGERS IN THE BRITISH VIRGIN ISLANDS



<i>Overview</i>	<b>1</b>
<i>Mergers</i>	<b>1</b>
<i>Acquisition of Minority Shareholders' Interest</i>	<b>4</b>
<i>Dissenting Shareholders</i>	<b>5</b>
<i>Purchase of Own Shares by BVI Company</i>	<b>6</b>
<i>Conflict of Interest</i>	<b>7</b>
<i>Insider Dealing</i>	<b>8</b>
<i>Regulatory Issues Involved in Takeovers and Mergers</i>	<b>8</b>

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## Overview

A “takeover” is normally considered the acquisition by one company (the “**purchaser**”, which may include a consortium of companies) of sufficient shares in another company (the “**target**”) to give the purchaser control of that other company. However, the BVI Business Companies Act, 2004, as amended (the “**Companies Act**”), does not provide any special procedures for the takeover of, or by, a BVI company, and it would normally take place in the form of an offer for shares by the purchaser to the target company’s directors. The offer may be in the form of money consideration or non-money consideration such as shares in the purchaser’s company in return for shares in the target company or a combination of money consideration and non-money consideration. However, if non-money consideration is used, either wholly or in part, the directors must first pass a resolution stating:

- (a) the amount to be credited for the shares;
- (b) their determination of the reasonable cash value of the consideration; and
- (c) that in their opinion the cash value is not less than the amount to be credited.

The takeover would be complete once the shares have been transferred to the purchaser, and this may be done

in accordance with the terms of a share sale and purchase agreement. However, a valid transfer of registered shares, other than by operation of law,<sup>1</sup> involves a written instrument of transfer signed by the transferor and containing the name and address of the transferee.<sup>2</sup>

Although a “merger” normally refers to the combination of two separate companies, it is normally done through the acquisition by one company of sufficient shares in another company to give it control of that other company, although there is no need to have a controlling interest by any single company in a merger for there to be a merger.

Although either a takeover or merger can take place in the course of a liquidation or voluntary arrangement, the acquisition is normally referred to as a “reconstruction” and similar considerations will apply.

## Mergers

There are three (3) basic types of mergers involving a BVI company, and several variations on each type, namely, a merger where all the constituent companies are BVI companies, a merger involving a BVI company and its BVI subsidiary, and a merger involving one or more BVI companies and one or more foreign companies, including any parent and subsidiary.

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<sup>1</sup> Section 53, BVI Business Companies Act, 2004.

<sup>2</sup> Section 54(1), BVI Business Companies Act, 2004.



(a) Mergers of Two or More BVI Companies

A BVI company may merge with any one or more BVI companies (together, the “**Constituent Companies**”).<sup>3</sup> All that is required is for the directors of each Constituent Company to approve a written plan of merger<sup>4</sup> (the “**Plan of Merger**”) containing:

- (a) the name of each Constituent Company and the name of the surviving company;
- (b) with respect to each Constituent Company:
  - (i) the designation and number of outstanding shares of each class of shares, specifying each such class entitled to vote on the merger, and noting that some or all shares of the same class of shares in each Constituent Company may be converted into a particular or mixed kind of assets and other shares of the class, or all shares of other classes of shares, may be converted into other assets;<sup>5</sup> and
  - (ii) a specification of each such class, if any,

<sup>3</sup> Section 170(1), BVI Business Companies Act, 2004.

<sup>4</sup> Section 170(2), BVI Business Companies Act, 2004.

<sup>5</sup> Section 170(4), BVI Business Companies Act, 2004.

entitled to vote as a class.

- (c) the terms and conditions of the proposed merger, including the manner and basis of cancelling, reclassifying or converting shares in each Constituent Company into shares, debt obligations or other securities in the newly incorporated BVI company, or money or other assets, or a combination of any of these; and
- (d) a statement of any amendment to the memorandum or articles of association of the newly incorporated BVI company to be brought about by the merger.

The Plan of Merger must then be authorized by a resolution of members and the outstanding shares of every class of shares that are entitled to vote on the merger as a class if the memorandum or articles so provide or if the plan of merger contains any provisions that, if contained in a proposed amendment to the memorandum or articles, would entitle the class to vote on the proposed amendment as a class. If a meeting of members is to be held, notice of the meeting, accompanied by a copy of the Plan of Merger, must be given to each member, whether or not they are entitled to vote on the merger.<sup>6</sup> Alternatively, if there is not going to be a meeting of members and it is

<sup>6</sup> Section 170(5)(a), BVI Business Companies Act, 2004.



proposed to obtain the written consent of members, then a copy of the plan of merger must be given to each member, whether or not entitled to consent to the plan of merger.<sup>7</sup>

After the Plan of Merger has been approved by the directors and authorized by the members, either at a meeting of members or by consent, of each Constituent Company then articles of merger must be executed by each Constituent Company containing:<sup>8</sup>

- (a) the Plan of Merger;
- (b) the date on which the memorandum and articles of association of each Constituent Company were registered by the Registrar; and
- (c) the manner in which the merger was authorized with respect to each Constituent Company.

