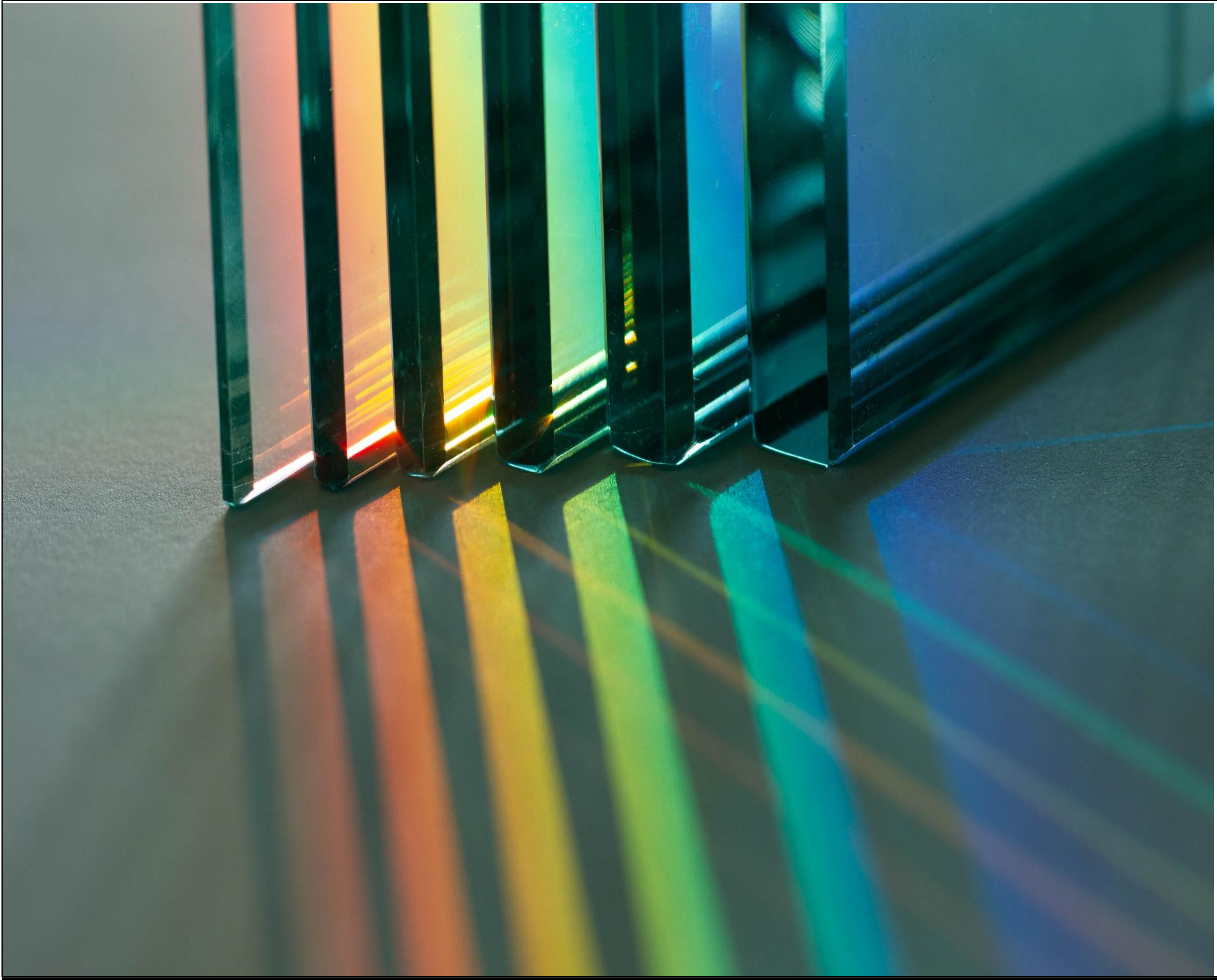


Statutory Merger Guide

South Africa

pwc

PwC Legal Business Solutions

PwC Legal Business Solutions is part of the PwC global network, a multidisciplinary professional services firm which employs more than 3,600 lawyers across 98 countries.

Drawing on the capabilities of our global network of M&A lawyers and transaction services specialists, we offer integrated, strategic, and commercially relevant advice on a range of domestic and transnational mergers, including merger control, compliance, and prohibited practices.

PwC Legal Business Solutions can advise and otherwise assist clients in respect of all types of mergers in South Africa and in across Africa in collaboration with our colleagues in local PwC offices.

The contents of this guide are for general information purposes only and do not constitute legal or other advice.

Introduction

In an amalgamation or merger, two or more companies' assets and liabilities are combined/merged/pooled together.

A statutory merger happens automatically by operation of law, so the following actions/transactions are not required to implement it:

- Concluding separate sale agreements for assets like real estate and intellectual property.
- Transferring staff or contracts of employment.
- Transferring liabilities (which would require creditor consent in a business transfer).
- Transferring rights, licenses, and permits including mining rights and environmental authorisations.
- Deregistering any of the merging companies from the Companies and Intellectual Property Commission (CIPC).

It is noteworthy that the transfer of assets which are registered under any public regulation must be registered in the property registry of origin.

