

**Companies Act 2014**

**Explanatory Memorandum**

**Published by the Department of Jobs, Enterprise and Innovation**

## Companies Act 2014

### Preliminary Note & Explanatory Memorandum

#### Part 1 – Preliminary and General

##### *Preliminary Note*

*Part 1* contains the defined terms and expressions, and interpretation provisions, which apply generally in the Act. Individual Parts and Chapters of the Act also contain definitions specific to the topic under consideration in those Parts or Chapters.

The terms and expressions defined in *Part 1* include most of the definitions found in section 2(1) of the Companies Act 1963, together with some of the definitions found in section 2(1) of the Companies (Amendment) Act 1983 and section 3 of the Companies Act 1990. Also included are new terms and expressions that are necessitated by subsequent amendments to the law and those which have been considered appropriate as a result of changes to and the updating of the law in the Act.

*Sections 7* and *8* are new sections which make substantive changes to the former law. They give an extensive definition for the terms “subsidiary”, “holding company”, “wholly owned subsidiary” and “group of companies” under the Act. Prior to the Act the definition of “subsidiary” as set out in section 155 of the Companies Act 1963 for company law purposes and of “subsidiary undertaking” as set out in Regulation 4 of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I 201/1992) for group accounting purposes were separate and distinct. The Companies Act definition was smaller than the group accounts definition meaning that more companies would fall to be “subsidiary undertakings” than would fall to be “subsidiaries”. Under the Act, there is just one definition that will apply for all purposes to bodies corporate.

*Section 9* sets out the significant structural concept in the Act, whereby in effect all of the law which applies to the most common company type in Ireland, the private company limited by shares, is contained in *Parts 1* to *14* of the Act. The law for all other company types is then set out in *Parts 16* to *25*. *Parts 1* to *15* apply save where they are disappplied, modified or supplemented.

When reading the provisions that apply to a particular company type contained in *Parts 16* to *25* it is important to understand that the law contained in *Parts 1* to *14* applies to that company type to the extent that the law is applied, modified or disappplied to that particular company type in the corresponding part in *Parts 16* to *25*.

This Part also contains standard provisions usually contained in Acts of the Oireachtas, For example, *section 12* contains the power for the Minister for Jobs, Enterprise and Innovation to make regulations under the Act, and *section 14* allows for expenses incurred by the Minister to be paid out of monies provided by the Oireachtas.

##### *Explanatory Memorandum*

*Section 1* provides that the short title of the Act is the Companies Act 2014 and states that the Act will come into operation on such day or days as the Minister appoints by order. In this regard, different days may be appointed for different purposes or different provisions.

*Section 2* sets out to define the terms used in the Act, both by citing existing definitions in the previous Companies Acts where appropriate, and by specifying unique definitions elsewhere for the purpose of clarity in the Act. New definitions and definitions of note in *subsection (1)* include:-

“Annual general meeting” and “extraordinary general meeting” – these expressions, whilst already in use, were not defined in the previous Companies Acts.

“Appropriate rate” sets the interest rate under the Act at 5%, or such other rate as may be specified by the Minister.

Category (1), (2), (3) and (4) offences are defined with reference to *section 871* of the Act, which sets out the new four-tier categorisation of offences so that, subject to a small number of exceptions in the case of the most serious offences (namely prospectus trading and market abuse), all offences under the Companies Acts will now be categorised according to this four-tier scheme.

A definition of “civil partner” has been inserted in line with the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

“Constitution” is a new definition meaning the constitution of a company as provided for in *section 19* of the Act (in the case of a CLS), or as provided for in *Parts 16, 17, 18, 19 or 24* (in the case of other company types).

“Contravention” is now defined under the Act as including a failure to comply.

The definition of “court” has been expanded upon and is now stated to include, in relation to proceedings for an offence that is being prosecuted summarily, the District Court or, in any other case, the court with jurisdiction in the matter concerned. In addition, where the term “court” is used in connection with proceedings for a debt or the recovery of a sum under this Act, and a particular court is not specified for that purpose, then “court” will mean any court of competent jurisdiction.

The term “deliver” has been newly inserted to clarify that “deliver” means to send or forward a document, notice or thing to the Registrar for the purposes of its registration.

“Designated activity company” (DAC) is defined as a company to which *Part 16* applies. This is a private company limited by shares or by guarantee (having a share capital), the primary defining feature of which is the continued existence of an objects clause in the constitution of the company. This is in contrast to the new model private company limited by shares (LTD), the constitution of which will no longer contain an objects clause.

The title of the Director of Corporate Enforcement has been shortened to the “Director” under this Act and the use of the term includes an Acting Director. The definition of the term “Director” facilitates the use of that shortened term to refer to the Director of Corporate Enforcement throughout the Bill. This should be contrasted with the term “director” which refers to a director of a company.

“Electronic means” or “electronic communications” is defined as including the use of electronic mail.

“Hire-purchase agreement” has the same meaning as it has in the Consumer Credit Act 1995.

“Insolvency proceedings” are defined as proceedings opened under Article 3 of the Insolvency Regulation in a Member State of the EU (other than the State itself and Denmark) where the proceedings relate to a body corporate.

The definition of “officer of the Director” is taken from the Company Law Enforcement Act 2001 and means either an officer of the Minister assigned to the Director of Corporate Enforcement; or a

member of An Garda Síochána seconded to the Director; or a person employed under a contract for service or otherwise to assist the Director.

“Ordinary resolution” was not previously defined under the Companies Acts and is newly defined here as a resolution of the type provided for in *section 191* of the Act.

The definition of “prescribed” has been expanded upon and now gives a specific meaning to the term in the context of *Part 11* and *Part 15* of the Act.

“Public holiday” is defined as a day which is a public holiday under the Organisation of Working Time Act 1997 and replaces the expression “bank holiday” as used in the Companies Act 1963.

The term “registered office” is now defined. The expression “the office” formerly found in Table A of CA 1963 is no longer used.

“The Registrar” is now defined as the Registrar of Companies under *section 887* of the Act.

A definition for the term “sealed” is new. Section 64 of the Land and Conveyancing Reform Act 2009 abolishes the need for a seal in the case of execution by an individual. A seal will however remain necessary for corporations.

“Shadow director” is a new definition taken from section 2(1) of the Companies Act 1963 and section 27 of the Companies Act 1990. The meaning of the term is set out in full in *section 221* of the Act.

“Special resolution” is given a new definition insofar as a special resolution is now said to be a resolution that is required to be passed as a special resolution, whether by this Act the company’s constitution or otherwise. A special resolution is no longer defined by reference to the notice of the resolution.

“Statutory Auditor” is an individual or firm that stands approved as a statutory auditor or statutory audit firm, as the case may be, under the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 (S.I. NO. 220 of 2010)

“Summary Approval Procedure” is the procedure provided for in *Part 4, Chapter 7* of the Act. This is the procedure to be followed in order to provide the corporate governance and approvals required for certain transactions such as the provision of financial assistance, the approval of guarantees of certain loans to directors and certain transactions involving the share capital of a private company.

“System of interconnection of registers” is defined as meaning the system of interconnection of central commercial and companies registers established in accordance with Article 4a(2) of Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009;

“Undischarged bankrupt” is defined as a person who is declared bankrupt by a court of competent jurisdiction, within the State or elsewhere, and who has not obtained a certificate of discharge or its equivalent in the relevant jurisdiction.

“Written resolution” is given a definition in accordance with *section 191(8)* of the Act. Written resolution means either an ordinary or a special resolution passed in accordance with *section 193* or *194*.

Finally, the definition of “accounts” has been removed and a new definition is to be found instead in *Part 6* of the Act using the new term “financial statements”.

A clear definition for a ‘sole-director company’ or a ‘company with a sole-director’ is set out. This is to ensure that, if, for example, an unforeseen eventuality results in a company having just one director, that company will be entitled to be considered as a Sole-Director company.

Elsewhere in *section (2)*, a reference to a receiver of the property of a company is said to include a reference to a receiver and manager of the property, and in *subsection (10)*, the circumstances in which a company will be considered to be “related” to another company are outlined.

*Section 3* deals with the calculation of time limits under the Act and is based on section 4 of the Companies Act 1990 and is now in line with the Interpretation Act 2005. Where a time limit expires on a Saturday, Sunday or a public holiday, that time limit will extend to the first following day that is not a Saturday, Sunday or a public holiday. Where a time limit under the Act is 6 days or less, any Saturday, Sunday or public holiday that falls within that period will not be taken into account when calculating the number of days.

*Section 4* refers to the repeals and revocations of enactments and statutory instruments specified in *Parts 1* and *2* of *Schedule 2* to the Act.

*Section 5* concerns savings and transitional provisions in relation to the registration of companies, documents referring to former enactments relating to companies, appointments of persons to any office, the keeping of registers, and funds and accounts. It is taken from section 3(5) to (9) and (11) of the Companies Act 1963. The section provides that the repeal of previous Companies Acts does not affect companies incorporated under those repealed Acts. It is provided that *Schedule 6* to the Act contains further savings and transitional provisions and *section (5)* is stated to be without prejudice to the generality of the Interpretation Act 2005. The term “former enactment relating to companies” is given to mean any enactment repealed or revoked by this Act, the Companies Act 1963 or the Companies (Consolidation) Act 1908.

*Section 6* is based on section 4 of the Companies Act 1963 and provides that references to a company formed and registered under the Companies (Consolidation) Act 1908 or the Companies Act 1963 will be read as references to a company formed and registered under whichever of those Acts is appropriate, or this Act.

*Section 7* is a new section and gives an extensive definition for the term “subsidiary” under the Act. It aims to merge the two concepts of “subsidiary” as defined by section 155 of the Companies Act 1963 and “subsidiary undertaking” as defined by Regulation 4 of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I 201/1992).

This section makes use of the new expressions “superior company” and “lower company” to assist in the understanding of the definition of “subsidiary”.

*Subsection (2)* lays down the circumstances in which a lower company is considered to be the subsidiary of a superior company and draws on section 155(1) of the Companies Act 1963 and Regulation 4(1) of the EC (Companies: Group Accounts) Regulations 1992. In circumstances where the superior company:

- (i) is a shareholder or member of the lower company and controls the composition of the board; or
- (ii) holds more than half in nominal value of the equity share capital in the lower company; or

- (iii) holds more than half in nominal value of the shares carrying voting rights in the lower company; or
- (iv) holds a majority of the shareholders' or members' voting rights in the lower company; or
- (v) is a shareholder or member of the lower company and controls a majority of the voting rights in that company

then the lower company in question will be considered to be the subsidiary of the superior company.

Alternatively, a lower company is considered to be the subsidiary of a superior company where the superior company has the right to exercise a dominant influence or control over the lower company or in circumstances where the superior company and the lower company are managed by the superior company on a unified basis or where the lower company is a subsidiary of any company which is a subsidiary of the superior company.

*Subsection (3)* provides that a superior company will be deemed to control the composition of the board of the lower company where that superior company can appoint or remove the holders of all or a majority of the directorships on the board of the lower company. Under *subsection (4)*, a superior company will be deemed to have the power to appoint a directorship where the person to be appointed cannot be so appointed without the superior company exercising their power in regard to the appointment, or where that person's appointment as a director follows on directly from his or her appointment as a director of the superior company. These subsections derive from section 155(2) of the Companies Act 1963.

*Subsection (5)* lays down what should and should not be taken into account when determining whether the lower company is a subsidiary of the superior company. This is adapted from section 155(3) CA 1963 and Regulation 4(3) of the EC (Companies: Group Accounts) Regulations 1992. The following should not be taken into account when determining whether the lower company is a subsidiary of the superior company:-

- (i) shares held or powers exercisable by the superior company in a fiduciary capacity; or
- (ii) shares held or powers exercisable by or on behalf of the superior company (or its subsidiary) by way of security in accordance with instructions received from the person providing the security; or
- (iii) shares held or powers exercisable by or on behalf of the superior company (or its subsidiary) where the ordinary business of the superior company includes the lending of money, and the shares or powers referred to are held or exercisable by way of security and are held or exercisable in the interests of the person providing the security.

Shares held or powers exercisable by a nominee on behalf of the superior company or by or on behalf of one of the superior company's subsidiaries should be taken into account in determining whether the lower company is a subsidiary of the superior company.

*Subsection (6)* explains how to determine whether or not the superior company holds a majority of voting rights in the lower company for the purposes of *subsection (2)(a)(iv)* and *(v)*. In this regard, the total voting rights of shareholders or members in the lower company must be reduced by the amount of any voting rights attaching to shares held by or on behalf of the lower company itself or held by or on behalf of any of its subsidiaries. Therefore, although the superior company might not, at first sight, appear to have a majority of the voting rights in the lower company, such a majority may in fact be deemed to arise after voting rights exercisable by or on behalf of the lower company or any of its subsidiaries are excluded. This derives from Regulation 4(4) of the EC (Companies: Group Accounts) Regulations 1992.

Under *subsection (7)*, in determining whether a superior company has the right to exercise a dominant influence over a lower company, the superior company must have a right to give directions with

respect to the operating and financial policies of the lower company, which the directors of the lower company are obliged to comply with. This provision will not affect the construction of the expression “actually exercises dominant influence” in *subsection (2)(c)* of this section (see *subsection (9)*). *Subsection (7)* and *subsection (9)* derive from Regulation 4(5) and (7) of the EC (Companies: Group Accounts) Regulations 1992 respectively.

*Subsection (8)* provides that the term “control contract” in *subsection (2)(b)* should be construed as a contract in writing conferring a right on the superior company to exercise a dominant influence over the lower company where such a right is authorised by the constitution of lower company and is permitted by the law under which that lower company is established. This is taken from Regulation 4(6) of the EC (Companies: Group Accounts) Regulations 1992.

*Subsection (10)* provides for existing documents that contain a definition of a “subsidiary” that is based on section 155(1) of the Companies Act 1963 Act are not affected by this section in the absence of an agreement to the contrary by the parties to the document.

*Subsection (11)* clarifies the meaning of the terms “company” and “equity share capital” as used in this section and is taken from section 155(5) of the Companies Act 1963.

*Section 8* gives definitions for the terms “holding company”, “wholly owned subsidiary” and “group of companies” in a stand-alone section. “Holding company” is defined in *subsection (1)* - a company is another company’s holding company if, but only if, that other is its subsidiary

Regarding the term “wholly owned subsidiary”, a company is another company’s wholly owned subsidiary but only if, the company has no members except—

- (a) that other company; or
- (b) companies that are wholly-owned subsidiaries (by virtue of the application of this subsection to them) of that other company; or
- (c) nominees of any company referred to in *paragraph (a)* or *(b)*; or
- (d) a mixture of what is referred to in 2 or more of the foregoing paragraphs.

“Group of companies” is defined as a holding company and its one or more subsidiaries.

*Subsection (10)* provides for existing documents that contain a definition of a “holding company” that is based on section 155(4) of the Companies Act 1963 Act are not affected by this section in the absence of an agreement to the contrary by the parties to the document.

*Section 9* is new and explains that the Act is structured so as to facilitate its use in relation to the most common type of company - the private company limited by shares (LTD). The law in relation to this company type is to be found in *Parts 1 to 14* of the Act and in *Schedules 1 to 6*. *Part 15* of the Bill applies to all company types. It is important to note that *Parts 16 to 25* of the Act may have an impact on and LTD.

*Section 10* is new and provides that the use of the term “company” in *Parts 1 to 14* of the Act is a reference to a private company limited by shares, unless expressly provided otherwise. The expressions “holding company” and any related expression are not to be read as covering only private companies limited by shares.

*Section 11* gives guidance as to the construction of references to directors, boards of directors and interpretation of other plural forms under the Act. A reference to the directors of a company or to the board of directors will, where the company has a sole director, be read as a reference to the

director of the company. References to the members of the company, or the subscribers to the constitution will, where the company has a sole member, or where there is only one subscriber to the constitution, be read as references to the member of the company, or the subscriber to the constitution, as appropriate. This section is new and is stated to be without prejudice to the generality of section 18(a) of the Interpretation Act 2005.

*Section 12* gives the power to the Minister to make regulations prescribing anything referred to in this Act as prescribed or to be prescribed, unless the regulation is specifically to be prescribed by another authority. Regulations or orders made by the Minister under the Act must be laid before each House of the Oireachtas as soon as possible after the making of the regulation or order and the Houses of the Oireachtas may then pass a resolution annulling the regulation or order within 21 days of it being laid before it (provided the House is sitting).