The articles of merger, along with any resolution to amend the memorandum and articles of association of the newly incorporated BVI company, would be filed with the Registrar.<sup>9</sup>

If the Registrar is satisfied that the requirements of the Companies Act have been complied with, the Registrar will then issue a certificate of merger to the company, and the merger will be effective on the date of

<sup>7</sup> Section 170(5)(b) and (c), BVI Business Companies Act, 2004.

<sup>8</sup> Section 171(1), BVI Business Companies Act, 2004.

<sup>9</sup> Section 171(2), BVI Business Companies Act, 2004.

the registration of the articles of merger (or some other date, not later than 30 days thereafter, as may be stated in the Articles).<sup>10</sup> The effect of the merger is that assets of every description, including choses in action and the business of each of the Constituent Companies, immediately vests in the newly incorporated BVI company and the newly incorporated BVI company is liable for all claims, debts, liabilities and obligations of each of the other Constituent Companies and the Registrar will strike off the other companies that are not the surviving company.<sup>11</sup>

#### (b) Merger with BVI Subsidiaries

A company which owns at least 90% of the outstanding shares of each class of shares in another company (the “**parent company**”) may merge with one or more companies at least 90% of whose outstanding shares it owns (the “**subsidiary company**”), without authorization from the members of any subsidiary company.<sup>12</sup> The Plan of Merger would be slightly different from a merger of two or more BVI companies, so that instead of a specification of each such class, if any, entitled to vote as a class, it must include the number of shares of each class of shares in each subsidiary company owned by the parent company.<sup>13</sup> A copy or outline would be given to all the members of

<sup>10</sup> Section 171(3), BVI Business Companies Act, 2004.

<sup>11</sup> Section 173, BVI Business Companies Act, 2004.

<sup>12</sup> Section 172(1), BVI Business Companies Act, 2004.

<sup>13</sup> Section 172(2)(b)(ii), BVI Business Companies Act, 2004.



each subsidiary company to be merged unless waived by that member.<sup>14</sup> Only the parent company would execute the articles of merger, and if it does not own all the shares in each subsidiary company to be merged, then the articles of merger must include the date on which a copy of the Plan of Merger or outline was made available to, or waived by, the members of each subsidiary company to be merged.<sup>15</sup>

(c) *BVI Mergers where Foreign Company is the Surviving Company*

Any company, regardless of where it is incorporated, may merge with any one or more other companies, regardless of where they are incorporated (together, the “**Constituent Companies**”).<sup>16</sup> However, it is necessary for the laws where the companies are incorporated to permit the merger in the British Virgin Islands before it takes the form of either a merger between two or more BVI companies or a merger with subsidiaries, as above. Along with various agreements and an appointment of registered agent with respect to dissenting shareholders and other related issues,<sup>17</sup> if the surviving company is to be incorporated outside the British Virgin Islands then it is required to file a certificate of merger issued by the appropriate authority of

the foreign jurisdiction where it is incorporated or alternative such evidence of the merger or consolidation as the Registrar considers acceptable,<sup>18</sup> which is normally in the form of an affidavit. The only difference in terms of the effect of a merger with a foreign company is where the surviving company is incorporated outside the British Virgin Islands then the effects of the merger are governed under the laws of that foreign jurisdiction.<sup>19</sup>

## Acquisition of Minority Shareholders’ Interest

Typically, a purchaser will make an offer for the shares of a target company that simply give it a controlling interest in the target company. However, in many circumstances the purchaser may wish to acquire 100% of the shares in the target company. In those circumstances the majority may have the opportunity to buy out the minority at a fair price. This may also take place in group structures where the parent company may wish to operate the subsidiaries in the interest of the group as a whole as opposed to the best interest of the individual subsidiary, which would only be possible if the parent company owns at least 90% of the outstanding shares in the subsidiary. Basically, where the purchaser acquires 90% of the outstanding shares in a target

<sup>14</sup> Section 172(4), BVI Business Companies Act, 2004.

<sup>15</sup> Section 172(5), BVI Business Companies Act, 2004.