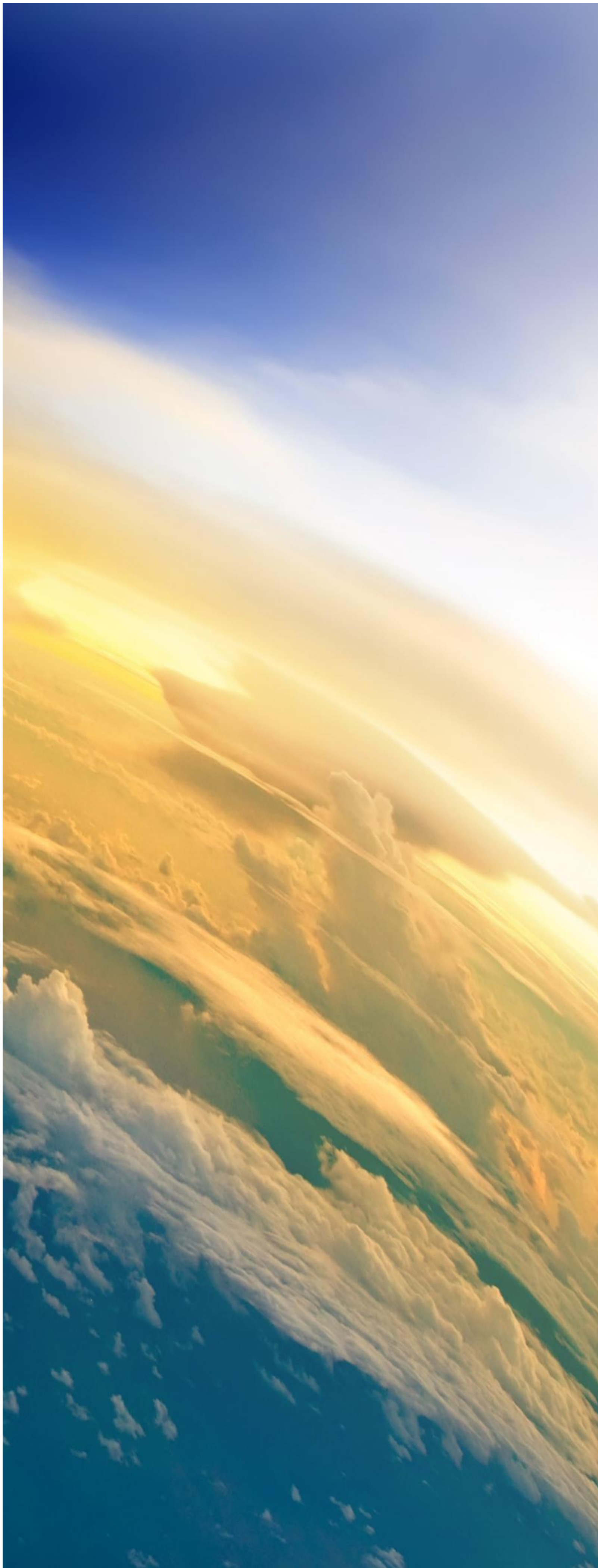
Therefore, a transfer of real estate must still be registered at the Deeds Office (except that the merger agreement is used in place of the customary sale agreement).

Court-free

Except in limited circumstances, and in line with the approach adopted in the USA and Canada, the South African merger procedure does not require court approval and creditors can object to the merger only in limited circumstances. This is elaborated upon below.

Creditor-free

Except in limited circumstances, creditors cannot prevent the merger from happening. This is elaborated upon below.



Advantages of a merger

- Efficiency.
- Lower cost on transfer of assets and liabilities because transfer happens automatically.
- Full control is obtained over the target company. In a takeover transaction a dissenting minority may hinder the transaction especially where the takeover offer is not accepted by 90% or more of the target's shareholders.
- The merging companies (as transferors of assets and liabilities) are wound-up and deregistered by operation of law.

Disadvantages of a merger

- The acquiring company assumes all the target's liabilities by operation of law (including unknown and contingent liabilities).
- It is therefore a risky type of transaction; accordingly, triangular mergers are advisable to ring-fence high-risk targets — see triangular mergers below — and a thorough due diligence is required in all merger transactions.
- At least two sets of shareholder approvals are required.