*Section 13* makes provision for the authentication of documents and states that any approval, sanction, direction or licence or revocation of licence given or made by the Minister under this Act may alternatively be authenticated by any person authorised in that regard by the Minister.

*Section 14* provides that expenses incurred by the Minister in the administration of this Act will be paid out of moneys provided by the Oireachtas, to the extent that such expenses are sanctioned by the Minister for Public Expenditure and Reform.



## **Part 2 – Incorporation and Registration**

### *Preliminary Note*

*Part 2* of the Act makes provision for the incorporation and registration of the new model company, the private company limited by shares (LTD).

The most significant changes in this Part are contained in *Chapters 3* and *6*.

*Chapter 1* contains a definition of “the transition period”. This date regulates the transition of existing companies to the new model company provided for in the Act. The transition period means the period expiring 18 months after the commencement of *section 15*. The Minister is given the power to alter these dates.

*Chapter 2* sets out the way in which a company is incorporated. In accordance with the recommendation of the Company Law Review Group (CLRG) in its First Report, any one or more persons may, by subscribing their names to an application for incorporation in a form prescribed for that purpose, form a LTD. *Chapter 2* abolishes the distinction between a memorandum of association and articles of association for the LTD and these two documents are combined into a single document called a constitution. The significant innovation here is that the constitution will not contain an objects clause. The requirement for a statutory declaration to be furnished on the incorporation of a company has been replaced by a requirement for an unsworn declaration under *section 22*. This reflects the recommendation in the First Report of the CLRG to move away from the requirement of a statutory declaration. Another innovation in this Chapter is an increase in the maximum number of members of a company. This maximum number has increased from 99 to 149 as a result of the Prospectus (Directive 2003/71/EC) (Amendment) Regulations 2012.

*Chapter 3* governs corporate capacity and authority. Under this Chapter, a company has “full and unlimited capacity to carry on and undertake any business or activity, do any act or enter into any transaction and for those purposes has full rights, powers and privileges”. Therefore, a private company now has no limit on capacity although it is, of course, still required to act within the law. *Section 40* is a new provision and is aimed at enhancing clarity and certainty in relation to the authority of the board of directors to bind the company and gives added protection to persons dealing with the company. *Section 41* reforms and clarifies the law applicable to powers of attorney. The use of a seal is no longer necessary to empower a person to execute deeds or other matters on behalf of a company.

*Chapter 4* deals with contracts and other transactions. It is provided that the company may have more than one common seal and the power for the company to have an official seal for use abroad is allowed for.

*Chapter 5* governs the company name, registered office and legal proceedings. A company may use as its registered office, the office of an agent approved for that purpose and in the event that the agent changes address, the notice of change of address to the Registrar is required to be delivered by the agent rather than the company. *Section 52* alters the law as it applies to security for costs in legal proceedings. Prior to the introduction of the Act, the law provided that the judge in a case may require “sufficient” security as to costs. The word “sufficient” has been deleted. The effect of this will be to give the court discretion as to the amount of security that is required.

*Section 53* is aimed at enhancing the enforcement of orders and judgments against companies and their officers. It provides for the transfer, from the Rules of the Superior Courts to primary legislation, of the option, with the courts permission, to enforce a judgment against a company to sequester the property of the company or the directors.

*Chapter 6* provides for the conversion of an existing private company limited by shares to a LTD. *Section 55* contains the default provisions that will apply to the existing private company if it takes no action. Unless an existing company re-registers as a DAC or other company type, it will become a private company limited by shares (LTD) under the Act on the expiry of the transition period (i.e. the period expiring eighteen months after the commencement of *section 15* of the Act), and it will retain the provisions of its existing constitution, with the exception of its objects clause, and also with the exception of any provisions of its constitution which would be inconsistent with a mandatory provision of the Act.

It should be noted that a Designated Activity Company (DAC) provided for in *Part 16* of the Act is essentially the same as an existing private company, including in the respect that it must have a memorandum of association which will contain an objects clause with consequential limitations on the capacity of the company.

Under *section 56*, a company may convert to a DAC by passing an ordinary resolution, not later than 3 months before the expiry of the transition period, resolving that the company be so registered and the provisions of *Part 16* will apply to it accordingly. Therefore, an existing private company effectively has a period of 15 months from the commencement of the Act to pass such a resolution to become a DAC. This section also *requires* an existing private company to re-register as a DAC if a member or members who hold more than 25% of the voting rights in the company serve a notice in writing requesting the company to do so. The rationale for this provision is that such a majority could, under the existing law, block any change to the objects of the company (as a special resolution, requiring 75% approval, is required to make such a change), and accordingly there is a justification that this majority should be able to require the company to retain its objects clause, by becoming a DAC (the alternative would be that the company would lose its objects clause were it to become a LTD).

*Section 57* is new and creates a right for members (holding 15% of the company's issued share capital) or creditors (holding 15% of the company's debentures) to apply to the court for an order requiring the company to re-register as a DAC.

*Section 58* provides that until the end of the transition period, the law applicable to a DAC shall apply to an existing company unless and until it re-registers as another company type.

This Chapter also makes provision for the adoption of a new constitution by the members. Alternatively, the directors have the capacity and the obligation to prepare and adopt a new constitution where one has not already been adopted by the members or where the company has not re-registered as a different company type. Failing the adoption of a constitution by the members or directors, an existing company shall be deemed to have a constitution as required under the Act. Certain members or creditors may apply to the court for relief if they consider that their rights have been prejudiced particularly by the failure of the directors to adopt a new constitution that properly protects those rights.

*Section 63* of the Act sets out the procedural steps to be followed by an existing private company which re-registers as a DAC under *section 56* or *section 57*.

The *First Schedule* provides a model form of constitution for the LTD.

### *Explanatory Memorandum*

## **Chapter 1** Preliminary

*Section 15* is a standard provision and contains definitions of a number of terms which are specific to *Part 2* of the Act. The definitions of “activity” and of “relevant classification system” are taken from the existing law in, respectively, section 42(7) of the Companies (Amendment)(No. 2) Act 1999 and the Annex to Council Regulation 3037/90/EEC of 9 October 1990. The definitions of “existing private company”, “registered person” and “transition period” are new.

*Section 16* gives the Minister the power to extend the “transition period” by order, in circumstances where difficulties arise in the operation of provisions of the Act to the extent that more time is required for affected or interested parties to carry out any procedures under the Act.

## **Chapter 2**

### **Incorporation and Consequential Matters**

*Section 17* sets out the manner in which a private company limited by shares may be formed and limits the liability of any member of such a company. It derives from the parts of section 5 of the Companies Act 1963 that deal with private companies limited by shares and Regulation 4 of the European Communities (Single Member Private Limited Companies) Regulations 1994 in relation to the formation of a company limited by shares.

*Subsection (1)* provides that a company may be formed for any lawful purpose by any person or persons subscribing to its constitution and complying with registration requirements as set out in this Act. This allows a private company limited by shares to be formed by one person as is permitted under Regulation 4 of the European Communities (Single Member Private Limited Companies) Regulations 1994.

*Subsection (2)* enshrines the principle of limited liability, and *subsection (3)* clarifies that the operation of this principle is without prejudice to any other liability to which a member may be subject pursuant to this Act.

*Subsection (4)* provides for an increase in the maximum number of members of a company. This maximum number has increased from 99 to 149 as a result of the Prospectus (Directive 2003/71/EC) (Amendment) Regulations 2012.

*Subsection (5)* provides that this limit does not take into account employee-members and former-employees who were members at the time of their employment. This, along with *subsection (4)*, reproduces section 33(1)(b) CA 1963.

*Subsection (6)* reproduces verbatim section 33(3) CA 1963 and provides that where two or more persons hold one or more shares in a company jointly, such persons shall be treated as a single member.

*Subsection (7)* clarifies that any registration of a person as a member of a company in excess of the limit as set out in this section shall be void.

*Section 18* is partially derived from section 42(1) of the Companies (Amendment)(No.2) Act 1999 and contains the basic principle that a company cannot be formed or registered unless it appears to the Registrar that the company, when registered, will carry on an activity in the State. A company shall not carry on the activity of a credit institution or an insurance undertaking.

*Section 19* is a new section, but derives from sections 6, 14 and 16 of the Companies Act 1963. It gives effect to the idea that the constitution is the single document of incorporation of the

LTD. The new form of the constitution corresponds with the structure envisaged by the First Report of the Company Law Review Group, which provides a simplified form of application for incorporation of the private company limited by shares – a single document of incorporation. This single-document constitution will combine and replace the previous system of two documents – the memorandum of association and the articles of association. The single document constitution of the LTD will no longer contain an objects clause.

*Subsection (1)* specifies what information the constitution must contain, including a clause to the effect that the liability of the members is limited. It provides that any additional regulations that a company may adopt are also to be included in its constitution. *Subsection (1)* is derived from the existing section 6(1), (2) and (4) CA 1963.

*Subsection (2)* deals with the form of the constitution and contains requirements as regards the signing of that document. *Subsection (2)(a)* reproduces the relevant parts of section 16 CA 1963 while *subsection (2)(b) and (c)* reproduces section 14 CA 1963.

*Subsection (3)* provides that the constitution must always state the share capital as it stands, not only what the position was at the time the company was registered.

*Section 20* provides that a company may not alter its constitution except as provided for in this Act. This reproduces in substance section 9 of the Companies Act 1963.

*Section 21* states that the constitution must be delivered to the Registrar of Companies. *Subsection (1)* also sets out what items are required to accompany the constitution on delivery. This list is new but is seen as helpful in providing clarity as to what is required to be delivered.

*Subsection (2)* provides that the Registrar shall not register any constitution delivered to him or her unless he or she is satisfied that all the requirements of this Act with regard to registration have been complied with. This is drawn from section 5(1) of the Companies (Amendment) Act 1983 and is applied to the LTD here.

*Section 22* specifies the particulars which must be contained in the statement which is required to be delivered with the constitution for registration. *Subsection (2)* requires that the statement must contain the names of the first directors and the first secretary of the company, the address of the company's registered office, and the place where the central administration of the company will be carried on. In cases where the constitution is delivered to the Registrar by an agent, *subsection (4)* requires the statement to specify the name and address of the agent.

*Subsection (6)* contains a requirement that, where no director of the company is resident in the European Economic Area (EEA), a bond must also be delivered for registration. *Subsection (7)* provides that the statement to be delivered with the constitution must indicate the general nature of the principal activity to be carried on by the company in the State, together with the class to which that activity belongs under the European Union's NACE system for the classification of economic activity. Where the activity does not belong to any such class under the NACE system, a precise description of the activity must be provided. It is also necessary to give the place in the State where it is proposed to carry on the activity.

*Subsection (9)* requires that the statement be signed by or on behalf of each subscriber to the constitution, and also be accompanied by a consent signed by each of the directors and secretary to act in that capacity. The authentication of documents by means of new technology other than by sealing or signature is provided for.

*Section 23* concerns the additional statement which must be delivered to the Registrar in circumstances where a director of the company is disqualified under the law of another state. Persons that are disqualified from acting as company directors in other jurisdictions will be required to make a statement to that effect if they propose to become a director of a company in the State. The section sets out the information that must be contained in this statement and has not substantively changed from the equivalent provision in section 3A of the Companies (Amendment) Act 1982, however it was amended to allow for the authentication of documents other than by signature or sealing.

*Section 24* provides that the Registrar may accept a declaration made by a director, secretary, or solicitor engaged in the formation of the company as sufficient evidence that the requirements outlined in *section 22* and *section 23* above have been complied with, and also as sufficient evidence that the company will carry on an activity in the State. The declaration to be made here need not be sworn, unlike the previous provision in section 5(5) of the Companies (Amendment) Act 1983, which required a statutory declaration to be made. This change reflects the recommendation in this regard contained in the CLRG's First Report.

*Section 25* sets out the effect of registration of a company. *Subsection (1)* states that, on the registration of the constitution, the Registrar will issue a certificate of incorporation to the company.

*Subsection (2)* enshrines the general principle that, from the date of incorporation as mentioned in the certificate, the members of the company will be a body corporate with the name contained in the constitution, having perpetual succession and a common seal. *Subsection (3)* provides that the certificate of incorporation shall state that the company is a private company limited by shares and *subsection (4)* states that the certificate of incorporation is conclusive evidence that the company is duly registered.

*Subsection (5)* provides that once the company has been incorporated, the persons named in the statement are deemed to have been automatically appointed as its first directors and secretary. *Subsection (6)* provides that if there is a conflict between the statement made under *section 22* and the constitution as to who the directors are, any names in the constitution that are not in the statement are void, while *subsection (7)* provides that a person is deemed not to have been appointed if he or she is disqualified from being appointed under the Act.

This section derives from section 18 of the Companies Act 1963, section 3(5) of the Companies (Amendment) Act 1982 and section 5 of the Companies (Amendment) Act 1983.

*Section 26* provides, in *subsection (1)*, that a company must have at the end of its name either "limited" or "teoranta", and that each word may be abbreviated to "ltd." or "teo." as specified in *subsection (2) and (3)*. *Subsection (4)* provides for the registration of a business name where the corporate name is not used.

*Subsection (5)* stipulates that undesirable names will not be registered but *subsection (6)* provides for the appeal of a decision by the Registrar under *subsection (5)*.

This section derives from section 6(1)(b) and sections 21 and 22 of the Companies Act 1963.

*Section 27* prohibits an individual or a body that is not a company from carrying on any business under a name which ends with the words "limited", "company limited by shares" or abbreviations of those words and provides that a breach of this provision is a category 3 offence. *Subsection (3)* provides an exception from the prohibition that neither a body that is not a company

nor an individual shall carry on any trade, profession or business under a name which includes, as its last part, the word “limited” or the words “company limited by shares” for Industrial and Provident Societies. *Subsections (4) and (5)* operate to similarly prohibit a company from using a name which would give the impression that it is a body other than a company, in circumstances where the fact that it is a company is likely to be material to any person. A breach of this provision by the company or one of its officers is also a category 3 offence, as per *subsection (5)*. This is derived from section 56 of the Companies (Amendment) Act 1983. The section does not apply to an external company that could, by its constitution, be either categorised as a private limited company or a designated activity company in this jurisdiction. The purpose of *subsection (7)* is to continue to facilitate external companies in carrying out business in Ireland.

*Section 28* allows a person, on application to the Registrar, to reserve a company name before the company is formed, for a maximum period of 28 days. This period may, on a further application made before the expiry of the initial 28 days, be extended for a maximum of an additional 28 days. However, a name cannot be reserved if, in the opinion of the Registrar, it is undesirable. This section, together with *section 29* below, is drawn from sections 59 and 60 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Section 29* provides that the effect of reserving a company name under *section 28* above is that, during the reservation period (including any extension of that period), a company may only be incorporated under the reserved name by the person who has made the reservation.

*Section 30* sets out the procedure for a company to change its name. *Subsection (1)* allows a company, by special resolution and with the written approval of the Registrar, to change its name. *Subsection (3)* provides for a situation where a company has, whether inadvertently or otherwise, been registered with a name which in the Registrar’s opinion is too similar to the name of another company. Where this happens, the company itself may change its name with the approval of the Registrar, or alternatively the Registrar may, within 6 months of the company being registered by that name, direct it to change its name, and this direction must, according to *subsection (4)*, be complied with within 6 weeks or such longer period as the Registrar allows. Failure to comply with such a direction is a category 4 offence under *subsection (8)*.

*Subsection (6)* provides that a change of a company’s name under this section shall not affect any rights or obligations of the company, or any legal proceedings by or against the company, and that any legal proceedings may be continued or commenced against the company by its new name. *Subsection (7)* makes clear that this section applies even where the name of a company has been specified by statute, but obliges the Registrar to consult with any relevant Minister of the Government before approving a change of name. This section derives from section 23 of the Companies Act 1963.

*Section 31* deals with the effect of a company’s constitution. *Subsection (1)* provides that the constitution, when registered, binds the company and its members to the same extent as if it had been signed and sealed by each member. *Subsection (3)* states that all money payable by a member to the company under the constitution shall be a debt due from him or her to the company. *Subsection (4)* provides that an action to recover a debt created by this section shall not be brought after the expiration of twelve years from the date on which the cause of action accrued. This is in harmony with the provisions of the Statute of Limitations. *Subsections (1), (3) and (4)* derive from section 25 of the Companies Act 1963.

*Subsection (2)* is new and is a general provision which clarifies that, where a provision of this Act allows a company’s constitution to “provide otherwise” to what is stated by that section of the Act, and where the company’s constitution does not in fact “provide otherwise”, then the provisions of that

section will apply to the company. This gives effect to the new approach in this Act whereby provisions which were previously contained in the Model Articles in Table A of the First Schedule to the Companies Act 1963 are now brought into the text of this Act and will apply by default except in cases where the Act allows a company the option to disapply or vary certain provisions by inserting additional articles into the company's constitution to this effect.