<sup>16</sup> Section 174(1), BVI Business Companies Act, 2004.

<sup>17</sup> Section 174(2)(b), BVI Business Companies Act, 2004.

<sup>18</sup> Section 174(2)(b)(iv), BVI Business Companies Act, 2004.

<sup>19</sup> Section 174(3), BVI Business Companies Act, 2004.





company, or 90% of the outstanding shares of each class of shares entitled to vote as a class, the purchaser can write to the directors directing them to redeem the remaining 10% of the outstanding shares.<sup>20</sup> In this situation, it doesn't matter whether the shares are by their terms redeemable.<sup>21</sup> The BVI statutory requirements allow for flexibility in determining the redemption price and the manner in which the redemption is to be effected<sup>22</sup> to comply with the various takeover rules in different jurisdictions.

## Dissenting Shareholders

In the case of a merger or in a takeover where the purchaser holds 90% of the outstanding shares and seeks to redeem the remaining 10% of the outstanding shares, the dissenting shareholders may object to the acquisition of their shares without going to court.<sup>23</sup> The dissenting shareholders, who is entitled to notice of the acquisition, must give written objection to the acquisition of their shares before any meeting at which a vote is to be taken, or at the meeting but before the vote is taken.<sup>24</sup> The written objection must include a statement that the shareholder proposes to demand payment for his or her shares if the company votes to

agree to the merger or the 100% takeover.<sup>25</sup>

The dissenting shareholders are entitled to receive, along with those shareholders who were not required to provide written objections unless they voted in favor of the merger or 100% takeover, written notice of the authorization of, or consent to, the merger or 100% takeover within 21 days immediately following the date on which the vote took place.<sup>26</sup> Within 20 days immediately following the date on which the company gives notice, or in the case of a shareholder who elects to dissent from a merger within 20 days immediately following the date on which the copy of the plan of merger or an outline thereof is given to the shareholder,<sup>27</sup> and the shareholder, whether previously dissenting or not, must give a written notice to the company of his or her decision to elect to dissent.<sup>28</sup> The written notice of election to dissent must state:<sup>29</sup>

- (a) the name and address of the dissenting shareholder;
- (b) the number and classes of shares in respect of which the dissenting shareholder dissents (the "**Elected Shares**"), which must be all the shares which

<sup>20</sup> Section 176(1), BVI Business Companies Act, 2004.

<sup>21</sup> Section 176(2), BVI Business Companies Act, 2004.

<sup>22</sup> Section 176(3), BVI Business Companies Act, 2004.

<sup>23</sup> Section 179(1)(a) and (d), BVI Business Companies Act, 2004.

<sup>24</sup> Section 174(2), BVI Business Companies Act, 2004.

<sup>25</sup> Section 174(3), BVI Business Companies Act, 2004.

<sup>26</sup> Section 174(4), BVI Business Companies Act, 2004.

<sup>27</sup> Section 174(5), BVI Business Companies Act, 2004.

<sup>28</sup> Section 174(5), BVI Business Companies Act, 2004.

<sup>29</sup> Section 174(5)(a) – (c), BVI Business Companies Act, 2004.



the dissenting shareholder holds in the company<sup>30</sup>; and

- (c) the demand for payment of the fair value of the Elected Shares.

The effect of the notice of election to dissent is that the dissenting shareholder ceases to have any rights in the company except the right to be paid the fair value of the shares.<sup>31</sup> In relation to a merger where the surviving company is a foreign company, an agreement is required to file an agreement that a service of process may be effected on it in the Virgin Islands in respect of proceedings, including proceedings for the enforcement of the rights of a dissenting shareholder of a BVI company against the surviving company (the “**Process Service Agreement**”).<sup>32</sup> It should also file an irrevocable appointment of its registered agent as its agent to accept service of process in those proceedings.<sup>33</sup> If it is not included in the Process Service Agreement, then a separate agreement would be necessary agreeing to promptly pay to the dissenting shareholders of the BVI company the amount, if any, to which they are entitled.<sup>34</sup>

<sup>30</sup> Section 174(6), BVI Business Companies Act, 2004.

<sup>31</sup> Section 174(7), BVI Business Companies Act, 2004.

<sup>32</sup> Section 174(2)(b)(i), BVI Business Companies Act, 2004.

<sup>33</sup> Section 174(2)(b)(ii), BVI Business Companies Act, 2004.

<sup>34</sup> Section 174(2)(b)(iii), BVI Business Companies Act, 2004.