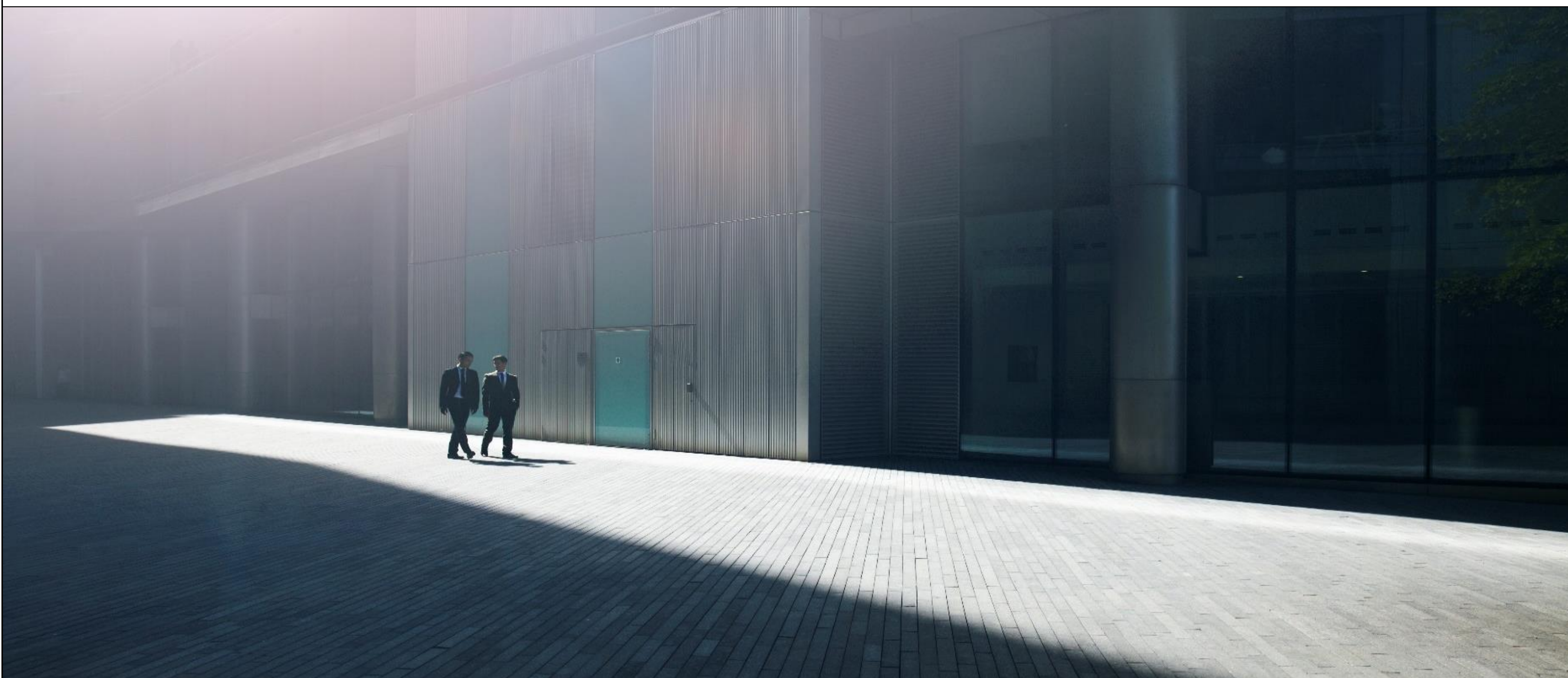
Change in control provisions

- Where one or more contracts concluded between the target company and any of its stakeholders or counterparts contain "change in control provisions" (which trigger an automatic cancellation, or which entitle the counterparty to cancel at its election) the merger will happen subject to those contracts.
- Therefore, a thorough due diligence investigation is required in this regard and careful consideration should be given to any contract clauses dealing with changes in immediate or ultimate direct or indirect control and the types of control concerned (management or ownership).

Prohibitions on cession

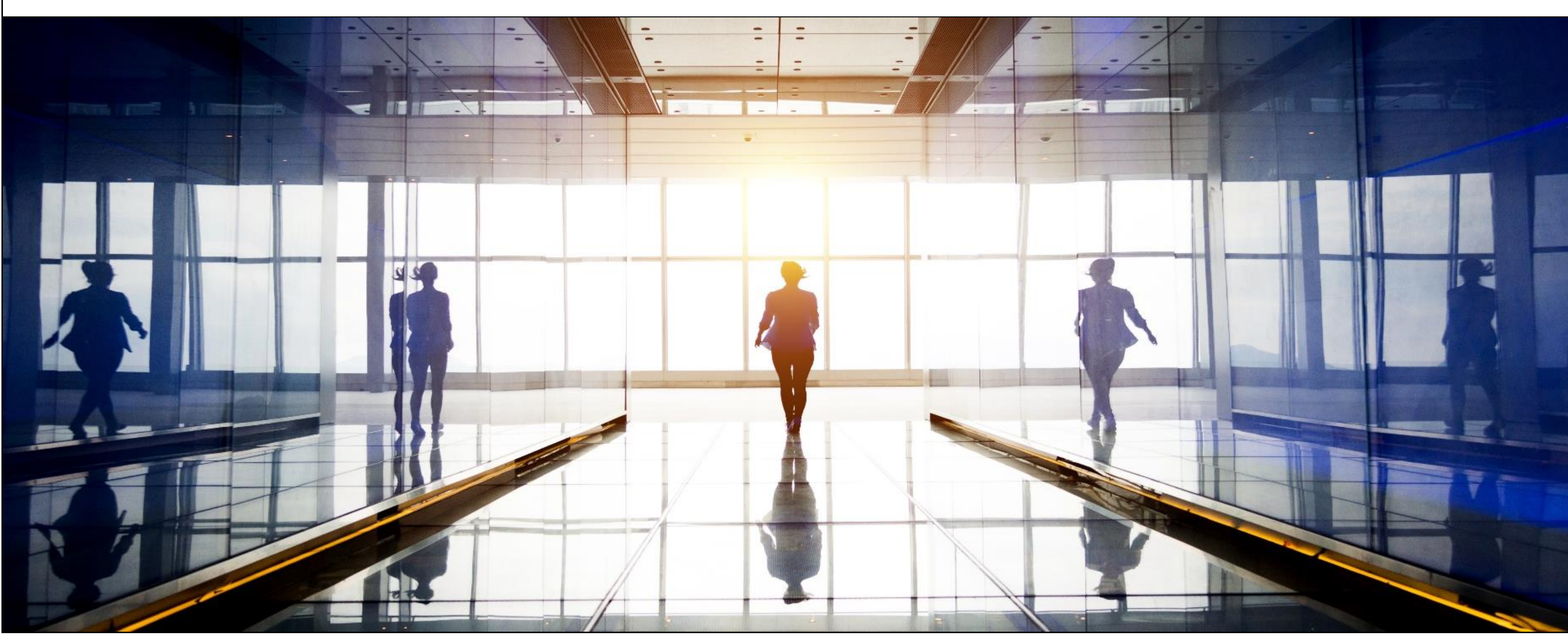
A term in a contract prohibiting cession will not be breached by a transfer of contractual rights pursuant to the m because there is no cession (only a transfer by operation of law).