*Section 32* states that a company's constitution may be amended by special resolution, subject to the provisions of the Act. *Subsection (2)* confirms that any such amendment will be valid as if it had originally been contained in the constitution, again subject to the provisions of the Act. If notice of the amendment is required to be published under *section 33*, then *subsection (3)* requires a copy of the text of the constitution as amended to be delivered to the Registrar in addition to the amendment. *Subsections (4)* and *(5)* state that, unless a member agrees in writing to be bound by an amendment to the constitution, he or she will not be bound by an amendment which is made after he or she becomes a member, so far as the amendment requires him or her to take more shares than the number held on the date of the amendment or which in any way increases his or her liability at that date to the share capital of the company or to pay money to the company.

*Subsections (1)* and *(2)* reproduce section 15 of the Companies Act 1963, with no substantive amendments. *Subsection (3)* is drawn from Regulation 5 of the European Communities (Companies) Regulations 1973 (S.I. 163/1973) and covers certain amendments made to a company's constitution which require notification to the Registrar. *Subsections (4)* and *(5)* derive from section 27 CA 1963.

*Section 33* is new. It incorporates the provisions of Regulation 4 of S.I. No. 163/1973 - European Communities (Companies) Regulations, 1973 into the Act. It provides that the Registrar shall publish in the CRO Gazette notice of the delivery to or the issue by the Registrar of certain documents and particulars listed in *subsection (1)*. *Subsection (2)* requires such a notice to be published within 10 days after the date of the relevant delivery or issue.

*Section 34* is a new section. It provides that any document filed with the Registrar may be in Irish or English, and a certified translation of the document into any official language of the EU may also be filed with the Registrar. However, under *subsection (4)*, if there is a discrepancy between the certified translation and the Irish or English version, the company may not rely on the certified translation but a third party may so rely unless it is proven that the third party had knowledge of the Irish or English document.

*Section 35* re-enacts section 57 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. It allows a company to appoint an electronic filing agent to file documents with the Companies Registration Office (CRO) in electronic form. Advance notice must be given to the CRO of such an appointment.

*Section 36* provides that a company may revoke an authorisation to act as an electronic filing agent, made under *section 35* above, and the revocation takes effect once notified to the CRO. This reproduces section 58 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Section 37* allows a member to request a copy of the constitution from a company. On the first request, the company must do this free of charge, but a payment of €5 may be sought by the company for a subsequent request. *Subsection (2)* requires that every copy of the constitution issued by a company shall contain any amendments which have been made to the constitution. *Subsection (3)*

imposes a category 4 offence for a breach of this section by a company or an officer. This re-enacts sections 29 and 30 of the Companies Act 1963.

### **Chapter 3** Corporate Capacity and Authority

*Section 38* is a new section, which effectively provides that a private company limited by shares has the same full legal capacity as a natural person, and therefore the doctrine of *ultra vires* no longer applies to such a company. *Subsection (1)* provides that a company shall have the capacity to carry on and undertake any business activity, do any act or enter into any transaction and for these purposes it is given full rights, powers and privileges. *Subsection (2)* is a safeguard provision stating that private companies are not relieved from their duties or obligations under any enactment or the general law as a result of *subsection (1)*.

*Section 39* provides that where a company chooses to appoint a person to fully bind the company on its behalf, such company may notify the Registrar in the CRO who will register the person as the company's "registered person". The company may notify the Registrar of the authorisation of a person as being entitled to bind the company, in the prescribed form. This provision is permissive rather than mandatory. The company can choose to, of their right, to grant unlimited authority on a person to act on behalf of the company without causing unnecessary mandatory burden on a business. Where a company revokes such an authorisation, the person will be considered as a registered person until the Registrar is notified in the prescribed form of this revocation. The purpose of such a provision is to reduce red tape for companies who wish to authorise a registered person to have full authority to exercise any power of the company. This will save 3<sup>rd</sup> parties having to search through the minutes of the company's board meetings to check if a person is authorised to bind the company. This authority is limited by any power of management of the company exercisable by its board of directors or where this Act requires a power to be exercised otherwise. This section is drawn from Regulation 6(3) of the European Communities (Companies) Regulations 1973 (S.I. 163 of 1973).

*Section 40* is a new section and provides that the board of directors and any registered person are deemed to have authority to exercise any power of the company and to authorise others to do so. *Subsection (1)* is similar to the old Model Regulation 80 of Part I of Table A of the First Schedule to the Companies Act 1963. *Subsections (2) to (9)* are new provisions which further elaborate on the authority to bind the company.

*Section 41* permits a company, to appoint a person as its attorney. This appointment can be made generally or in respect of specified matters, and enables the attorney to execute deeds or do any other matter on behalf of the company. *Subsection (2)* provides that a deed signed by an attorney on behalf of the company will bind the company as if it had been signed under the company's common seal. The appointment of an attorney can be made regardless of any provision in the company's constitution. This section derives from section 40 of the Companies Act 1963 and is in line with the Powers of Attorney Act 1996 and the Land and Conveyancing (Law Reform) Act 2009. The use of a seal is no longer necessary to empower a person to execute deeds or other matters on behalf of a company.

### **Chapter 4** Contracts and Other Transactions



*Section 42* is a consolidating section. It sets out how contracts on behalf of a company may be made, whom they bind and how they may be varied or discharged. The section derives from section 38 of the Companies Act 1963 and the only amendment of substance is that “private persons” are now stated as “natural persons”.

*Section 43* includes the requirement for a company to have a common seal, which was contained in section 18 of the Companies Act 1963 and the requirement that the name engraved on the seal be legible, as contained in section 114(1)(b) of the Companies Act 1963. *Subsections (2) and (3)* deal with the authority to use the seal. The section now provides that unless a company’s constitution provides otherwise, it will be implied that its seal may only be used by the authority of its directors (or a board committee) and that any instrument to which it is affixed must be signed by a director, or an authorised person, and countersigned by the secretary, a second director, or an authorised person.

*Section 44* allows a company, where it is authorised by its constitution, to have an official seal for use in any place outside the State. The official seal must resemble the common seal of the company and must indicate the places where it is to be used. Use of this official seal will have the same effect in binding the company in respect of deeds or documents as if the company’s common seal had been used. This provision derives from section 41 of the Companies Act 1963.

*Section 45* derives from section 37(1) and (2) of the Companies Act 1963. It concerns contracts purported to be entered into by a company prior to its formation. This section provides that any such contract may be ratified by the company after its formation as if it had been in existence at the date on which the contract was entered into. Section 37(3) CA 1963 has been deleted as it no longer applies (it had been a transitional provision and therefore is no longer relevant).

*Section 46* concerns bills of exchange and promissory notes which are made, accepted or endorsed on behalf of a company. It reproduces in substance section 39 of the Companies Act 1963, and is self-explanatory.

*Section 47* sets out a number of offences, at category 4 level, in respect of the use of the company seal or the issue of a range of documents where the company’s name is not properly displayed. *Subsection (3)* provides for circumstances where an officer of the company or another person who commits the offences may be personally liable to the other party. This section derives from section 114(4) of the Companies Act 1963, although a wider discretion has now been vested in the court as regards the imposition of personal liability under *subsection (3)*.

*Section 48* is a re-enactment of section 42 of the Companies Act 1963 and sets out the parties that may sign a document in order to authenticate it, but with the addition here of a “registered person”.

## **Chapter 5**

### Company Name, Registered Office and Service of Documents

*Section 49* deals with the display of a company’s name, both outside its places of business and outside its registered office, and on a range of business and official documents. *Subsection (2)* establishes that breach of these requirements by a company or an officer constitutes a category 4 offence, while *subsection (3)* clarifies that the use of the abbreviations “ltd” or “teo” instead of

“limited” or “teoranta” does not constitute a breach. This section derives from section 114(1) to (3) of the Companies Act 1963.

*Section 50* requires a company to have a registered office within the State, to which all communications may be addressed. Under *subsection (4)*, a company may have its registered office as care of a specified agent who has been approved by the Registrar for that purpose. Where a company is availing of an agent for the purposes of the company’s registered office, such an agent must be a company that is registered in Ireland. *Subsections (3) and (5)* require notification to be given to the Registrar within 14 days of any change in either the company’s registered office or the office of the specified agent, as the case may be. *Subsection (6)* makes a breach of these requirements by the company or an officer of the company a category 4 offence. This section derives from section 113 of the Companies Act 1963.

*Section 51* deals with the service of documents on a company at its registered office or, where this cannot be properly identified, by delivery to the Registrar. *Subsection (2)* confirms that the registered office for this purpose will be that as heretofore has been recorded by the Registrar. This section derives from section 379 of the Companies Act 1963.

*Section 52* enables a court to require a company to give security for the costs of legal proceedings where the company is a plaintiff, if it appears that the company will be unable to pay the costs if it loses the proceedings. This reproduces in substance section 390 of the Companies Act 1963.

*Section 53* is a new section, which is aimed at enhancing the enforcement of orders and judgments against companies and their officers. *Subsection (1)* is drawn from Order 42, rule 32 of the Rules of the Superior Courts 1986. This provision was considered to be such a fundamental exception to the principle of separate legal personality of a corporate entity that it needed to be stated in primary legislation and not merely in the Rules of the Superior Courts. *Subsection (2)* is new and provides that, should the judgment or order be disobeyed by the company, an application may not be made for attachment against the directors or other officers or for sequestration against their property unless the judgment or order to which the application relates contains a statement indicating the liability of those persons or of their property. *Subsection (3)* is a new provision and is necessary in light of the origins of *subsection (1)*.

## **Chapter 6**

Conversion of Existing Private Company to Private Company Limited by Shares to which *Parts 1 to 15* apply

*Section 54* is new and provides interpretation for the purposes of this Chapter.

*Section 55* is a new section and it contains the default provisions that will apply to the existing private company if it takes no action. Unless an existing company re-registers as a DAC or other company type, it will become a private company limited by shares (LTD) under the Act on the expiry of the transition period (i.e. the period expiring eighteen months after the commencement of *section 15* of the Act), and it will retain the provisions of its existing constitution, with the exception of its objects clause, and also with the exception of any provisions of its constitution which would be inconsistent with a mandatory provision of the Act.

It should be noted that a Designated Activity Company (DAC) provided for in *Part 16* of the Act is essentially the same as an existing private company, including in the respect that it must have a

memorandum of association which will contain an objects clause with consequential limitations on the capacity of the company.

*Section 56* is also new. In this section, a company may convert to a DAC by passing an ordinary resolution, not later than 3 months before the expiry of the transition period, resolving that the company be so registered and the provisions of *Part 16* will apply to it accordingly. Therefore, an existing private company effectively has a period of 15 months from the commencement of the Act to pass such a resolution to become a DAC. This section also requires an existing private company to re-register as a DAC if a member or members who hold more than 25% of the voting rights in the company serve a notice in writing requesting the company to do so. The rationale for this provision is that such a majority could, under the existing law, block any change to the objects of the company (as a special resolution, requiring 75% approval, is required to make such a change), and accordingly there is a justification that this majority should be able to require the company to retain its objects clause, by becoming a DAC (the alternative would be that the company would lose its objects clause were it to become a LTD).

*Section 57* is new and creates a right for members (holding 15% of the company's issued share capital) or creditors (holding 15% of the company's debentures) to apply to the court for an order requiring the company to re-register as a DAC.

*Section 58* provides that until the end of the transition period, the law applicable to a DAC shall apply to an existing company unless and until it re-registers as another company type. This law approximates most closely to the law which was applicable to private limited companies prior to the introduction of the Act. It will mean however, that the advantages that will accrue to the model private limited company under *Parts 1 to 15* will be denied to companies that do not elect to opt into the new regime. Existing companies which have adopted in whole or in part the regulations contained in Table A will continue during this transition period to be governed by those regulations notwithstanding the repeal of the Companies Act 1963. The section also applies to semi-state companies and other companies formed pursuant to a statute.

*Section 59* makes provision for the adoption of a new constitution by the members of the company. An existing private company may, on the passing of a special resolution, adopt a new constitution complying with *section 19* of the Act. Such a constitution should be sent to the Registrar and upon registration of it, the company shall become a private company limited by shares governed by *Parts 1 to 15* of the Act. Upon registration of the new constitution, the Registrar will issue a new certificate of incorporation to the company. The names of all private companies limited by shares, to which *Parts 1 to 15* of the Act apply, will end with 'limited' or 'teoranta' notwithstanding any exemptions outlined in *section 61(3)*, pursuant to the prior Companies Acts.

*Section 60* gives the directors of the company the capacity and the obligation to prepare and adopt a new constitution where one has not already been adopted by the members or where the company has not re-registered as a different company type. The directors of an existing private company are required to prepare a constitution for the company, deliver a copy to each member and deliver a copy of it to the CRO. This must be done before the expiry of the transition period. The directors are permitted to insert the provisions of a company's articles of association in to the new constitution but in so doing, the directors must disregard any exemptions under *section 61(3)*, of the Act in relation to the company's name.

*Section 61* applies, in general, in cases where an existing private company fails to deliver a constitution to the Registrar during the transition period or where it has not re-registered as a DAC or another company type in accordance with *section 57*. Such a company will be deemed to have a constitution comprising of the provisions of its existing memorandum and articles of association, with the exception of any objects clause and/or any provisions that provide for or prohibit the alteration of all or any of the provisions of that company's memorandum or articles. Such a constitution will be deemed to comply with the provisions of *section 19* of the Act as to the form of the company's constitution and the company will be deemed to have become a new private company limited by shares (LTD) to which *Parts 1 to 15* apply and the CRO will issue it with a new certificate of incorporation, attesting to its status as such. Any exemption from including the words "limited" or "teoranta" in a company's name shall continue, in respect of a new model company limited by shares, only until the expiry of the transition period and shall then cease.

*Section 62* is a new section and provides that any member of a company who considers that his or her rights or obligations have been prejudiced by the exercise, non-exercise, or exercise in a particular manner of any power under *Chapter 6* by the company or its directors, may apply to the court under *section 212* for relief. *Subsection (5)* extends a similar right in certain circumstances to creditors who hold not less than 15 per cent of certain debentures of the company.

*Section 63* of the Act sets out the procedural steps to be followed by an existing private company which re-registers as a DAC under *section 56* or *section 57*. Where an ordinary resolution is passed by the members to re-register as a DAC or where the directors resolve to re-register as a DAC (whether because a notice is served by qualifying members, because the company must re-register as a DAC or because such is ordered by the court) the effect is to alter the company's memorandum of association so that it states that the company is to be a DAC: *section 63(2)* of the Act. The company must file the resolution, the new memorandum and articles of association, a declaration of compliance and the prescribed form with the CRO. The section recognises that it is possible that the private company limited by shares model may not be an appropriate fit for existing semi-state companies. Thus, the schemes governing such companies are premised on such a company being a two document company, that is, the company's incorporation is governed by a memorandum and articles of association. Furthermore, a semi-state company, under its new guise as a DAC will be subject to the same terms of its governing legislation as it was before it re-registered.

## **Part 3 – Share Capital, Shares and Certain Other Instruments**

### *Preliminary Note*

*Part 3* contains provisions relating to share capital. Several sections in *Part 3* incorporate provisions that were previously contained in Table A of the First Schedule to the Companies Act 1963. In general, those provisions are now incorporated into the text of the Act and apply unless the company's constitution provides otherwise. Those provisions therefore represent the default position in relation to the matters mentioned therein, but that position may be departed from in the constitution of the company.

*Chapter 1* is concerned with interpretation provisions and incorporates existing defined terms concerning share capital along with some newly defined terms which are required in view of amendments to the law made by the Act. *Section 64* contains the general definitions used in this Part. *Section 66(9)* makes it clear that a company shall not be permitted to issue bearer shares. There is a limited power for Public Limited Companies to issue certain "permissible letters of allotment" that might otherwise be treated as bearer instruments (*section 1019*).

*Chapter 2* contains the general prohibition on the private company limited by shares (LTD) making any offer of securities to the public or listing any shares, debentures or other securities on any stock exchange. Subject to certain exceptions, a LTD cannot make any invitation to subscribe or offer any shares, debentures or other securities of the company, etc, and shall neither apply to have, or have, its securities (or interests in them) admitted to trading or to be listed on any market, whether in Ireland or elsewhere (*section 68(1) and (2)*). Existing private companies which have debt listings will, therefore, either have to delist or convert to a DAC or other company type.