A dissenting shareholder who is resident in an EU Member State may be affected by the EU Savings Tax Directive on the income derived from any sale after 1 July 2005.<sup>35</sup>

## Purchase of Own Shares by BVI Company

There is no prohibition against a BVI company purchasing its own shares under BVI law. The Companies Act provides a statutory regime for the purchase, redemption or other acquisition of a BVI company's own shares,<sup>36</sup> but it also provides an opt out mechanism whereby the memorandum and articles of association may provide other provision for the purchase, redemption or acquisition of those shares<sup>37</sup> and the statutory regime will not apply to the extent they are negated, modified or inconsistent with those provisions.<sup>38</sup>

However, regardless of the mechanism used for redemption, purchase or other acquisition of a company's own shares, it is subject to the directors being satisfied, on reasonable grounds, that the Company will, immediately after the redemption, purchase or other acquisition, satisfy the solvency test.<sup>39</sup>

<sup>35</sup> See, Mutual Legal Assistance (Tax Matters) (Amendment) Act, 2005

<sup>36</sup> Section 59(1)(a), BVI Business Companies Act, 2004.

<sup>37</sup> Section 59(1)(b), BVI Business Companies Act, 2004.

<sup>38</sup> Section 59(2), BVI Business Companies Act, 2004.

<sup>39</sup> Section 57(1), BVI Business Companies Act, 2004.



The directors' resolution authorizing the redemption, purchase or other acquisition must contain a statement that, in the opinion of the directors, the company will, immediately after the redemption, purchase or other acquisition, satisfy the solvency test.<sup>40</sup> The obligation of the directors is a continuing obligation until the completion of the redemption, purchase or other acquisition to ensure that immediately after the redemption, purchase or other acquisition the company will continue to meet the solvency test otherwise there would be a statutory unwinding of the redemption, purchase or other acquisition of the company's own shares as it will be deemed not to have been authorized.<sup>41</sup> For this purpose, a company satisfies the solvency test if:

- (a) the value of the company's assets exceeds its liabilities; and
- (b) the company is able to pay its debts as they fall due.<sup>42</sup>

## Conflict of Interest

The principle espoused by Lord Cranworth in the House of Lords decision of Aberdeen Railway Co. v. Blaikie Brothers<sup>43</sup> was adopted by George-Creque, J., as she then was and now Dame Pereira, CJ, in the persuasive Anguillan High Court

decision of Charles Hickox v. Leeward Isles Resorts Limited<sup>44</sup> continues to guide our law. The principle states:

“. . . it is a rule of universal application that no one, having such [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.”

Therefore, this common law rule that will normally be followed by a BVI court allows the company to avoid the takeover or merger transaction unless the company delays unduly before rescinding the transaction, or *restitutio in integrum* becomes impossible or the rights of bona fide third parties intervene.<sup>45</sup> However, in addition to the common law rule, the Companies Act provides that a director of a BVI company must, forthwith after becoming aware of the fact that he is interested in a transaction entered into or to be entered into by the company, disclose the interest to the board,<sup>46</sup> except when the transaction or proposed transaction is between the director and the BVI company and it is, or is to be, entered into in the ordinary course of the BVI company's business and on usual

<sup>40</sup> Section 57(2), BVI Business Companies Act, 2004.

<sup>41</sup> Section 57(3), BVI Business Companies Act, 2004.

<sup>42</sup> Section 56(a), BVI Business Companies Act, 2004.

<sup>43</sup> (1854) 1 Macq 461 at 471 – 472.

<sup>44</sup> Claim No. AXAHCV1998/0097 (unreported, 8 July 2008).

<sup>45</sup> Hely-Hutchinson v. Brayhead Ltd [1967] 3 All ER 98 which was similarly adopted in Charles Hickox v. Leeward Isles Resorts Limited (*supra*).

<sup>46</sup> Section 124, BVI Business Companies Act, 2004.





terms and conditions (the “**Excluded Information**”).<sup>47</sup> For this purpose, a director need only give a general notice to the board, which must be made or brought to the attention of every director on the board to be a proper disclosure,<sup>48</sup> to the effect that he is a member, director, officer or trustee of another named company or other person and is to be regarded as interested in any transaction which may, after the date of the entry or disclosure, be entered into with that company or person.<sup>49</sup> The failure by a director to comply with subsection (1) does not affect the validity of the transaction entered into by the director or the BVI company,<sup>50</sup> but the company may avoid the transaction unless a valid disclosure was made prior to the BVI company entering into the transaction or it is Excluded Information.<sup>51</sup> However, even where the director failed to make a valid disclosure, the company cannot avoid the transaction if the material facts of the interest of the director in the transaction are known by the shareholders entitled to vote at a shareholders meeting and the transaction is approved or ratified by a shareholders resolution, or alternatively if the BVI company received fair value for the transaction.<sup>52</sup> For this reason, it is always necessary that shareholder approval be obtained for any takeover

or merger, except where it involves the merger with one or more subsidiaries.