This is distinguishable from a “change in control provision” which is triggered when the target’s controllers befor merger are different from those after the merger.



Process

Merger Agreement → Solvency & Liquidity Test → Approvals → Notice to Creditors → Merger implementation



Merger Agreement

The merging parties must conclude a written agreement setting out (amongst others):

- the proposed Memorandum of Incorporation of any new company to be formed by the merger;
- the name and identity number of each proposed director of any proposed merged company;
- the way in which the securities of each company will be converted to securities of any proposed merged company, or exchanged for other property;
- if any securities will be converted into securities of any proposed merged company, the consideration that the securities holders will get in addition to or instead of securities of any proposed merged company;
- how payment will be made;
- details of the proposed allocation of the assets and liabilities of the merging companies among the companies that will be formed or continue to exist when the merger is implemented;
- details of any arrangement or strategy necessary to complete the merger, and to provide for the subsequent management and operation of the proposed merged company or companies; and
- the estimated cost of the proposed amalgamation or merger.

Solvency and Liquidity Test

- Each merging company must satisfy the solvency and liquidity test which is designed to ensure that all creditors are protected.
- The test includes forward-looking information and assumptions.

Approvals

(1) <u>Meeting</u>

- Each merging company must call a shareholders' meeting to consider and approve the merger ("the *Meeting*").
- The Meeting must be attended by holders of at least 25% of the company's issued shares (if there are non-voting shares they are excluded). Therefore, the minimum approval threshold is 18.75% (75%*25%).
- At the Meeting, holders of at least 75% of the company's issued shares must approve the merger by <u>*resolution*</u> (if there are non-voting shares they are excluded).
- Any voting rights controlled by another merging party, or a person related to it, are excluded in determining whether the quorum or approval thresholds have been met. In the case of a regulated company (ultimate paragraph below) any person acting in concert with either of the foregoing parties must also be excluded.

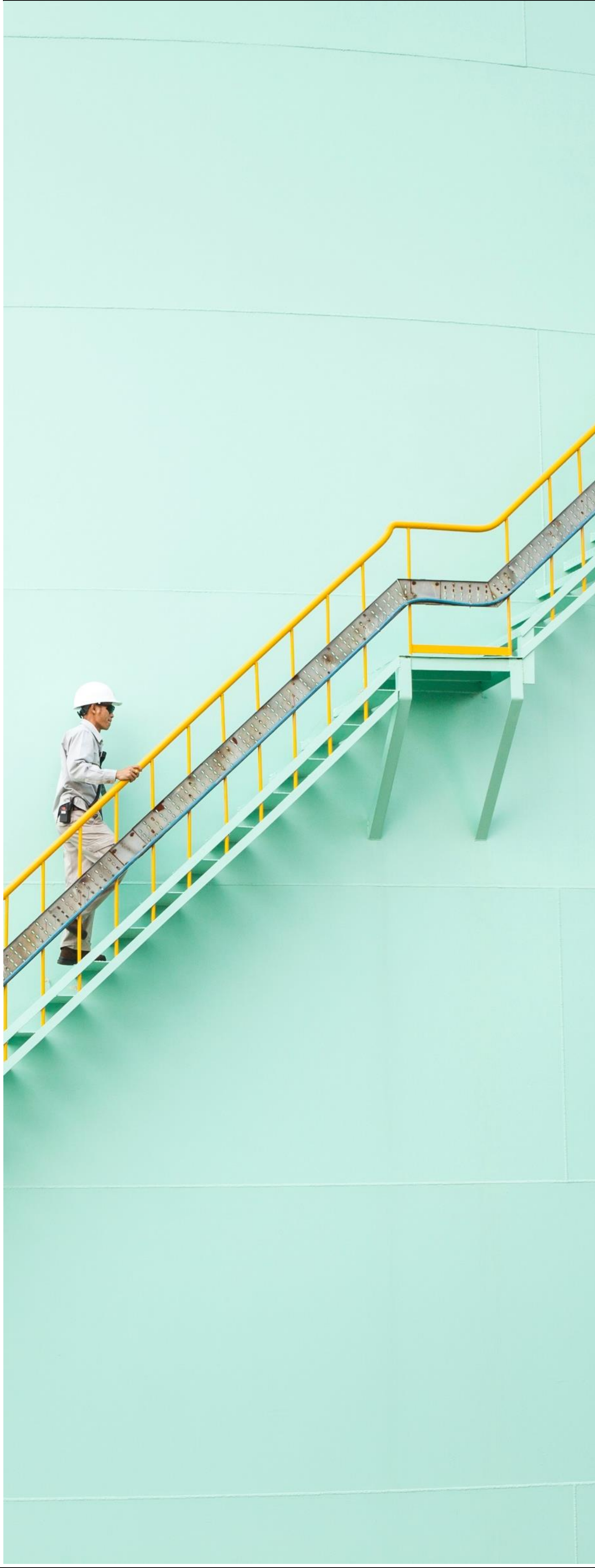
(2) <u>Court Approval</u>

If the resolution is opposed by 15% or more of the voting rights exercised, any shareholder who voted against it may either:

- require the company to seek court approval for the merger, in which case the company must do so within ten business days after the vote (at its own cost); or
- apply to court to set it aside.

A court (on application by the company or a Dissenting Shareholder) may set aside the resolution only if:

- the resolution is manifestly unfair to any class of shareholders; or
- voting was materially tainted by conflict of interest; inadequate disclosure; failure to comply with the Act, the company's Memorandum of Incorporation, or any applicable rules of the company; or some other significant and material procedural irregularity.