*Chapter 3* contains provisions relating to the allotment of shares. *Sections 69 and 70* set out the fundamental rules regarding the allotment of shares. They bring together various previous provisions on allotment of shares, including from the Model Regulations. *Section 69* contains a new provision providing that if a LTD registers an authorised share capital then no shares may be allotted by it unless the shares concerned are comprised in its authorised but unissued share capital.

Under the 1983 Companies (Amendment) Act (sections 20 and 23), a company cannot issue shares without having authority from its members and generally it must offer them first to the existing equity shareholders (this latter provision, contained in section 23, is referred to as 'pre-emption' right and it is often disapplied). These provisions are regarded as complex and the opportunity has been taken to simplify them in this section. Pre-emption provisions in relation to new allotments of shares will operate in relation to a LTD on a default basis. The shareholder authority to issue shares can last for a maximum of 5 years and the authority must set out the maximum number of shares that can be issued. These requirements, which are often impractical, will now be removed. Prior to the introduction of the Act the right to receive a first offer did not apply to shares which carried a fixed dividend, but these shares are now included. The stipulated period of 21 days for a pre-emptive offer has been reduced to 14 days.

*Section 71* deals with the payment of shares, providing that the amount paid in excess of the nominal value of a share (i.e. share premium) is credited to the undenominated capital.

*Sections 72 to 74* are new and enable the distribution to members of amounts that would otherwise stand to the credit of share premium account created by reason of an acquisition. Such distribution is enabled in cases of mergers and group reconstructions. These provisions reflect similar provisions in the UK Companies Act 2006.

*Sections 77 to 81*, concerning calls on shares, lien and forfeiture, are drawn from Model Regulations 11 to 21 and 33 to 39 of Part I of Table A of the First Schedule to the Companies Act 1963. These provisions apply subject to a LTD's right to opt out or vary the provisions in its constitution.

*Section 82* sets out the prohibition on the provision of financial assistance by a company in connection with the acquisition of its own shares, and outlines specific exemptions from that prohibition. The exemption to the prohibition which existed in earlier legislation has been re-formulated in *subsection (6)(a)*, which provides that financial assistance given in accordance with the new Summary Approval Procedure is permitted.

*Chapter 4* contains provisions enabling the variation of capital of a LTD, whether by increase or reduction. *Section 83* gathers together the pre-existing provisions regarding the increase, consolidation, division, cancellation and conversion (to redeemable) of shares. To this is added the ability to increase or reduce the nominal value of shares using or crediting, as the case may be, undenominated capital. A LTD will be able to convert any of its shares to redeemable shares, save where its constitution provides otherwise. *Section 84* permits a LTD to reduce its share capital, again save to the extent that its constitution provides otherwise. This may be effected by special resolution approved by the court, as is the case at present, or by the new Summary Approval Procedure.

*Chapter 5* deals with the transfer of shares and debentures, gathering together provisions found throughout the Companies Acts and Table A of the First Schedule to the Companies Act 1963. *Section 95* provides that, save where the constitution otherwise provides, the directors may decline to register a transfer of shares. *Sections 98* and *99* deal with certification of shares and the issue of share certificates. *Section 100* deals with rectification of dealings in shares and derives from section 89 CA 1963. *Section 101* substantially re-enacts the existing provision which was contained in section 90 CA 1963 in relation to personation of shareholders.

*Chapter 6* deals with the acquisition by a company of its own shares. *Sections 102* and *103* gather together the various provisions describing how its own shares may be acquired by a LTD – by gift, forfeiture, cancellation, court order, redemption or purchase, with special provisions where the LTD is a subsidiary of a public company. This Chapter sets out the formalities of share purchase by a LTD, which effectively re-enacts the pre-existing law more clearly.

*Chapter 7* deals with distributions, re-enacting those provisions of Part IV of the Companies (Amendment) Act 1983 which affect the existing private company limited by shares, along with provisions of Table A of the First Schedule to the Companies Act 1963 concerning dividends and reserves.

### *Explanatory Memorandum*

## **Chapter 1** Preliminary and Interpretation

*Section 65* contains definitions of a number of terms used in *Part 3*. This section takes account of the recommendations of the First Report of the Company Law Review Group which provided that greater use should be made of the defined terms in order to make the legislation more succinct.

The definition of “capital conversion reserve fund” is new and arises as a result of the re-nominalisation of share capital under section 26 of the Economic and Monetary Union Act 1998.

The definition of “cash” is taken from section 2(3) of the Companies (Amendment) Act 1983 and “cash” is defined as including any currency.

The definition of “company capital” is new. This concept is comprised of the share capital of the company, the share premium account, the capital conversions reserve fund and the capital redemption reserve fund of the company.

The definition of “employees’ share scheme” reproduces the definition under section 2 C(A)A 1983. The term as defined here appears in *section 69(11)(e)* of the Act and such schemes are seen as necessary to promote and encourage shareholding by employees in the LTD’s concerned.

The definition of “nominal value” is new. This term was used in previous Companies Acts although it was never defined as a term. The nominal value of shares is used in *section 66(1)* of the Act.

The definitions of “parent public company” and “private limited subsidiary” are both new. They were introduced in accordance with the requirement to clearly distinguish between private companies and all other companies - this equally applies to groups of companies in this Part. These definitions recognise that some private companies limited by shares (dealt with in *Parts 2 to 14* of the Act) can be subsidiaries of PLCs.

The definition of “redeemable shares” reproduces the definition in section 206 of the Companies Act 1990.

The definition of “securities” is new. *Paragraph (b)* is a slightly amended version of the definition of debentures in section 2 of the Companies Act 1963. *Paragraph (c)* is drawn from the definition of “securities” contained in the Markets in Financial Instruments Directive (2004/39/EC) which was transposed into Irish law by the Markets in Financial Instruments and Miscellaneous Provisions Act 2007 and the European Communities (Markets in Financial Instruments) Regulations 2007 (S.I. 60/2007).

The definition of “share capital” is new and replaces what was previously the issued share capital. The definition of “undenominated capital” is also new.

*Subsection (3)* comes from section 2(3)(a) C(A)A 1983 and it deals with the clarification and interpretation of the expression “paid up in cash” in relation to the purchase of shares. Shares will be taken to have been paid up in cash when the allottee pays in cash or in cheque, or extinguishes a liability of the LTD for a liquidated sum, (i.e. undertakes payment of a debt or other liability involving a fixed amount) or undertakes to pay cash to the LTD at a future date.

*Subsection (4)* deals with non-cash consideration in relation to the purchase of shares. It re-enacts section 2(3)(b) C(A)A 1983.

*Section 65* deals with powers to convert shares into stock and is taken from Model Regulations 40 to 43 of Part I of Table A of the First Schedule to the Companies Act 1963. The provisions of this section apply to the LTD in so far as they have not been excluded or modified by the LTD’s constitution.

*Section 66* is new. It is drawn from a number of different provisions of the previous Companies Acts relating to shares. Under *subsection (1)*, a share must have a nominal value. *Subsection (2)* is new and provides for the allotment of shares. *Paragraph (b)* goes beyond the previous legislation in that it expressly provides that shares of different currencies may be allotted. *Paragraph (c)* is similar to Model Regulation 20 of Part I of Table A of the First Schedule to the Companies Act 1963 and provides that a LTD may allot shares with different amounts payable on them. *Subsection (3)* provides that a LTD may allot shares with preferred, deferred or other special rights or restrictions. This subsection re-enacts Regulation 2 of Part I of Table A.

*Subsection (4)* provides that a LTD may allot redeemable shares unless its constitution provides otherwise. The requirement for a company to maintain 10 per cent of its issued share capital as non-

redeemable has been removed. This subsection derives from section 207(1) of the Companies Act 1990.

*Subsection (5)* deals with the nature of shares and is taken from section 79 CA 1963. The reference to shares being transferable in a manner provided by the articles of the company has been deleted as these provisions are now contained in the text of the Act.

*Subsection (6)* provides that, unless required by law, a company will not recognise shares held on trust nor shall it recognise any share or any fractional part of a share held pursuant to an equitable, contingent or partial interest. In addition, a company shall not recognise any other rights in respect of shares except the absolute right of the registered holder to the entirety of the share. *Subsection (7)* states that *subsection (6)* shall not preclude a LTD from requiring information as to the beneficial ownership of any share from a member of the company or a transferee of shares. A company may not expressly seek to restrict its right to request details of the beneficial ownership of its shares.

These subsections derive in part from Regulation 7 of Part I of Table A and section 123 CA 1963.

Provision is made in *subsections (8), (9) and (10)* for the abolishment of bearer shares in line with the Company Law Review Group recommendation from its 2011 report. The Review group recommended that the general provision for bearer shares should be abolished by way of an express prohibition, and that transitional arrangements should be provided to take account of companies that may have legitimately issued bearer shares in the past. This prohibition should not affect the position governing renounceable letters of allotment of fully or partly paid up bonus shares or beneficial interests in shares and arrangements should be put in place to take account of the specific regulatory regime for collective investment funds.

*Section 67* regarding the numbering of shares is based on section 80 CA 1963.

## **Chapter 2**

### Offers of Securities to the Public

*Section 68* is based on section 33 of the Companies Act 1963 and concerns the limitation on offers of securities to the public. There is a general prohibition on a LTD issuing shares or debts to the public where a prospectus would be needed. This section allows private companies to access capital by making offers to the public in limited circumstances. As a result of the changes brought about by the Prospectus (Directive 2003/71/EC) (Amendment) Regulations 2012 (S.I. No. 239 of 2012) an offer to 149 persons or less (rather than 99 persons under the law prior to CA 2014) does not constitute a “public” offer and therefore does not require the issuing of a prospectus. Accordingly, a LTD may make offers provided they are to 149 persons or less, and it may also make an offer to qualified investors. However, in no case may a LTD have securities admitted to trading or listed nor apply to have securities admitted to trading or listed, either in the State or elsewhere.

*Subsection (3)* provides that the limitations in *subsection (1)* on offers of securities shall not apply to certain offers or allotments of debentures by a company.

This approach is seen as adopting, within the context of prospectus law, a balanced approach of retaining an inherent limitation on the issue of shares to the public by a private company, while at the same time enabling a LTD to access capital by way of share participation or raising debt, in limited circumstances.

## **Chapter 3**



## Allotment of Shares

*Section 69* on the allotment of shares is drawn from sections 20 and 23 to 25 of the Companies (Amendment) Act 1983 and Model Regulation 5 of Part I of Table A of the First Schedule to the Companies Act 1963. It also contains some new provisions.

*Subsection (1)* provides that a LTD may allot shares only where it is authorised to do so by the constitution of the LTD or a resolution of the members. The authorisation may relate to a specific allotment or it may confer a general power to allot.

*Subsection (2)* is new. It provides that if a LTD's constitution states an authorised share capital, the LTD may not allot shares unless the shares are included in the authorised but unissued share capital.

*Subsection (3)* provides that an authorisation to allot shares in *subsection (1)* may specify a time limit within which the allotment of shares must be made and any allotment outside of that limit is therefore not authorised. This subsection derives from section 20(3) of the Companies (Amendment) Act 1983; however, the 5-year maximum period of authorisation which existed under the C(A)A 1983 has been removed for the LTD here.

*Subsection (4)* provides that, unless the LTD's constitution states otherwise, only the directors may exercise the LTD's authority to make an allotment and they must do so in the best interests of the LTD. Although new, this subsection is drawn in part from section 20 C(A)A 1983 and Regulation 5 of Part I of Table A.

*Subsection (5)* reflects the law as it stood in section 20(7) C(A)A. A category 3 offence is laid down against any director who knowingly permits or authorises allotment of shares contrary to the provisions of the section.

*Subsections (6) to (12)* deal with the subject of pre-emption rights (i.e. the right of first refusal where new shares are issued), and require a LTD that is proposing to allot shares to first offer them to existing shareholders. Only holders of shares of the same class as that of the shares proposed to be allotted have pre-emption rights. This maintains the status quo in as it stood in law prior to the introduction of the Act.

*Subsection (12)* lists the situations where pre-emption does not apply, including where shares are issued other than for cash and employees' share scheme shares. The allotment of bonus shares does not trigger the statutory pre-emptive provision. It was the intention to maintain the status quo with the law as it stood prior to the introduction of the Act. Under the C(A)A 1983 (sections 20 and 23), a company could not issue shares without having authority from its members and generally was required to offer them first to the existing equity shareholders (this latter provision, contained in section 23, is referred to as a 'pre-emption' right and it is often disapplied). Pre-emption provisions in relation to new allotments of shares will operate in relation to a LTD on a default basis.

The period of 21 days for a pre-emptive offer has been reduced to 14 days. This reflects the period in Article 29.3 of the Second Directive on Company Law (77/91/EEC) - this provision, although only required in the case of a PLC, has been extended to the LTD here.

*Section 70* contains supplemental and additional provisions as regards allotments and is drawn from various provisions of the Companies Act 1963 and the Companies (Amendment) Act 1983.

Under *subsection (1)*, where a LTD has made a pre-emptive offer under *section 69* to a holder of shares in the LTD, those shares may be allotted to that holder or alternatively to anyone in whose

favour the holder has renounced his/her entitlement to allotment. This comes from section 23(5) C(A)A 1983.

*Subsection (2)* stipulates that, where an authorisation to allot shares described in *section 69(1)* has expired, the directors may still allot shares where such an allotment is in furtherance of an offer or agreement previously made by the LTD. This will only be allowed in circumstances where the authorisation that has expired enabled the company to make an offer or agreement which would or might require shares to be allotted in such a way (i.e. after the expiry of the authorisation). This subsection re-enacts section 24(4) C(A)A 1983.

*Subsections (3) and (4)* clarify the scope of *sections 69 and 70* by describing the terms “allot”, “shares” and “holder of shares”. These provisions are drawn from section 23 C(A)A 1983.

*Subsection (6)* provides that shares are taken to be allotted when the allottee has the unconditional right to be listed in the company’s register of members. It is a re-enactment of section 2(2) C(A)A 1983.

*Subsection (7)* requires that allotments of shares be notified to the Registrar of Companies (known throughout the Act as “the Registrar”). The purpose of the section is to ensure that the information available for public inspection at the office of the Registrar in connection with the allotment of the LTD’s shares will be at all times up to date. This provision is taken, in substance, from section 58 of the Companies Act 1963.

*Subsection (8)* provides that if a company fails to comply with *subsection (7)* the company and any officer of it who is in default shall be guilty of a category 4 offence.

*Subsection (9)* provides that nothing in *section 69* or this *section 70* shall affect the validity of an allotment of shares. It is a re-enactment of section 20(8) of the Companies (Amendment) Act 1983 and it operates to protect the interests of LTD’s and allottees in so far as shares allotted in contravention of the rules of this section may subsequently be transferred or disposed of.

*Subsection (10)* provides for the joint and several liability of the LTD and any of its officers in default for the compensation of anyone to whom a pre-emptive offer should have been made in accordance with *section 69(5)* for any loss or expense arising from the failure to receive an offer.

*Subsection (11)* states that proceedings to recover any loss, damage, costs or expenses for a contravention of *section 69(5)* must be brought within 2 years from the registration of the allotments in question with the CRO.

*Subsections (10) and (11)* are a slightly amended version of section 23(11) C(A)A 1983.

*Subsections (12) and (13)* are new and address the legacy with regard to existing authorities to allot shares. If, before the commencement of *section 69*, the directors of a company have been granted authority, pursuant to section 20 of the C(A)A 1983, to allot relevant securities and that authority is in force immediately before that commencement – neither *section 69* nor this *section 70* shall apply to the allotment, after that commencement, of relevant securities by the directors pursuant to that authority and sections 20, 23 and 24, of the C(A)A 1983 shall apply to that authority and any allotment of relevant securities on foot thereof, but, on the expiry of that authority, *section 69* and this section shall apply to any allotment thereafter of shares in the company.

*Section 71* deals with payment of shares and is taken, in substance, from various provisions of the Companies Act 1963 and the Companies (Amendment) Act 1983.

*Subsection (1)* provides that shares allotted by a LTD may be paid up in money or money's worth - this term includes goodwill and expertise. The rule originates in section 26(1) C(A)A 1983 and in Article 7 of the Second Directive on Company Law (77/91/EEC). While the Directive only requires that the rule apply to PLCs, this subsection, like section 26(1) C(A)A 1983, extends it to the LTD.