## Insider Dealing

The use by an insider of inside information (known to him or her but not generally and which he or she has acquired by virtue of his or her position) to trade to his or her advantage in price-affected securities of a BVI company is known as “insider dealing” which is an offence under the Securities and Investment Business Act, 2010.<sup>53</sup> Although insider dealing is not restricted to directors and can include employees, shareholders and professional agents, directors normally have easy access to insider information and have a fiduciary duty not to tip off other persons who may benefit from that insider information. Therefore, where the BVI company is listed on AIM, the sub-market of the London Stock Exchange, or any other stock exchange, involved in a takeover bid or merger the issue of insider dealing arises and adequate safeguards should be in place to prevent insider dealing.

## Regulatory Issues Involved in Takeovers and Mergers

### (a) Financial Services Regulatory Approval

<sup>53</sup> Section 88, Securities and Investment Business Act, 2010.

<sup>47</sup> Section 124(3), BVI Business Companies Act, 2004.

<sup>48</sup> Section 124(6), BVI Business Companies Act, 2004.

<sup>49</sup> Section 124(4), BVI Business Companies Act, 2004.

<sup>50</sup> Section 124(5), BVI Business Companies Act, 2004.

<sup>51</sup> Section 125(1), BVI Business Companies Act, 2004.

<sup>52</sup> Section 125(2), BVI Business Companies Act, 2004.



Where the takeover or merger involves a regulated entity such as a bank, trust company (except a private trust company), company management company, insurance company or investment company, the BVI company must inform the Financial Services Commission within a reasonable time prior to the proposed takeover or merger becoming effective.<sup>54</sup>

(b) Shipping Regulatory Approval

Where the BVI company owns a BVI registered ship, the takeover or merger cannot cause the ship to cease to be a British ship. The Registrar of Shipping must be satisfied that the ship continues to be a British ship and may terminate the ship's registration if the ship is no longer eligible to be registered as a result of the takeover or merger.

(c) Telecommunications Regulatory Approval

Similarly, any person holding a significant interest in a BVI company licensed to provide a public telecommunications service must also obtain prior written approval of the Minister before selling, transferring, charging or otherwise disposing of that interest or any part of that interest and a public telecommunications service provider cannot merger with another company without first obtaining the prior

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<sup>54</sup> Section 72 and Schedule 3, Regulatory Code, 2009.

written approval of the Minister,<sup>55</sup> and in either case the approval shall not be unreasonably withheld.<sup>56</sup> Similarly, a person holding a significant interest in a BVI company authorized to use the spectrum must obtain the prior written approval of the Telecommunications Regulatory Commission before selling, transferring, charging or otherwise disposing of that interest or any part of that interest.<sup>57</sup>

(d) Land Regulatory Approval

Where the BVI company owns land, or an interest in land, in the British Virgin Islands there is generally no requirement to obtain any regulatory approval unless the BVI company is a non-belonger company. However, in any case all instruments in respect of the takeover or merger of the BVI land holding company would be liable to stamp duty.

(e) Business, Trade and Profession Regulatory Approval

Where a BVI company is engaging in any business, profession or trade within the British Virgin Islands, other than in relation to locally produced unprocessed agricultural products or any marine products or roadside vending of homemade pastries, drinks and confectioneries it must obtain a licence for that purpose.<sup>58</sup> However,

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<sup>55</sup> Section 16(2), Telecommunications Act, 2006.

<sup>56</sup> Section 16(4), Telecommunications Act, 2006.

<sup>57</sup> Section 20(2), Telecommunications Act, 2006.

<sup>58</sup> Section 3, Business, Professions and Trade Licences Act (Cap. 200).



there is no requirement to provide the shareholders of the company,<sup>59</sup> and there is also no requirement to indicate any change which occurs with respect to the shareholding, or any part thereof, in a BVI trading company.<sup>60</sup> Therefore, there is no regulatory approval required for any takeover or merger of a BVI company which is only trading in the BVI.

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<sup>59</sup> Section 5(2)(b), Business, Professions and Trade Licences Act (Cap. 200).

<sup>60</sup> Section 5(3), Business, Professions and Trade Licences Act (Cap. 200).



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