(3) Takeover Regulation Panel

Lastly the Takeover Regulation Panel ("the *TRP*") must have issued a compliance certificate in respect of the merger where a merging party is a regulated company, that is:

- a public company;
- a state-owned company; or
- a private company if (i) more than 10% of the company's issued shares have been transferred, other than between/among related or interrelated persons, within the period of 24 months immediately before the date of the merger; or (ii) the company's Memorandum of Incorporation expressly requires the TRP's approval.

Notice to Creditors

- Once the merger is approved each merging company must give notice (of the merger) to every known creditor in a form prescribed in the Regulations to the Companies Act.
- Within 15 business days after delivery of such a notice, a creditor may seek leave to apply to a court for a review of the merger only on the grounds that the creditor will be materially prejudiced by the amalgamation or merger.
- A court may grant leave only if it is satisfied that the creditor is acting in good faith; if implemented, the amalgamation or merger will materially prejudice the creditor; and there are no other remedies available to the creditor.

Merger implementation

- A notice of merger must be filed with the Companies and Intellectual Property Commission after the transaction has satisfied all the applicable requirements and it must include certain prescribed information and must be accompanied by the Memorandum of Incorporation for any company newly incorporated in terms of the merger agreement.
- Thereafter the CIPC will attend to the necessary company registration and deregistration.

Dissenting shareholder appraisal rights

All shareholders who vote against the merger may put their shares to the company at their fair value and the company must buy them. This counterbalances any prejudice arising due to the liberal merger mechanisms (in addition to the minimum quorum and exclusion of related party votes).

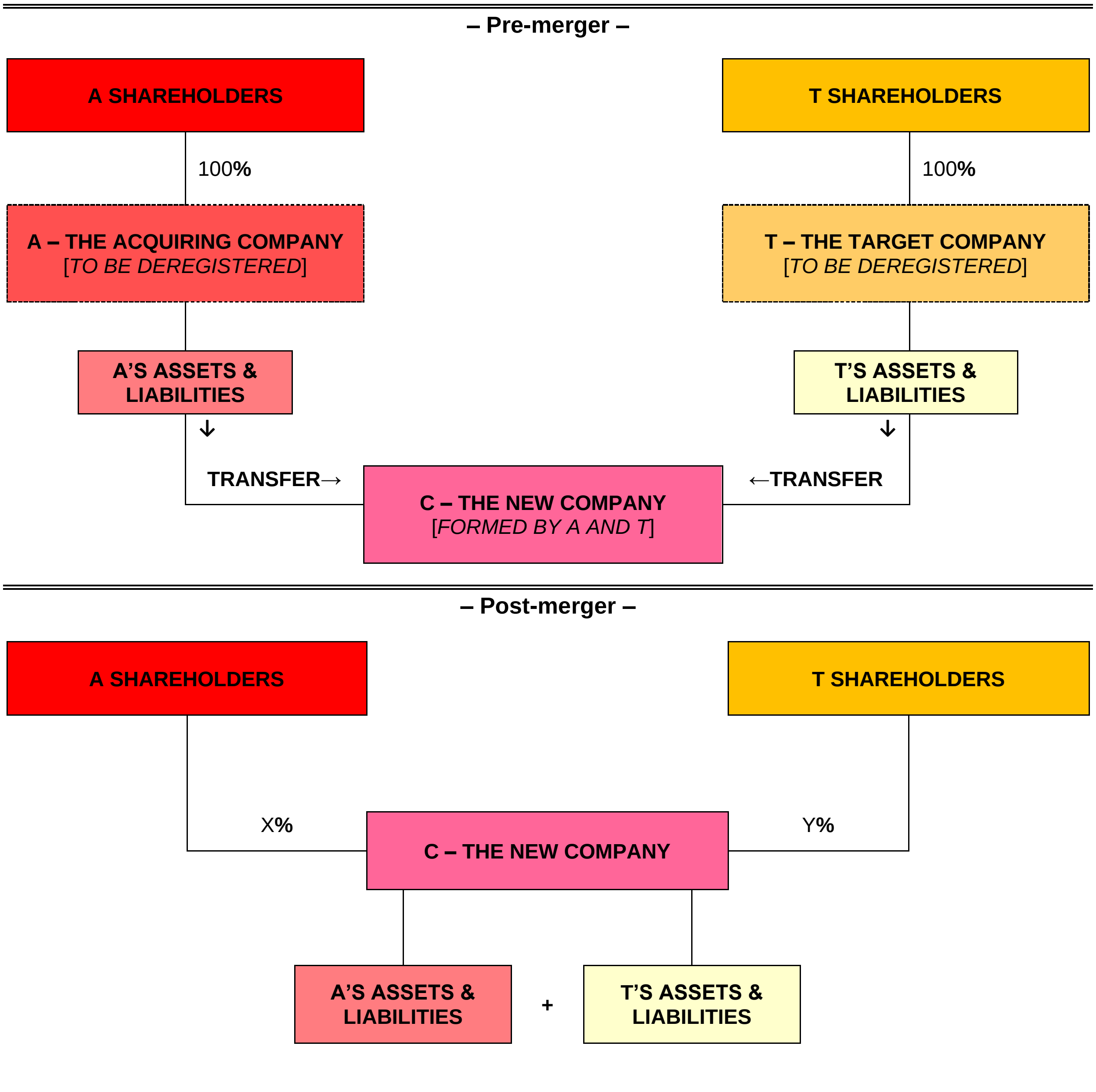
Types of simple mergers – examples

What follows is a simple illustration of the types of possible mergers.

It is however noteworthy that the merger provisions in the Companies Act are flexible, and it is thus possible to have more than one surviving company, more than one new company, and different types of merger considerations (including shares in other companies).