*Subsections (2) and (3)* prohibit the allotment of shares at a discount to their nominal value and states that if any shares are so allotted, the allottee will be liable to pay the LTD an amount equal to the discount and to pay interest thereon at the appropriate rate. These subsections are drawn from section 27(1) and (2) C(A)A 1983. The words "...at a discount" in the original provision have been here replaced by "...at a discount to their nominal value". The rule originates in Article 8 of the Second Directive on Company Law and is extended here to the LTD.

*Subsection (4)* preserves the right of a LTD to allot bonus shares (i.e. an issue of shares to existing shareholders made possible by the capitalisation of reserves) notwithstanding *subsection (1) and (2)*. It derives from section 26(5) C(A)A 1983 and the application of the subsection has been extended insofar as it now also overrides the application of *subsection (2)*.

*Subsection (5)* provides that when a LTD issues shares at a premium, the premium received forms part of the undenominated share capital. The premium received shall be transferred to the "share premium account". This provision is based on section 62(1) of the Companies Act 1963.

*Subsection (6)* effectively re-enacts section 27(3) of the Companies (Amendment) Act 1983. It provides for the joint and several liability of subsequent holders of shares allotted in contravention of this section. A person who buys the shares knowing that they had been allotted in contravention of this section, or derives title to them from someone who is liable to pay under this section any amount to the LTD, will himself or herself be jointly and severally liable with any other person so liable to pay that amount to the LTD. In contrast, a person who buys the shares unaware that they were allotted in contravention of this section, or who derives title to them from someone who became a holder of them after the contravention and was not liable for any payment under this section to the LTD, will not incur any liability under this section.

Under *subsection (7)*, where a LTD contravenes any provision of this section, the LTD and any of its officers in default shall be guilty of a category 3 offence.

*Sections 72 to 74* enable the distribution to members of amounts, created by reason of an acquisition that would otherwise form part of the undenominated capital of the LTD under *section 71(5)*. These provisions are similar to sections 611 to 614 of the UK Companies Act 2006 and implement the recommendation of the Company Law Review Group to extend the application of the flexibilities afforded to companies in the UK to companies in Ireland.

*Section 72* is new and restricts the application of *section 71(5)* in the case of mergers. It applies in merger situations where shares in one LTD are issued in consideration for shares in another LTD and where the issuing company acquires at least a 90 per cent interest in the other company. It stipulates that if the shares in the issuing LTD are issued at a premium, *section 71(5)* does not apply and therefore the premium does not form part of the undenominated capital of the LTD and may be distributed. This section implements the recommendation of the Company Law Review Group and effects a change in the law in order to allow the distribution of what are known as "pre-acquisition profits" in the case of mergers.

*Section 73* is also new and it restricts the application of *section 71(5)* in the case of group reconstructions. It has the same effect as the previous *section 72* but here applies in the case of group reconstructions rather than mergers.

*Section 74* is new and supplements *sections 72 and 73*. It clarifies the position with regard to the amount representing premiums (or part of premiums) on issued shares. Where such an amount is not included in the issuing company's undenominated capital (by virtue of the preceding *sections 72 and 73*), it may be disregarded when calculating the amount at which any shares or consideration provided for those shares issued is to be included in the company's balance sheet. References in *sections 72 and 73* to acquisitions, issues, allotments and transfers of shares shall be read as including acquisitions by, and issues, allotments and transfers to or by nominees of the relevant company or body corporate. Furthermore, it is stated that references in *sections 72 and 73* to the transfer of shares in a body corporate encompass the transfer of a right to be included in the register of members of that body corporate.

*Section 75* is new and provides for a restriction of *section 71(5)* in the case of shares allotted in return for acquisition of issued shares of a body corporate.

*Section 76* deals with the treatment of premiums paid on shares issued before a certain date.

*Section 77* deals with calls on shares and reproduces in the Act, in a slightly amended manner, Model Regulations 15 to 18 of Part I of Table A of the First Schedule to the Companies Act 1963. *Subsection (1)* stipulates that the provisions of this section and *section 78* set out the default position in relation to calls on shares. However a LTD may provide differently in its constitution.

Under *subsections (2) to (5)*, directors are given the power to make calls subject to the provision that such calls shall not be made on shares where the conditions of allotment provide for the payment of moneys in respect of those shares at fixed times. Subject to receiving at least 30 days' notice, each member shall pay to the LTD, at the time or times and place so specified, the amount called on the shares. The requirement under Regulation 15 of Part I of Table A that no call shall exceed one-fourth of the nominal value of the share or be payable at less than one month from the date fixed for payment of the last preceding call has been removed and the notice period has been extended from 14 days to 30 days. A call may be revoked or postponed should the directors so determine.

*Subsection (6)* provides that a call shall be considered to have been made on the date of the resolution that authorised the call and also stipulates that calls may be required to be paid in instalments.

*Subsection (7)* provides for the joint and several liability of joint shareholders to pay calls.

*Subsection (8)* states that if a call is not paid before or on the date appointed by the directors, it will carry interest not exceeding the appropriate rate, as the directors may determine. The directors may waive the payment of such interest in whole or in part.

*Section 78* makes supplemental provisions in relation to calls and replicates in the Act, in a slightly amended manner, Model Regulations 19 to 21 of Part I of Table A of the First Schedule to the Companies Act 1963. *Section 77(1)* stipulates that the provisions of this *section 78* apply in so far as they have not been excluded or modified by the company's constitution.

*Subsections (1) and (2)* provide that where shares are to be paid up on allotment or at any fixed date, they are to be treated as a call made and are deemed payable on the date specified in the terms of issue. It is stated that all the provisions regulating payments of interest and expense, forfeiture or other matters shall apply to the shares mentioned in *subsection (1)* as if the sum had become payable by virtue of a call.

*Subsection (3)* allows directors to differentiate between holders of different classes of shares as to the amount of calls to be paid and the time of payment. Under *subsection (4)*, directors may receive payments in advance of calls and they may pay interest at a rate (not exceeding the appropriate rate) agreed upon by the directors and the member paying up in advance.

*Section 79* makes further provisions regarding the different times and amounts of calls and supplements the previous *sections 77* and *78*. This section permits a LTD to take certain actions provided that the LTD's constitution does not prohibit them. It is drawn from sections 65 and 66 of the Companies Act 1963.

Under *paragraph (a)*, a company can issue shares for different amounts to different shareholders and it can allow for different times for the payment of calls on shares between the shareholders. This relates to *section 78(3)* of the Act which gives this power to directors of the company. *Paragraph (b)* permits the company to accept from a member all or part of the amount that remains unpaid on shares held by that member although such amount has not been called up. This follows on from *section 78(4)* of the Act which states that the directors of the company may accept moneys in such a way. *Paragraph (c)* provides that where a larger amount is paid up on some shares than on others, a LTD is entitled to pay a dividend in proportion to the amount paid up on each share. This is the corollary to *subsections (4) to (6)* of *section 124* of the Act in relation to the payment of dividends.

*Paragraph (d)* provides that where a LTD so determines by special resolution, any portion of a LTD's share capital which has not been called up shall not be capable of being called up except in the event and for the purposes of the LTD being wound up.

*Section 80* entitled "Lien" reproduces in the Act Model Regulations 11 to 14 of Part I of Table A of the First Schedule to the Companies Act 1963. *Subsection (1)* states that the provisions of this section apply in so far as they have not been excluded or modified by the LTD's constitution.

*Subsection (2)* provides that a LTD shall have a lien on every share which has not been fully paid up, as of the day on which the share is called up or payable. However, *subsection (3)* allows the directors to declare any shares exempt from such lien. Under *subsection (4)*, the LTD's lien on a share shall extend to all dividends payable on that share.

*Subsections (5) and (6)* together provide that a LTD may sell any shares on which it has a lien provided that the sum is immediately payable; the LTD gives fourteen days' notice to the shareholder; and the amount payable is not paid by him within that period.

*Subsection (7)* contains provisions governing a sale under *subsection (5)*. Directors may appoint some other person to execute the transfer to the purchaser on the shareholders behalf, thus dealing with situations where a shareholder may be unwilling to execute the transfer. Once the shares are transferred, the purchaser is to be registered as the holder of them and such purchaser will not be obliged to ensure the purchase money is applied in payment of the amount of the lien. Any irregularity will not affect the purchaser's title to the shares. Under this subsection, the proceeds of sale shall go to the LTD and must be applied in payment of the amount of the lien that is immediately payable. If there is any amount left over it must be paid to the person entitled to the shares at the date of the sale provided there is no further lien for sums, not immediately payable but which existed on the shares before the sale.

*Section 81* provides for the forfeiture of shares in the event of a member failing to pay any call or instalment of a call by the day appointed for payment. It replicates Model Regulations 33 to 38 of Part I of Table A of the First Schedule to the Companies Act 1963. The provisions of this section apply in so far as they have not been excluded or modified by the LTD's constitution.

*Subsection (2)* provides for the service of notice by the directors requiring payment from a member, where a member fails to pay any call or instalment of a call by the day appointed for payment. *Subsection (3)* sets out what must be included in the notice.

*Subsection (4)* provides that if the member does not make payment as required by the notice, his or her shares may be forfeited by a resolution of the directors of the LTD.

Under *subsection (5)*, a forfeited share may be sold or otherwise disposed of by the LTD. The directors may cancel the forfeiture, if they see fit, before such sale or disposition.

*Subsection (6)* provides that a person who had their shares forfeited ceases to be a member of the LTD in respect of those forfeited shares; however, such a person shall continue to be liable for all moneys outstanding on the day of forfeiture until the monies have been paid to the LTD in full.

*Subsection (7)* provides that a statement in writing by a director or secretary of the LTD that a share has been forfeited is to be conclusive evidence that the share has been forfeited.

*Subsection (8)* states that a person taking a forfeited share under sale or other disposition, whether for consideration or not, shall be registered as the holder of the share and he or she shall not be bound to see the application of the purchase money, if any, nor shall his or her share be affected by any irregularity in the forfeiture of the share or in the sale or disposition of the share to him or her.

*Section 82* deals with financial assistance for acquisition of shares and is drawn from section 60 of the Companies Act 1963. This section sets out the prohibition on the provision of financial assistance for the acquisition of a LTD's own shares. It also outlines specific exemptions from that prohibition.

*Subsection (1)* defines the term "acquisition" and reproduces the meaning as contained in section 60(1) CA 1963. It is a wide definition encompassing all means of acquiring shares.

*Subsection (2)* sets out the general prohibition on the provision of financial assistance. LTD's are prohibited from providing financial assistance to another person in order that the person may acquire shares in the LTD or its subsidiary. However, *subsection (3)* provides that this prohibition is subject to *subsections (5) and (6)*, which set out certain circumstances in which the prohibition does not apply.

*Subsection (4)* clarifies that financial assistance is prohibited whether it is direct or indirect and regardless of the way in which assistance is provided.

*Subsection (5)* provides for two general circumstances where the giving of financial assistance is not prohibited, firstly where the LTD's purpose in giving the assistance is not for the purpose of an acquisition as defined in this section or secondly, where the giving of such assistance is merely incidental to some larger purpose of the LTD. Such assistance must be given in good faith and in the interests of the LTD.

*Subsection (6)* sets out the specific exemptions to the prohibition in *subsection (2)* and reproduces section 60(12) CA 1963, as substituted by section 56(1) of the Investment Funds Companies Miscellaneous Provisions Act 2005. It also introduces a new exemption in *paragraph (a)*, which provides that financial assistance given in accordance with the new Summary Approval Procedure is permitted. The Summary Approval Procedure, contained in *Part 4* of the Act, is being introduced in

accordance with the recommendations contained in the First Report of the Company Law Review Group. It replaces the procedures contained in sections 60(2) to 60(11) and section 256 CA 1963 and section 31 of the Companies Act 1990.

*Paragraph (b) of subsection (6)* provides that a LTD is not prevented from paying a dividend or making a distribution out of profits available for distribution. Under *paragraph (c)*, a LTD may discharge a liability that was lawfully incurred.

*Paragraph (d)* permits the purchase under *section 105* or the redemption under *section 105 or 108*, of own shares or the giving of financial assistance, by means of a loan or guarantee, the provision of security or otherwise, for the purpose of such purchase or redemption.

*Paragraph (e)* permits the lending of money by the LTD in the ordinary course of business where the LTD's business, or part of it, is to loan money.

*Paragraphs (f) and (g)* provide that financial assistance may be given to employees of a LTD in order to acquire shares in it. Such assistance may be provided by means a scheme for the purchase of shares or by means of a loan.

*Paragraph (h)* provides that a LTD is not prevented from granting a loan to refinance a loan which has already been given by the LTD in accordance with the Summary Approval Procedure. This paragraph clarifies that there is an exemption in relation to transactions that previously gave rise to financial assistance which were approved by the company.

Under *paragraph (i)*, a LTD is not prevented from making or giving representations, warranties or indemnities to a person in connection with a purchase or subscription or a proposed purchase or subscription of shares by that person.

*Paragraph (j)* expressly permits a LTD to pay the expenses of the advisers to a subscriber for shares or of the advisers to the LTD, when the costs relate to that subscription.

*Paragraph (k)* provides that expenses incurred in connection with the admission to trading of securities of a LTD's holding company (for example the preparing of disclosure documents such as prospectuses) are not prohibited by *subsection (2)*.

*Paragraph (l)* provides that expenses incurred by a LTD to ensure compliance by the company or its holding company with the Irish Takeover Panel Act 1997 and other legislation implementing the Takeover Bids Directive (2004/25/EC), are not prohibited.

*Paragraph (m)* permits a private limited subsidiary of an offeree to pay the expenses incurred by an offeror within the terms of the Takeover Panel Act and as permitted by the Irish Takeover Panel.

*Paragraph (n)* provides that a private limited subsidiary of a public company may pay limited commissions to intermediaries and may pay professional fees, where those commissions and fees are incurred in connection with an allotment of shares by that parent public company.

*Paragraph (o)* permits the provision of financial assistance to employees in certain circumstances, to the extent that it is not permitted by *paragraphs (f) and (g)*.

*Subsections (7) and (8)* are new but they derive from the EC (PLC Subsidiaries) Regulations 1997 (S.I. No. 67/1997), in relation to financial assistance. *Subsection (7)* provides that a private limited subsidiary is not permitted to give financial assistance in accordance with the Summary Approval Procedure in order to acquire shares in its parent public company. However, under *subsection (8)*, the Minister is permitted to specify circumstances whereby a private limited subsidiary may use the

Summary Approval Procedure and provide financial assistance to acquire shares in its parent public company.

*Subsection (9)* provides that a transaction in breach of this section is voidable at the instance of the LTD against any person (whether a party to the transaction or not) who had notice of the facts that gave rise to the breach. This re-enacts section 60(14) of the Companies Act 1963.

*Subsection (11)* substantially re-enacts section 60(15) CA 1963 and provides that if a LTD gives financial assistance in breach of this section, the LTD and any officer of it who is in default shall be guilty of a category 2 offence.

#### **Chapter 4** Variation in Capital

*Section 83* on variation of company capital is drawn from sections 68 and 69 of the Companies Act 1963 and section 210 of the Companies Act 1990. It sets out the provisions relating to the consolidation, division, increase, reduction, conversion and cancellation of shares.

*Subsection (1)* sets out a procedure by which a LTD may vary its share capital by ordinary resolution. Account has been taken of the abolition of “authorised-nominal capital”. *Paragraphs (c), (d) and (e)* contain provisions in relation to the undenominated capital of the LTD. The position is clarified with regard to a resulting credit when there is reduction in the nominal value of a share. The resulting credit from a reduction in the nominal value of the share may not go into a share premium account. This provision is in line with the law as it stood prior to the introduction of the Act. This satisfies the requirements of the Fourth Company Law Directive.

*Paragraph (f)* reproduces paragraphs (a) and (e) of section 68(1) CA 1963 and, in light of the abolition of “authorised-nominal capital”, restricts their application to those LTD’s whose constitutions state an authorised share capital.

*Subsection (2)* provides that a cancellation of share capital under *subsection (1)(f)(ii)* will not be considered to be a reduction of capital within the meaning of this Act.

*Subsection (3)* permits a LTD to convert its shares into redeemable shares, subject to certain limitations. This provision is drawn from section 210(1) CA 1990.

*Subsection (4)* provides that a shareholder may notify the LTD, before a conversion, that he or she does not wish to have his or her shares converted, and that where a shareholder does so, their shares cannot be converted. *Subsection (5)* provides that such a shareholder may invoke the jurisdiction of the court if the LTD does attempt to convert their shares. *Subsections (4) and (5)* re-enact sections 210(2) and (3) CA 1990. The requirement to maintain 10 per cent non-redeemable shares, which is contained in section 210(4) CA 1990 has been removed.

*Subsections (6) and (7)* require a LTD to deliver a copy of a resolution under *subsection (1)* to the Registrar and failure to do so amounts to a category 3 offence. This notification requirement is taken from section 69 CA 1963.

*Section 84* allows a LTD to reduce its capital, provided that its constitution does not stipulate otherwise. Section 72(2) of the Companies Act 1963 already provides that a company may reduce its share capital by a special resolution approved by the court. *Section 84* re-enacts that provision and also introduces the option that a LTD may reduce its capital by means of the Summary Approval Procedure set out in *Part 4*. *Section 84* now expresses the ability to reduce share capital as a positive entitlement rather than as an exception to a prohibition on the reduction of share capital of the company.



*Subsection (3)* is new. It stipulates the date on which the reduction approved by the Summary Approval Procedure shall take effect.

*Subsections (4), (5) and (6)* are new. *Subsection (4)* provides that a LTD may only reduce its capital using the methods outlined in this section. *Subsections (5) and (6)* state that any transaction in breach of this section is voidable at the instance of the LTD and that where a LTD acts in contravention of this section both the LTD and every officer in default shall be guilty of a category 3 offence.

*Section 85* sets out the procedure by which a special resolution to reduce capital may be confirmed by the court. This section is drawn from sections 73 and 74 of the Companies Act 1963 and also contains new provisions.

A new element has been added in *subsection (2)* in that the requirement to advertise the passing of the special resolution is now limited to one daily newspaper in the State and notification by post to creditors outside the State. In determining any preliminary application for directions as to the hearing of an application, the court must consider whether the LTD has complied with *subsection (2)*.

*Subsection (4)* deals with creditor protection and the creditors' right to object to a proposed reduction of capital. *Subsection (5)* qualifies *subsection (4)*; it provides that the court may, if it thinks proper to do so, direct that *subsection (4)* shall not apply.

*Subsections (6) and (7)* set out the circumstances in which a court may confirm the resolution to reduce the capital. *Subsection (8)* gives the court the power, when confirming a resolution for the reduction of capital, to order the LTD to publically give reasons for the reduction or such other information as it deems fit.

*Subsection (9)* is new and it clarifies the meaning of the termination of a debt or claim for the purposes of this section.

*Section 86* provides that the Registrar must register the order of the court confirming the resolution reducing the capital and the minute of the altered capital, when furnished with those documents. This is based on section 75 of the Companies Act 1963.

*Section 87* sets out the consequences for shareholders where a LTD's capital has been reduced and it also deals with creditor protection following a reduction of capital. *Subsections (2) to (4)* are an amended version of section 76 of the Companies Act 1963. *Subsection (5)* lays down the offences under this section and is taken from section 77 CA 1963.

*Section 88* provides that a LTD may alter or modify the rights attached to any class of shares provided certain conditions are met. It is drawn principally from section 38 of the Companies (Amendment) Act 1983.

*Subsections (1) to (7)* are re-enactments of sections 38(1) to 38(7) C(A)A 1983. *Subsection (1)* has been amended insofar as the phrase "whether or not the company is being wound up" has been newly inserted and the phrasing of *subsection (6)* has also been amended.

*Subsection (2)* provides that where the LTD's constitution does not attach rights to a class of shares and does not provide for the variation of rights, a variation of rights may be effected either with the written sanction of 75% of the holders of the class of shares the rights of which are being affected, or a special resolution of that class sanctioning the variation.

*Subsection (3)* imposes certain limitations on the variation of rights in accordance with the constitution. It deals with circumstances where it is proposed to vary rights attached to a class of shares where such variation is concerned with either the giving, variation, revocation or renewal of an authority for the purposes of *section 69(1)* (i.e. the authority to allot shares) or a reduction of the company's capital under *section 84*. In these circumstances, the rights cannot be varied unless the holders of 75% of the issued shares of the relevant class consent in writing to the variation or alternatively, a special resolution is passed which sanctions the variation, such resolution being passed at a meeting of the holders of shares of the relevant class.

Under *subsection (4)*, where a variation of rights attached to a class of shares is not connected with the authority to allot shares or connected with a reduction in company capital, those rights may only be varied in accordance with the provision of the constitution that deals with the variation of those rights. This is the case in relation to rights attached by the constitution or otherwise. Where the rights are attached by the constitution, the provision in respect of their variation must have been included in the constitution at the time of the company's incorporation, otherwise this subsection will not apply. Where the rights are attached otherwise than by the constitution, it is enough that the constitution contains a provision in relation to their variation for this subsection to apply – the provision does not need to have been in the constitution from the date of the company's incorporation.

*Subsection (5)* provides that where the constitution does attach rights to a class of shares but does not provide for the variation of those rights, the rights may be varied with the agreement of all of the members.

*Subsection (6)* lays down the procedure to be followed at a meeting of the members holding a particular class of shares where a special resolution referred to in this section is proposed.

*Subsection (7)* provides that an amendment in the constitution of a LTD for the variation of rights attached to a class of shares is to be treated itself as a variation of those rights.

*Subsections (8) and (9)* re-enact subsections (9) and (10) of section 38 C(A)A 1983, respectively. *Subsection (8)* clarifies the meaning of the term "variation". *Subsection (9)* makes it clear that the provisions of this section do not derogate from the court's powers under *sections 212, 451 and 455* of this Act.

*Subsection (10)* provides that where there are preference shares or shares with other rights, the issue of further shares having similar rights is not to be regarded as an alteration of the rights of the first shareholders. This provision is equivalent to Model Regulation 4 of Part I of Table A of the First Schedule to the Companies Act 1963.

*Section 89* sets out a mechanism by which members holding a class of shares may apply to the court to seek to have a variation of the rights attached to that class, under *section 88*, cancelled. This section is drawn from section 78 of the Companies Act 1963. *Subsections (1) and (2)* re-enact subsection (1) of section 78 CA 1963. However, *subsection (1)* now expressly refers to *section 89*, which permits the variation of rights attached to class shares. *Subsections (3) to (8)* re-enact subsections (2) to (6) of section 78 CA 1963. They describe the manner in which an application to the court should be made and provide that the court can confirm or disallow the variation, having regard to all the circumstances of the case. The decision of the court can be appealed on a question of law only. The LTD is obliged to deliver to the Registrar a certified copy of the court order within 21 days from when such order is made and failure to do so will result in a category 4 offence. *Subsection (7)* now makes reference to a categorised offence, in line with the changes made in this Act with regards to offences.

*Section 90* requires the delivery to the Registrar of particulars of special rights attaching to shares that have not previously been registered. This is taken from section 39 of the Companies (Amendment) Act 1983. Failure to comply with this section constitutes an offence and the LTD and any officer in default shall be guilty of a category 4 offence.

*Section 91* is new and deals with variation of company capital on reorganisation. A company may dispose of assets, liabilities and undertakings in exchange for securities in the transferee being allotted to members of the company (rather than to the transferor company). This facilitates what is sometime referred to as the “three way re-organisation” where a company spins out some of its assets in return for the issue of shares to its shareholders. This will now be permitted by either employing the Summary Approval Procedure; or adopting the traditional procedure of passing a special resolution that is to be confirmed by the court under *section 85* of the Act.

*Subsections (1) and (2)* permit a LTD to enter into a transaction to dispose of assets, undertakings or liabilities, or a combination thereof, to a body corporate in return for shares or securities being allotted to the members of the LTD or its holding company as consideration. It is clarified in *subsection (1)* that a company may lawfully transfer or dispose of assets and/or undertakings (or parts thereof) where the re-organisation of company capital is not the purpose of the transaction removing any doubt as to whether the transaction permitted by the section can lawfully be carried out where this is plainly not the purpose or may only be a secondary purpose.

Under *subsection (3)*, the provisions of *subsection (2)* apply whether or not the terms of the transfer or disposal also involve the payment of cash to the members. *Subsection (4)* provides that such transactions are only given effect following the approval by the LTD under the Summary Approval Procedure or by special resolution which has been confirmed by the court under *section 86* of the Act. If the transaction is given effect, *subsection (5)* provides for a reduction in the capital of the LTD to the value of the asset(s) and/or undertaking(s) transferred or disposed. Under *subsection (6)*, any transaction in contravention of this section shall be voidable at the instance of the LTD against any person who had notice of the facts constituting such contravention.

*Section 92* provides that an alteration of share capital, other than an increase in share capital, must be notified to the Registrar within 30 days. Failure to provide such notification constitutes a category 3 offence. This section is based on section 69 of the Companies Act 1963.

*Section 93* provides that, where a LTD has an authorised share capital, notice of an increase of capital must be delivered to the Registrar within 30 days after the passing of the resolution to increase the capital. Not providing this notification constitutes a category 3 offence. This is taken from section 70 of the Companies Act 1963.

## **Chapter 5**

### **Transfer of Shares**

*Section 94* deals with transfer of shares and debentures and is drawn from sections 81, 82 and 83 of the Companies Act 1963 and Model Regulations 22 and 23 of Part I of Table A of the First Schedule to the same.

*Subsection (1)* provides that a member of a LTD may transfer, in writing, all or any of his or her shares in the LTD subject to any restrictions that may exist in the LTD’s constitution and subject to the provisions of this section. The form of the transfer must be one that is commonly used or that is approved by the directors. *Subsection (1)* comes from Regulation 23 of Part I of Table A and that provision has been altered to take account of the fact that the Model Regulations are now incorporated in the text of the Act and apply unless the LTD’s constitution specifies otherwise.

*Subsection (2)* deals with the execution of the instrument of transfer. The instrument of transfer is to be executed by both transferor and transferee (save that if the share concerned is not fully paid.) This is in line with the law as it is set out in regulation 22 of Part 1 of Table A.

*Subsection (3)* provides the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered into the register. This provides certainty that the legal title to shares remains with the transferor and it is he/she who continues to be regarded as the 'member' of the company.

*Subsection (4)* provides that in order to register a transfer of shares, a proper instrument of transfer must be delivered to the LTD. *Subsection (5)* states that this provision is without prejudice to a LTD's power to register as a shareholder any person to whom the right to any shares in the LTD has been transmitted by operation of law.

Under *subsection (6)*, a transfer of shares of a deceased member made by his or her personal representative shall, although the personal representative is not himself or herself a member of the LTD, be as valid as if the personal representative had been such a member at the time of the execution of the instrument of transfer.

*Subsection (7)* provides that the transferor may apply to have the name of the transferee entered in its register of members and on such application the LTD must register the name of the transferee as if the application for the entry were made by the transferee himself or herself.

*Subsection (8)* is new. It stipulates that the provisions of this section do not affect the application of the Stock Transfer Act 1963, unless a LTD's constitution regulates the execution of instruments by any particular LTD or other body corporate.

*Section 95* places restrictions on transfers of shares. It is drawn from section 84 of the Companies Act 1963 and certain Model Regulations of Part I and II of Table A of the First Schedule to the same. It also contains new provisions.

*Subsection (1)(a)* provides that, save where the constitution provides otherwise, the directors may decline to register a transfer of shares. This re-enacts Regulation 3 of Part II of Table A. *Subsection (1)(b)* is a new provision bringing an existing common law rule into statute. It states that, save where the constitution otherwise provides, if the directors do not exercise the power to decline to register a share transfer within two months, such power lapses.

*Subsection (2)* specifically provides that the directors may decline to register a transfer that is not accompanied by a fee or the share certificate or if the instrument of transfer is in respect of one class of shares only. This subsection does not prejudice the general power of the directors to refuse to register a share transfer under *subsection 1(a)*. This provision is taken from Regulation 25 of Part I of Table A.

*Subsection (3)* requires the LTD to notify the transferee within two months of the fact that his application has been refused by the directors. This provision is taken from section 84 CA 1963. *Subsection (4)* provides that the directors can suspend the registration of shares provided that they do not do so for periods totalling more than 30 days in the year. This is a re-enactment of Regulation 27 of Part I of Table A.

*Section 96* deals with the transmission of shares on the death or bankruptcy of a member and sets out certain restrictions to such transmissions. This section reproduces Model Regulations 28 to 32 of Part I of Table A of the First Schedule to the Companies Act 1963 and re-enacts section 87(2) of the same.

*Subsection (1)* provides that *subsections (2) to (11)* apply unless the LTD's constitution provides otherwise. *Subsections (2) and (3)* stipulate the persons to be recognised as having any title to shares of a deceased member and provide that the estate of a deceased joint holder of shares shall still be liable in respect of any shares held jointly by him or her with other persons.

*Subsections (4) and (5)* provide for the registration of any person entitled to a share in the circumstances outlined in this section and state that the directors are entitled to decline or suspend registration of such shares.

Under *subsections (6) and (7)*, a person becoming entitled to a share in consequence of death or bankruptcy of a member must give to the company a notice in writing if he or she wishes to be registered as owner or, if such person elects to have another person registered as owner, they shall execute a transfer of the share to that other person. Such notice or transfer shall be subject to all the limitations, restrictions and other provisions of this Chapter relating to the right to and registration of transfers.

*Subsection (8)* provides that any person entitled to a share by reason of death or bankruptcy of the holder will be entitled to any dividends and other advantages to which a registered holder of the share would be entitled. This provision is subject to *subsection (9)* which states that a person who has not yet been registered as a member shall not be permitted to exercise any right conferred by membership in relation to meetings of the company (for example, voting rights). A further limitation on *subsection (8)* is provided for in *subsection (10)* whereby the directors of the LTD may serve a notice on the person entitled to the share requiring them to make the election specified in *subsection (4)* (i.e. either elect to take the share themselves or give it to another person). If the person does not make the election within 90 days of the notice, the payment of dividends, bonuses or any other money payable in respect of the share may be withheld.

*Subsection (11)* provides that the company may charge a fee not exceeding €10 on every registration (probate, letters of administration etc.).

*Subsection (12)* re-enacts section 87(2) of the Companies Act 1963. Its object is to prevent a LTD unreasonably refusing to register the name of a person who is entitled to shares in consequence of the death of a former holder, or to pay dividends to him or her. Section 87(1) CA 1963 is reproduced in *section 99(1)* of this Act.

*Section 97* is new and deals with the transmission of shares in special circumstances (including cases of mergers). *Subsection (1)* provides that the Minister may prescribe procedures whereby the registration of shares may be validly effected (a) in cases of death of a sole member of a single member company where that member was the only director of that company, or; (b) in other cases where it is difficult to effect registration.

*Subsection (2)* states that nothing in *section 96* prevents the adoption of procedures other than those specified in that section with respect to the registering of a transfer of shares in a company held by another company that are transferred as a result of a merger between those 2 companies.

*Subsection (3)* provides that such alternative procedures shall be determined by the directors of the holding company, provided the constitution of the holding company so allows and subject to any order of the court made in respect of the matter in hand.

*Section 98* provides that the certification of a share transfer shall be treated as a representation by a LTD that documents showing a prima facie title to the shares were produced to the LTD. However the certification will not be treated as a representation that the transferor has, in fact, any

title to the shares. Under *subsection (2)*, the LTD shall be liable for any false certifications negligently made and *subsection (3)* provides for the practicalities of certification. This section is a re-enactment of section 85 of the Companies Act 1963.

*Section 99* contains provisions on share certificates and is drawn from section 86 and section 87(1) of the Companies Act 1963 and Model Regulations 8 and 9 of Part I of Table A of the First Schedule to the CA 1963.

*Subsections (1)* and *(2)* provide that each shareholder is entitled to be furnished with a share certificate within two months of the allotment or transfer and that such certificate is *prima facie* evidence of his or her title to the shares. *Subsection (3)* provides that this section does not apply to a transfer that the LTD is entitled to refuse and does not register.

*Subsections (4)* and *(5)* provide that if a LTD fails to comply with *subsection (2)*, it shall be liable to make good the default and if it does not do so, the court may order the LTD to make good the default and also may order that the costs be covered by the LTD or an officer responsible for the default. *Subsection (6)* provides for the renewal, for a fee, of lost or damaged certificates. *Subsection (7)* provides that all members are entitled to receive, for a fee, one or more share certificates for one or more shares held by them. *Subsection (8)* provides that, in the case of jointly held shares a LTD need not issue more than one certificate and delivery to one of the joint holders is sufficient. *Subsection (9)* provides that contravention of *subsection (2)* constitutes a category 4 offence.

*Section 100* provides that certain persons, if they have a reason to believe that shares have been invalidly allotted, may apply to the court to have the allotment declared valid and the court may do so if it would be just and equitable. This is drawn from subsections (1) and (3) of section 89 of the Companies Act 1963, as amended by section 227 of the Companies Act 1990.