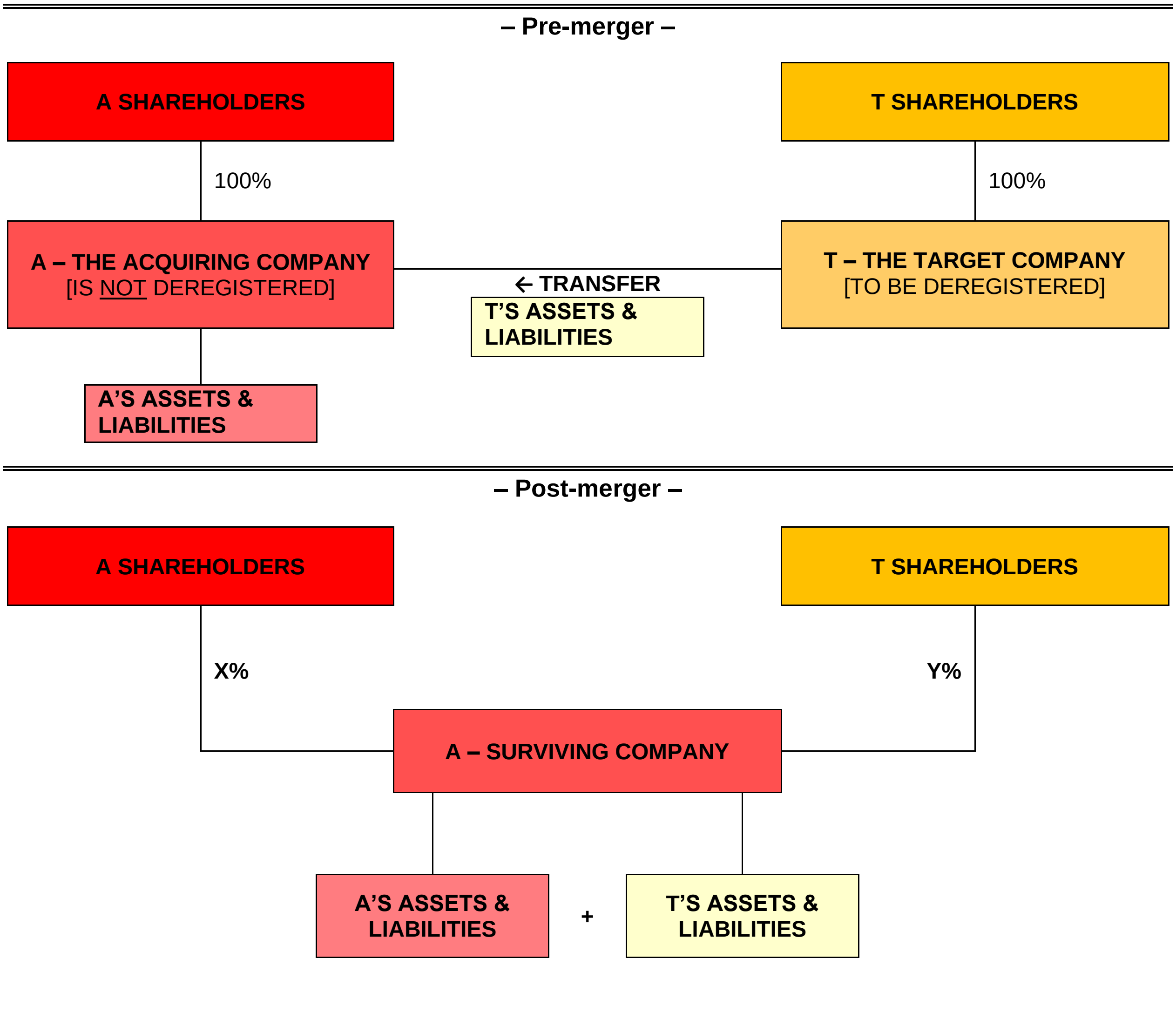
The steps involved in the merger and the type of merger concerned are determined with reference to the merger agreement.

Pooling type merger into a new company (both merging companies are deregistered)