*Section 101* provides that it is a category 2 offence to personate a shareholder. This derives from section 90 CA 1963.

## **Chapter 6** Acquisition of Own Shares

*Section 102* sets out the circumstances in which a LTD may purchase its own shares and also prohibits the purchase, by a LTD, of shares in its parent public company. This section is taken from section 41 of the Companies (Amendment) Act 1983 and Regulation 5 of the EC (PLC Subsidiaries) Regulations 1997 (S.I. 67/1997).

*Subsections (1)* to *(3)* set out the circumstances in which a LTD may purchase its own shares. The law as it stood prior to the introduction of the Act was reproduced. However, positive language has now been used in order to express the right of the LTD to acquire its own shares as an entitlement of the LTD, rather than to an exception to a general prohibition. A LTD may not acquire its own shares otherwise than in accordance with this section and if it does it and any officer of it who is in default shall be guilty of a category 2 offence and the acquisition shall be void.

*Subsection (4)* provides that where a LTD is a subsidiary of a PLC, it shall not subscribe to shares in its parent public company or purchase such shares that are not fully paid up. *Subsections (5)* to *(7)* elaborate on this prohibition.

*Section 103* provides that certain subscriptions and allotments are not prohibited by *section 102*.

*Section 104* deals with the situation where a nominee of a LTD acquires shares in the LTD. This section re-enacts section 42 of the Companies (Amendment) Act 1983 with some modifications. Subsection (5) of section 42 has not been reproduced here as that provision only relates to PLCs.

*Subsection (1)* provides that where shares in a LTD are issued to or purchased by a nominee of the LTD, then those shares are treated as being owned by the nominee and the LTD shall be regarded as having no beneficial interest in them. *Subsection (2)* states that if the nominee fails to pay any part of the value of the premium of the share within 21 days of being called on to do so, the other subscribers or the directors shall be jointly and severally liable with the nominee to pay the amount. Provision is made in *subsections (3) and (4)* for the subscribers or directors to claim relief from their liability under *subsection (2)*.

*Subsection (5)* excludes two scenarios from the application of *subsections (1) and (2)*. Firstly, *subsections (1) and (2)* do not apply to shares acquired by a nominee of a LTD where the LTD has no beneficial interest in those shares apart from a right to remuneration or the recovery of its expenses out of a trust property. Secondly, *subsections (1) and (2)* do not apply to shares issued in consequence of an application made before the 13 October 1983 (the day on which section 42 C(A)A 1983 came into force) or transferred in pursuance of an agreement to acquire them made before that day.

*Section 105* concerning acquisition of own shares is drawn from the following sections of the Companies Act 1990: section 207(1) and (2); section 211(1) and (2); section 213(5), (6) and (7); and section 214.

*Subsection (1)* provides that a LTD may acquire its own shares by purchase or, where those shares are redeemable shares, by redemption or purchase.

*Subsection (2)* provides that shares acquired under *subsection (1)* must be paid for in full on their acquisition out of profits available for distribution or, where the LTD proposes to cancel the acquired shares, out of the proceeds of a fresh issue of shares specifically issued for the purpose of the acquisition pursuant to *section 106* of this Act.

*Subsection (3)* sets out a restriction on the power to issue shares for the purpose of paying for the purchase or redemption of own shares. Where the shares being acquired were issued at a premium, some, or all, of the premium may be paid from the proceeds of the issue of shares. The amount that may be paid from the proceeds of the issue of shares is the amount equal to either the total of premiums received by the LTD when it issued the shares being acquired or the actual balance in the LTD's undenominated capital (including any sum transferred to its share premium account in respect of premiums on the new shares) whichever amount is less. The balance remaining in the LTD's share premium account or other undenominated capital shall then be reduced by the same amount as was taken out of the proceeds of the issue of new shares to repay the premiums.

Under *subsection (4)*, a contract for the purchase of own shares no longer needs to be authorised by special resolution; the terms and manner of the purchase may also be provided for in the LTD's constitution or in the rights attaching to the shares in question.

*Subsection (5)* provides that a special resolution to approve a contract for purchase of own shares under *subsection (4)* will not be effective if any member of the LTD whose vote was necessary to pass the resolution and who holds shares to which the resolution relates exercised the voting rights carried by any of those shares in voting on the resolution.

*Subsection (7)* expressly sets out that any member demanding a poll must already have voting rights with the company. This member may demand a poll on a special resolution authorising the acquisition

by a company of its own shares. This subsection prevents any confusion in relation to the right of a member to demand a poll on a special resolution.

*Paragraph (a) of subsection (8)* provides that, where the proposed contract for purchase is approved by special resolution, the proposed contract (or a written memorandum of its terms) must be given to the members of the LTD on request or made available for inspection at the registered office of the company from the date of notice the meeting and at the meeting itself. The requirement for 21 days display of the contract at the registered office has been removed, instead the display period will be for the duration of the notice of the meeting. *Paragraph (b)* provides that a memorandum of the terms of the contract of purchase made available under *paragraph (a)* must include the names of any members holding shares to which the contract relates, and a copy of a contract made available under that paragraph which does not contain all the names of such members must be accompanied by a written memorandum specifying those names which do not appear in the contract itself.

*Subsection (10)* provides for the variation of a contract of purchase. *Subsections (11) and (12)* state that a LTD may enter into a contract (apart from a contract to purchase shares) that may give rise to an entitlement of the LTD, or an obligation on the part of the LTD, to purchase any of its shares. The entitlement or obligation arising from such a contract is referred to as an “option”. A LTD may purchase its own shares in pursuance of an option only if the terms of the option have been authorised by a special resolution of the LTD in accordance with *subsections (5) to (9)*. *Subsections (11) and (12)* reproduce section 214 of the Companies Act 1990, except that the concept of “contingent purchase contract” is now replaced with the concept of “option” as defined in *subsection (12)*.

*Section 106* contains supplemental provisions in relation to *section 105* and derives from section 208 and section 209(1) of the Companies Act 1990.

*Subsection (1)* provides that where a LTD acquires shares under *section 105* they must be either cancelled or retained as treasury shares.

*Subsection (2)* provides that a LTD may issue shares in order to acquire its own shares under *section 105*. This derives from section 208(c) and (d) CA 1990. The references to sections of the Stamp Duties Consolidation Act 1999 have been deleted. Under *subsection (3)*, a cancellation of shares under *subsection (1)* shall not be taken as reducing the amount of the company’s authorised share capital.

*Subsection (4)* provides that where shares are acquired under *section 105*, a particular amount, depending on how the shares were paid for, must be transferred to the undenominated capital of the LTD. This is based on section 208(b) CA 1990. Instead of the “aggregable difference” being transferred to the “capital redemption reserve fund”, it will now be transferred to the undenominated capital of the company, other than its share premium account. This is in line with the requirements of the Fourth Company Law Directive.

Under *subsection (5)*, the excess in price for the redemption of shares allotted before 1 February 1990 is now said to be payable out of the “undenominated capital” of the LTD instead of being payable out of the share premium account or the profits available for distribution.

*Subsection (6)* provides that preference shares issued before 5 May 1959 may not be purchased or redeemed under *section 105*. Such shares may only be redeemed by the means set out in *section 108* of the Act.

*Section 107* re-enacts section 217 of the Companies Act 1990 as it applies to purchases under *section 105* of this Act. Under this section, a LTD is prohibited from assigning to any third party any



rights attaching to its authorisation to purchase its own shares. However, *subsections (2) and (3)* provide that a LTD may release its right to purchase where the release has been authorised by a special resolution of the LTD in advance of the release.

*Section 108* derives from section 65(1) to (6) of the Companies Act 1963 and deals with the power to redeem preference shares issued before 5 May 1959. The CRO Gazette is replaced as the required method of publication in *subsection (d)* with publication in *Iris Oifigiúil*. The rationale for this is that the item to be published is under the control of a third party and involves free text.

*Section 109* concerns treasury shares and derives from section 209(2) to (7) of the Companies Act 1990. *Subsection (1)* restricts to 10% of the company capital the amount of treasury shares that a LTD can hold. According to *section 107* of the Act, treasury shares are shares in a LTD that are held by that LTD itself. Furthermore, this section provides that shares held in the LTD by any subsidiary in pursuance of *section 114* of the Act and shares held in the LTD by any person acting in his or her own name but on the LTD's behalf shall also be considered treasury shares.

*Subsection (3)* provides that shares of the company acquired by it otherwise than for valuable consideration shall not be deemed to be treasury shares.

*Paragraph (a)* of *subsection (4)* prohibits a LTD from exercising any voting rights on shares held in itself, while *paragraph (b)* suspends a LTD's right to a dividend or other payment in respect of shares held in itself.

*Subsection (5)* refers to *section 320(1)* of the Act which provides for the manner in which treasury shares are to be treated in the financial statements of the LTD.

*Subsection (6)* sets out two options as to what a LTD may do with treasury shares. *Paragraph (a)* empowers it to cancel the shares, in which case the provisions of *section 107* shall apply as if they had been originally redeemed for cancellation. *Paragraph (b)* empowers the LTD to re-issue treasury shares in any class or classes. The conditions and limitations on such a move are set out in the following subsections.

*Subsection (7)* provides that a re-issue of shares in whatever class will be subject to the legislative requirements applicable to an issue of shares in the normal way. *Subsection (7)* also provides that the issued share capital will not be increased by the amount raised by the re-issue.

*Subsection (8)* gives a LTD the power to determine, by special resolution, the price range of treasury shares to be re-issued and such special resolution must be passed before any contract for the re-allotment of shares is entered into.

*Subsection (11)* allows a LTD to vary or renew the re-issue price range already decided by way of special resolution. "Variations" may be needed for several reasons – for example, inflation or increases or decreases in share values. "Renewals" will be needed in the event of the lapsing of the requisite period.

*Subsection (12)* provides that an allotment in contravention of *subsection (8), (9), (10) or (11)* shall be unlawful.

*Subsection (13)* provides that the requisite period referred to in this section is 18 months or shorter at the discretion of the special resolution passed by the general meeting.

*Section 110* is an amended re-enactment of section 218 of the Companies Act 1990. The purpose of *subsection (1)* is to ensure that incidental payments arising out of a contract for purchase of

own shares, a variation of such a contract or a release from such a contract are paid out of the distributable profits of the LTD. *Subsection (2)* provides that where *subsection (1)* is breached, in other words where the specified incidental payments are paid otherwise than from distributable profits, then either the purchase or the release as appropriate will be void.

*Section 111* re-enacts section 219 of the Companies Act 1990 and deals with the effect of a company's failure to redeem or purchase shares. The Circuit Court is now included in *subsection (3)* given that it too has jurisdiction to grant specific performance of contracts.

*Subsections (1)* and *(2)* provide that a LTD is not, by virtue of an agreement to purchase or redeem shares, made liable if it fails to go through with the contract. However, under *subsection (3)*, a shareholder may obtain an order of specific performance to compel the LTD to fulfil the agreement, unless the LTD can show that it cannot do so out of distributable profits. *Subsections (4)* to *(7)* provide that the terms of an agreement to redeem or purchase shares will, in general, be enforceable notwithstanding the fact that a LTD may have gone into liquidation.

*Section 112* contains provisions dealing with the retention and inspection of documents. It re-enacts section 222 of the Companies Act 1990 except that the reference to PLCs in section 222(2) CA 1990 has been dropped.

*Subsection (1)* requires the LTD to retain at its registered office, all documentation or details of purchase contracts for 10 years after these contracts are fulfilled. The form in which these records are to be retained is either a copy of the contract concerned or a memorandum of its terms.

*Subsections (2)* and *(4)* are standard provisions in relation to the actual inspection by members of the records of purchase contracts being retained at the LTD's registered office in accordance with *subsection (1)*. The main requirements are availability during business hours, for not less than 2 hours daily.

*Subsection (3)* provides that a member who considers that the LTD is refusing his request to inspect documents in accordance with this section can apply to the High Court to make an order requiring the LTD to allow the inspection requested.

Under *subsection (5)*, failure to comply with this section constitutes a category 3 offence.

*Section 113* derives from section 32 of the Companies Act 1963 which was designed to prevent undesirable forms of inter-company financing between holding companies and subsidiaries. The wording in *subsection (7)* has been modified and *subsection (9)* of section 32 CA 1963 is not reproduced here, as this Part of the Act only deals with the private company limited by shares (LTD).

*Subsection (1)* provides that a LTD cannot be a member of a LTD which is its holding company, and that allotment or transfer of shares in a LTD to its subsidiary shall be void.

*Subsection (2)* provides an exception to the general prohibition above in that where the subsidiary is appointed as the personal representative or trustee of some person or body holding shares in the holding company, this *section 113* does not apply.

*Subsections (3)* and *(4)* provide that a subsidiary which was a member of its holding company at the time the restriction was introduced in 1959, or a LTD which, at the date on which it becomes a subsidiary of another LTD is a member of that other LTD, may continue to be a member.

*Subsection (5)* maintains the law as it stood prior to the introduction of the Act. It allows a subsidiary (whether limited or unlimited) to hold shares in its listed parent public company where that subsidiary is a member of an approved stock exchange. In effect, this permits market-making in a parent company's shares. The subsection replicates section CA 1963 as amended by section 111 of the Company Law Enforcement Act 2001. If the subsidiary is a member of an approved stock exchange acting in the ordinary course of its business as a professional dealer in securities, the restrictions and limitations of the acquisition of shares by a subsidiary in its holding company will not apply. A holding company must treat such shares as treasury shares.

*Subsection (6)* provides that a subsidiary, which is a member of its holding company, may accept further shares in the holding company provided they are allotted to it in consequence of a capitalisation and provided that the subsidiary does not pay for them. However, under *subsection (7)*, the subsidiary would have no right to vote at meetings in respect of the shares in question.

*Subsection (8)* refers to *section 320(2)* of the Act and states that the manner in which shares held in a holding company by a subsidiary are to be treated in the subsidiary's financial statements is provided for in that section.

Under *subsection (9)*, it is stipulated that this section applies to a nominee of the subsidiary as it applies to the subsidiary.

*Subsection (10)* provides that where a holding company makes an offer of shares to its members, it may sell any shares which the subsidiary could have taken by virtue of its shares already held, and instead pay the proceeds of sale to the subsidiary.

*Section 114* re-enacts in part section 224 of the Companies Act 1990, which provides that a subsidiary may acquire and hold shares in its holding company, subject to a number of conditions. Section 224(6), which referred to the Insurance Act 1990, has not been reproduced. In summary, a contract for the acquisition of shares under this section must be approved in advance by both the subsidiary and the holding company and in this regard, the provisions regarding acquisition of own shares and assignment or release of company's right to purchase own shares apply. The holding and subsidiary companies may also vary, revoke or release the authorisation.

Under *subsection (2)*, where a subsidiary acquires and holds shares in its holding company, the cost of purchasing these shares must come from the profits of the subsidiary available for distribution. In addition, the subsidiary is not permitted to exercise any voting rights in respect of the acquired shares and the manner in which these shares are to be treated in the financial statements of the subsidiary is provided for in section 320(2) of the Act.

*Subsection (3)* provides that a contract for the acquisition of shares under this section must be approved in advance by both the subsidiary and the holding company and in this regard, the provisions of *section 105* (acquisition of own shares) and *section 107* (assignment or release of company's right to purchase own shares) apply. The holding and subsidiary companies may also vary, revoke or release the authorisation and again the provisions of *sections 105* and *107* of the Act apply.

*Subsection (4)* states that the profits of a subsidiary available for distribution shall not include the profits attributable to any shares being held by the holding company in the subsidiary, so far as these profits relate to the period before the date on which the holding company acquired the shares.

*Subsection (5)* provides that circumstances permitted by *section 113* (membership of holding company) shall not be caught by this *section 113*.

*Subsection (6)* ensures that the section cannot be construed as having extra territorial effect.

Furthermore, under *subsection (7)*, the operation of *section 102(4)* of the Act is not restricted. *Section 102(4)* prohibits a LTD, which is a subsidiary of a public company, from subscribing to shares in its parent public company and from purchasing such shares which are not fully paid up.

*Section 115* derives from section 225 of the Companies Act 1990. It provides that when an insolvent subsidiary is wound up within six months of acquiring shares in its holding company, the court may make the directors of the subsidiary liable to repay the amount paid for the shares. The court may relieve a person from this liability if it appears to it that the person believed on reasonable grounds that the purchase was in the best interests of the company.