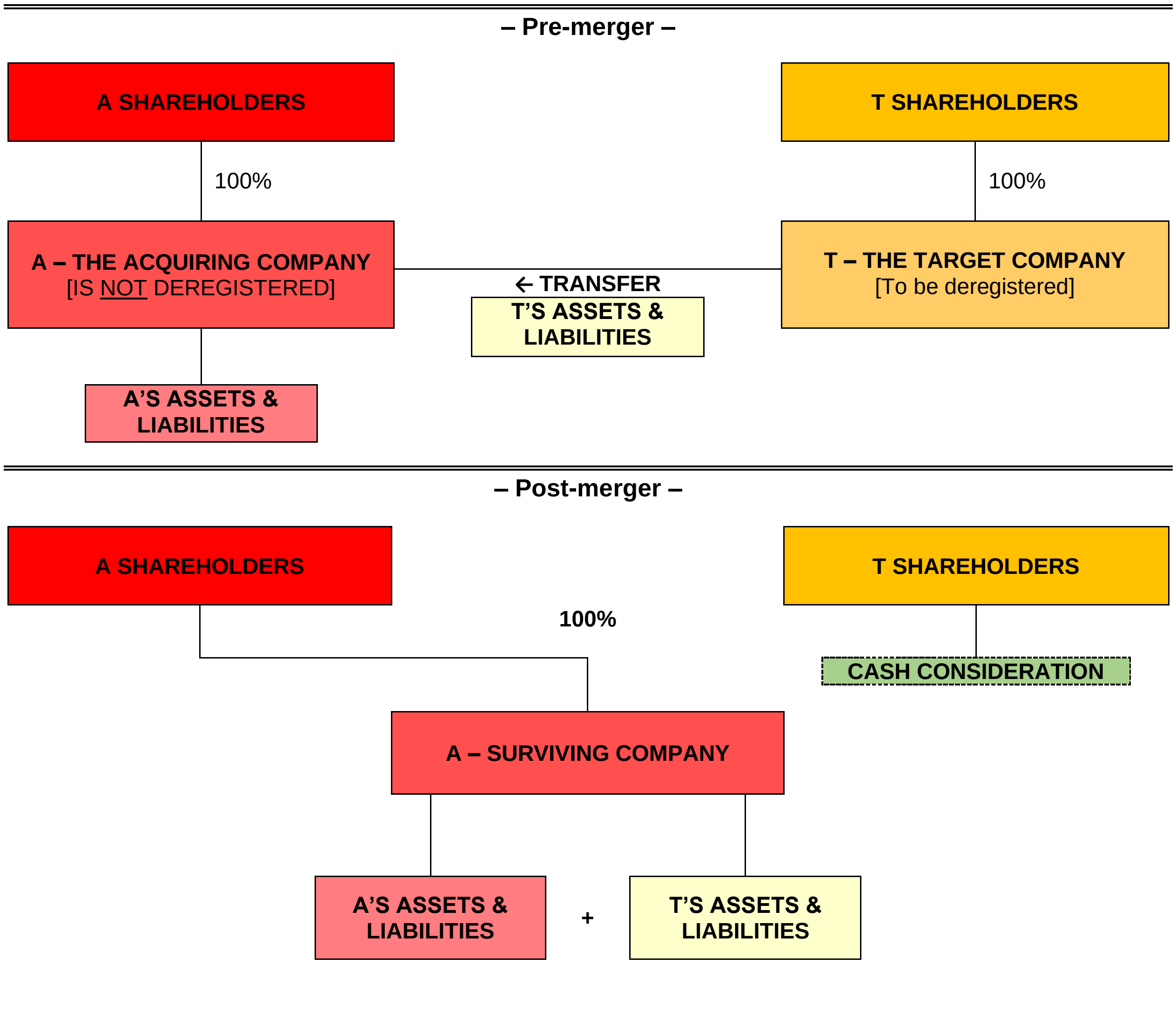
Companies A and T transfer their assets and liabilities into a C and their shareholders receive shares in C as consideration for the transfer of T's assets.

Pooling type merger into one of the surviving merging companies (the other is deregistered)



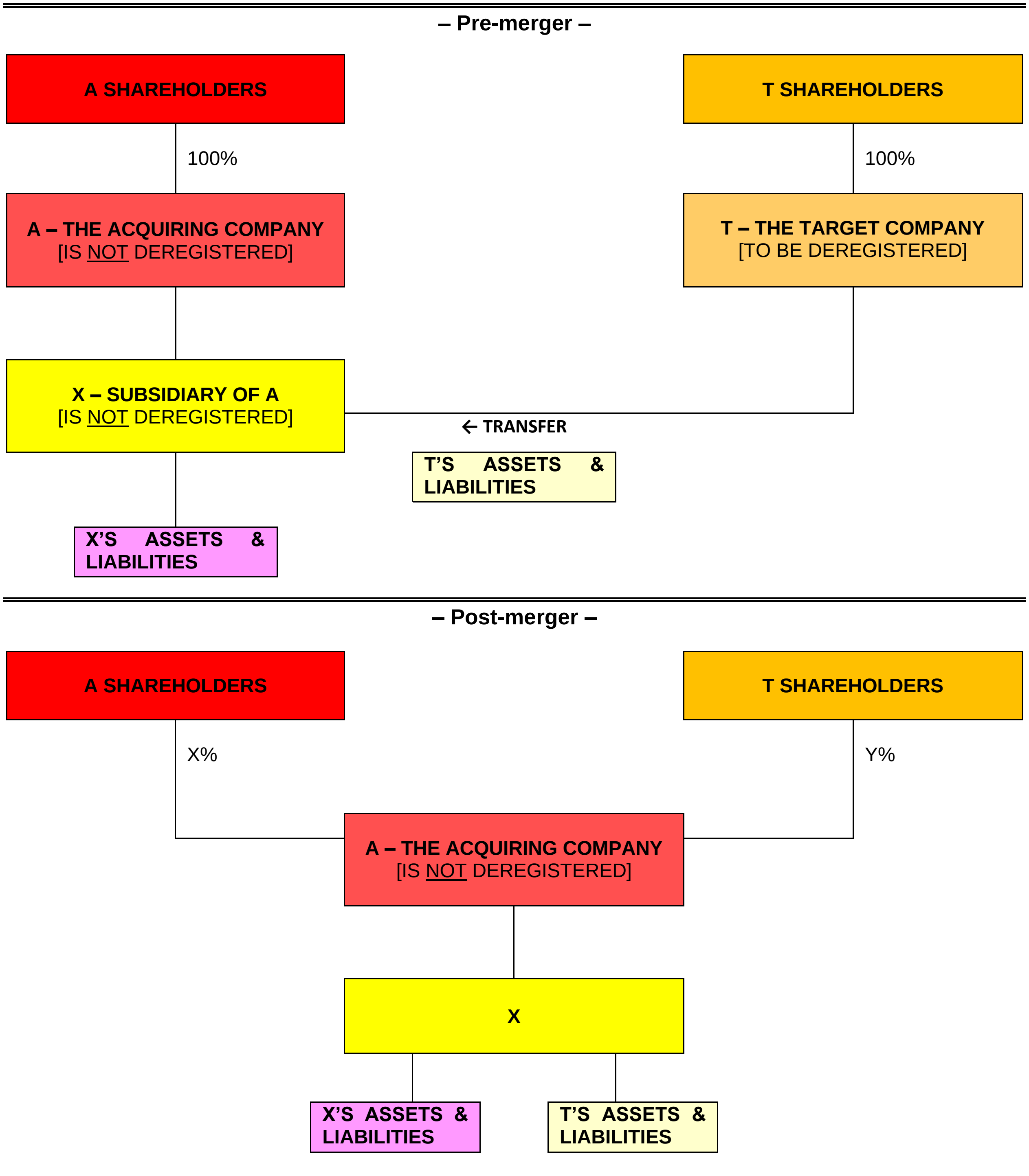
Company T transfers its assets and liabilities to A and its shareholders receive shares in A as consideration for the transfer. A's shareholders are diluted.

Cash merger into one of the surviving merging companies (the other is deregistered)



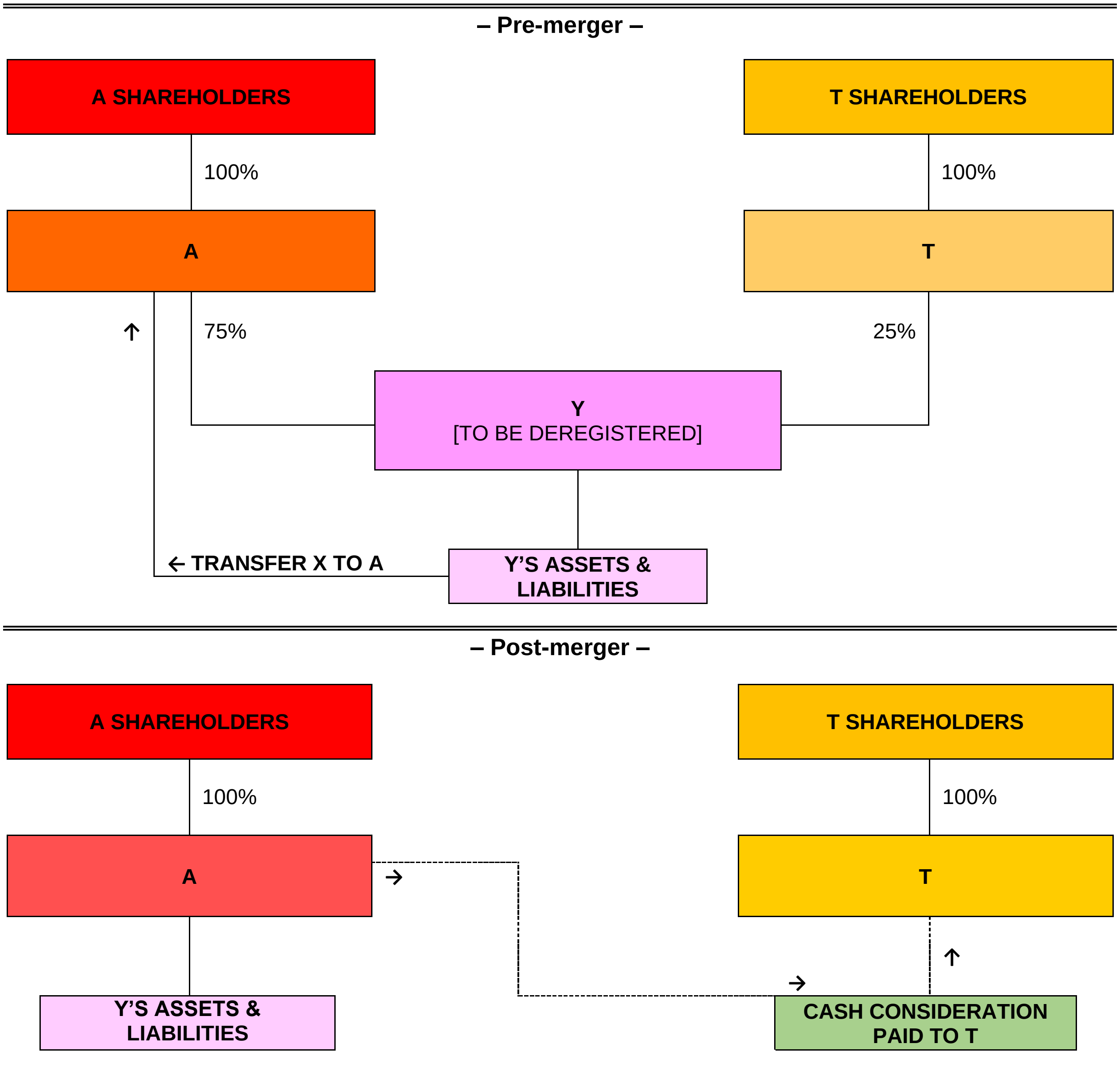
This is more like an acquisition that is made under the statutory merger process to avoid hinderances by minority shareholders holding 10%.

Triangular merger (at least three companies are involved, and the target company is deregistered)



The purpose of a triangular merger is to ring-fence T's liabilities in X and protect A from any unexpected liabilities. The effect is also that the A's business and T's business are kept apart. It is also noteworthy that A is not a party to the merger agreement and X is often a newly formed company without any assets or liabilities (and is formed solely to house T's assets and liabilities).

Freeze-out merger



This type of merger will prejudice minority shareholders. It is noteworthy that related party voting rights are excluded and minority shareholders have appraisal rights.