*Section 116* provides that a LTD must, within 30 days, notify the Registrar of the acquisition of its own shares. The return notifying the acquisition must include the number and nominal value of the shares acquired in each class and the date on which they were delivered to the LTD. The LTD may register, in a single return, the particulars of shares delivered to the LTD on different dates and under different contracts. Contravention of this section is a category 3 offence.

## Chapter 7 Distributions

*Section 117* concerns profits available for distribution and is substantially drawn from section 45 of the Companies (Amendment) Act 1983. *Section 117* provides that distributions may only be made out of profits available for that purpose and it sets out the rules relating to the calculation of profits available for distribution. It is clarified that reserves resulting from a reduction of capital will be treated as realised profits.

*Section 118* is partly new and concerns the prohibition on pre-acquisition profits or losses being treated in holding company's financial statements as profits available for distribution. It provides that distributions may only be made out of profits available for that purpose and it sets out the rules relating to the calculation of profits available for distribution. It also provides for a new procedure whereby a company may treat pre-acquisition distributable reserves of an acquired entity in its own distributable reserves in certain circumstances. The distribution of pre-acquisition profits will be permitted on the completion of the Summary Approval Procedure.

*Section 119* concerns distributions in kind and is partly new. A company may treat pre-acquisition distributable reserves of an acquired entity in its own distributable reserves in certain circumstances. The distribution of pre-acquisition profits will be permitted on the completion of the Summary Approval Procedure. Prior to the introduction of the Act, there was a requirement of certification from a company's directors and auditors that to distribute such profits would be fair and reasonable and would not prejudice any person.

*Section 120* caters for the treatment of development costs carried as an asset in a LTD's balance sheet in terms of the impact of development costs on a LTD's distributable profits. It enacts section 45A of the Companies (Amendment) Act 1983, as inserted by section 20 of the Companies (Amendment) Act 1986 and as amended by Regulation 9 of EC(IFRSMA)R 2005. Section 1(b) of section 45A C(A)A 1983 has not been included here as it relates only to investment companies.

*Subsection (1)* provides that any amount shown in respect of development costs in the balance sheet must be treated as a loss for the purposes of determining the LTD's distributable profits. The effect of this is to require that any amount shown in respect of development costs in the balance sheet must be deducted from profits available for distribution before any such distribution is made.

Two exceptions to the rule are set out in *subsections (2) and (3)*. *Subsection (2)* provides that any unrealised profit arising from the revaluation of development costs need not be treated as a realised loss. *Subsection (3)* provides that if the directors feel there are special circumstances justifying development costs not being treated as a realised loss; *subsection (1)* will not apply provided that the directors state that fact and explain the reasons by way of a note to the accounts.

*Section 121* deals with relevant financial statements for the purposes of a distribution and is drawn from section 49 of the Companies (Amendment) Act 1983. Sections 49(5) and 49(6) of that Act have not been included as they apply only to PLCs. *Section 121* sets out in greater detail what can be regarded as a distribution permitted under *section 117*.

*Subsection (1)* provides that in the determination of whether or not a distribution may be properly made and of the amount of such a distribution, a LTD must make the assessment on the basis of financial statements prepared in compliance with this section.

*Subsection (2)* defines "relevant entity financial statements" as the financial statements for (a) the last preceding financial year before the distribution; (b) interim financial statements where those at (a) do not justify the distribution, and; (c) initial financial statements in the case of distributions proposed in the first financial year or before any financial statements are laid.

*Subsection (3)* sets out the requirements which apply to the last financial statements of a LTD where these are the "relevant entity financial statements" for the purposes of this Part.

*Subsection (4)* provides that a statement under *subsection 3(c)* by the auditors suffices for the purposes of proposed distributions together with distributions which have not, at the time of the statement, been proposed.

Under *subsection (5)*, all distributions proposed to be made on the basis of particular financial statements must be treated as an aggregate or cumulative distribution for the purposes of this section.

*Subsection (6)* provides that, where *subsection 3(a)* applies, *section 117(5)* will not apply for the purposes of determining whether any revaluation has taken place, unless certain disclosures are made in the note to the financial statements.

*Subsections (7)* provides for interpretation in relation to the section as a whole. *Subsection (7)* defines the terms "properly prepared", "relevant item" and "unqualified report", and it is clarified that financial statements will be taken to be laid when the provisions of *Part 6* of the Act have been complied with.

Section 49 (10) of the C(A)A 1983 which contains the definition of "Properly prepared" has not been included as it is applicable only to PLCs. As such "Properly prepared" refers to statutory financial statements and not also to the "initial" and "interim" financial statements.

*Section 122* deals with the consequences of making an unlawful distribution and is a re-enactment of section 50 of the Companies (Amendment) Act 1983.

*Subsection (1)* provides that where a shareholder is knowingly in receipt of all or part of a distribution made in contravention of the provisions of this Part of the Act - or where he or she has reasonable grounds for believing that it is unlawful – he or she will be liable to repay it to the company. This subsection also provides that, where the distribution is made otherwise than in cash, the shareholder will be liable to pay the company a sum equal to the value of the distribution or that part of it which is in contravention.

*Subsection (2)* provides that other obligations on shareholders (apart from this section) to repay unlawful distributions – for example a distribution made in contravention of the company’s articles – are not affected by the provision in *subsection (1)*.

*Section 123* deals with a number of general matters, which clarify the scope and application of this Part of the Act. It derives from section 51 of the Companies (Amendment) Act 1983 and section 853 of the UK Companies Act 1985. Section 51(6) C(A)A 1983 has not been included as it applies only to PLCs. In summary the section provides that where a company makes a distribution of non-cash assets, any part of the amount at which that asset is valued in the financial statements which represents an unrealised profit, shall in fact be treated as a realised profit, for the purposes of determining whether the distribution is lawful, and also for the purposes of certain accounting provisions in *Schedule 3* of the Act. .

*Subsections (1) and (2)* define “distribution” and “capitalisation”. The definition of ‘distribution’ is changed from section 51(2) C(A)A 1983 by eliminating as an exception distributions made by way of the reduction of company capital by the reduction of the liability of shareholders. The reduction in the liability of shareholders will therefore now fall within the definition of a distribution and is subject to the normal rules of requiring distributable reserves – this is now consistent with *section 117(3)*. *Section 117(3)* provides that a company shall not apply an unrealised profit in paying up debentures or any amounts unpaid on any of its issued shares.

*Subsection (3)* deals with the interpretation of references to profits and losses in this Part of the Act. Unless otherwise stated, these are to be taken to include revenue and capital profits and revenue and capital losses.

*Subsection (4)* provides that, where there are other existing rules which further restrict the amounts which a LTD may distribute, be they in law or in the LTD’s constitution, such rules will not be prejudiced by the requirements of this Part of the Act.

*Subsection (5)* deals with distributions of (or including) non-cash assets and provides that any part of the amount at which that asset is valued in the financial statements which represents an unrealised profit shall in fact be treated as a realised profit firstly for the purposes of determining whether the distribution is lawful in accordance with this Chapter and secondly for the purpose of the application of *paragraphs 14(a) and 37(3) of Schedule 3*.

*Section 124* lays down procedures for declarations and payments of dividends, among other things. It derives from Model Regulations 116, 117, 119, 120 and 121 of Part I of Table A of the First Schedule to the Companies Act 1963. Regulation 118 is no longer necessary due to the other provisions of this Chapter, in particular *section 117*.

The provisions of this section and *section 125* apply only in so far as they have not been excluded or modified by the constitution of the LTD.

*Subsection (2)* provides that a company may, by ordinary resolution, declare dividends. Previously, dividends were declared “...in general meeting”, however, this has been amended in line with the fact

that a formal general meeting may now be dispensed with in certain circumstances. *Subsection (2)* also provides that no dividend shall exceed the amount recommended by the directors of the company.

*Subsection (3)(a)* provides that the directors may pay to the members such interim dividends as appear to the directors to be justified by the profits of the company. This is expressed to be subject to the provisions on profits available for distribution in *section 117* of the Act.

*Subsection (3)(b)* provides that the directors may, before recommending any dividend, set aside a reserve out of the profits of the company. That reserve can then be applied in the same way in which profits of the company may be applied, and until they have been applied they may be used in the business of the company or be invested. *Paragraph (c)* provides that the directors may also carry forward any profits, which they may think prudent not to distribute, without having to place them in reserve.

Under *subsection (4)*, all dividends shall be declared and paid according to the amounts paid on the shares to which the dividend relates. This is made expressly subject to the rights of anyone that is entitled to shares that carry special rights as to dividends.

*Subsection (5)* provides that only amounts paid on a call shall be treated for the purposes of this section as paid on the share.

*Subsection (6)* provides that all dividends shall be apportioned and paid in proportion to the amounts paid on the shares during any portion of the period in respect of which the dividend is paid. However, if a share is issued on terms providing that it shall rank for a dividend as from a particular date, then it shall rank for dividend accordingly.

*Subsection (7)* provides that the directors may deduct from a dividend to a member any sum of money that is immediately payable by that member to the company (for example due to a call) in relation to those shares.

*Section 125* contains supplemental provisions in relation to *section 124* and derives from Model Regulations 122, 123 and 124 of Part I of Table A of the First Schedule to the Companies Act 1963. The provisions of this section apply in so far as they have not been excluded or modified by the constitution of the LTD.

*Subsections (1)* and *(2)* provide for the payment of dividends otherwise than in cash.

*Subsections (3), (4)* and *(5)* provide for the payment of dividends in cash.

*Subsection (6)* provides that no dividend shall bear interest against the company.

*Section 126* deals with bonus issues and is drawn from Model Regulations 130, 130A and 131 of Part I of Table A of the First Schedule to the Companies Act 1963. Again, the provisions of this section apply in so far as they have not been excluded or modified by the constitution of the LTD.

A bonus issue of shares occur where the company capitalises profits or revenue reserves or some permissible fund such as the share premium account or the capital redemption reserve fund, and applies the proceeds in paying up bonus shares which are then given, normally to existing members in proportion to their entitlement to dividend.

*Subsection (2)* defines “relevant sum” for the purposes of *subsection (3)* and *(4)*. This term is new and has been introduced to improve readability of the section. Due to recent developments in accounting and company law the subsection clarifies that a company is permitted to utilise unrealised profits

arising from revaluation of all the fixed assets of the company to be capitalised. The subsection addresses other reserves that exist as a result of these innovations. The definition of relevant sum to comprise (i) any sum for the time being standing to the credit of the company's undenominated capital, (ii) any of the company's profits available for distribution and (iii) any sum representing unrealised revaluation reserves arising on a revaluation of all the fixed assets of the company.

*Subsection (3)* provides that the LTD's reserves and the LTD's profit and loss account may be capitalised or used for the purposes of paying unpaid amounts on any shares or in paying up in full unissued shares

*Subsection (4)* provides that profits which are not available for distribution may be used to pay up, in full, unissued shares to be allotted as fully paid bonus shares pursuant to a resolution by the general meeting prompted by a recommendation of the directors.

*Subsection (5)* provides that the directors must give effect to any resolution under *subsection (3)* or *(4)*. *Subsection (6)* elaborates on what the directors must do in order to give effect to such a resolution.

*Subsection (7)* empowers the directors to make provisions for the case of shares becoming distributable in fractions and to authorise any person to enter, on behalf of all the members concerned, into an agreement with the company providing for either of the following:

- (i) the allotment to them, respectively credited as fully paid up, of any further shares or debentures to which they may become entitled on the capitalisation concerned or;
- (ii) the payment by the application thereto of their respective proportions of the profits resolved to be capitalised of the amounts remaining unpaid on their existing shares.

Such power is given without limiting their obligations under *subsection (6)*.

*Subsection (8)* provides that any agreement made under the authority in *subsection (7)* is effective and binding on all the members concerned.

*Subsection (9)* is new. It contains provisions for dealing with the net capital surplus in excess of the previous book value of the assets arising from a revaluation of the fixed assets of the company. Where the directors have resolved to approve a bona fide revaluation of all the fixed assets of the company, the net capital surplus in excess of the previous book value of the assets arising from such revaluation may be (a) credited by the directors to undenominated capital, other than the share premium account; or (b) used in paying up unissued shares of the company to be issued to members as fully paid bonus shares. If a revaluation reserve is capitalised as "undenominated capital" it is not to be included in the share premium account. This is in line with *section 117(3)* of the Act which provides that a company shall not apply an unrealised profit in paying up debentures or amounts unpaid on any of its issued shares.



## **Part 4 – Corporate Governance**

### *Preliminary Note*

*Part 4* deals with corporate governance and contains some of the most significant changes in the Act. It is now provided that a private company limited by shares (LTD) may have a single director rather than the minimum of 2 required under the previous law (*section 128*). A new age restriction on directors has been introduced so that all directors must be a minimum of 18 years of age (*section 131*). A large area of reform in this Part concerns the meetings of members of a LTD. Since 1994 it has been possible for single-member private limited companies to dispense with holding an annual general meeting (AGM). This continues for an LTD under the Act and is also applied to single-member DACs, PLCs, CLGs and UCs (*section 175*). A multi-member LTD can now dispense with holding of AGMs under the Act (*section 175(3)*). In addition, the business of the AGM has now been set out in *section 186*. A further innovation is to be found in *section 194*, which permits majority written ordinary and special resolutions; at present, only unanimous written resolutions are allowed. The new Summary Approval Procedure, whereby restricted activities can be carried out when validated by the company, is contained in *Chapter 7* of this Part of the Act.

*Part 4* of the Act provides for duties and responsibilities of directors and other officers as regards their appointment and proceedings in relation to the company and its members. In particular, *Part 4* sets out the ways in which the activities of the company on a day-to-day basis are conducted. Other than the individual areas of change described below, the processes of consolidation and simplification of the pre-existing law are mainly adhered to by incorporating the procedures for corporate governance which would have been contained in the standard articles of association for a company limited by shares (as set out in the First Schedule to the Companies Act 1963 in Table A, Parts I and II) into the body of the Act. Provision is made throughout this Part for the LTD to adopt in its constitution such additional powers or restrictions as the company may require, so long as these provisions do not conflict with the main body of law in the Act.

*Chapter 1* deals with the practicalities of the access to documents referred to throughout *Part 4* in addition to other parts of the Act that are outlined in *Chapter 10* (Inspection of Registers, Provision of Copies of Information in Them and Service of Notices). Such documents must be available for inspection during business hours for not less than 2 hours in each day. Once this requirement is complied with, a company may, in general meeting, impose such reasonable restrictions in relation to the inspection of documents as it sees fit.

*Chapter 2* contains provisions regarding directors and secretaries. A single director is now permitted in a private company limited by shares. It is intended that this will enhance accountability of the sole director. It is a fact that in many small private companies the ‘second director’ is a nominee, appointed only to meet a numeric statutory requirement. Although a director will still be permitted to act as secretary to the company, a separate secretary is required if a person is appointed as sole director. The prohibition on the appointment of a corporation to serve as company director remains. A new age restriction for directors is introduced and any director under the age of eighteen years will cease to be a director on the commencement of *section 131(1)*. Undischarged bankrupts will continue to be prohibited from acting as officers. If the Director of Corporate Enforcement is of the opinion that a person acting as director is an undischarged bankrupt in any jurisdiction, he or she may initiate court proceedings to disqualify such a person. The prohibition on a person simultaneously acting as director and secretary in any transaction continues.

The amendments made by the Companies (Amendment) Act 2009 which require residence of one director in a member state of the EEA and clarify the methods by which a company can prove that it has a link with economic activity in the State have been brought forward here. The restriction on the number of directorships a person can hold is continued – namely 25 directorships, not including

directorships of PLCs. The provisions for the removal of directors remain substantially unchanged from the Companies Act 1963. The provisions formerly contained in Table A regarding vacation of office have been incorporated, including the provision that the absence of a director from meetings for 6 months terminates his or her office. The constitution of a private company may make alternative provisions in this regard. The previous provisions regarding the maintenance of registers of directors and secretaries are substantially re-enacted. It is provided that where the company fails to notify the Registrar of a person having ceased to be a director or secretary, the person who ceases to be a director or secretary is then empowered to notify the Registrar of his or her cessation (this was previously dealt with in subsections (11A) and (11B) of section 195 of the Companies Act 1963).

*Chapter 3* concerns service contracts and remuneration.

In *Chapter 4*, the provisions of Table A regarding the general powers of management and delegations by directors have been incorporated, with the power to adjust these in the individual company's constitution. Table A provisions regarding managing directors as well as meetings of directors and committees of directors have been incorporated and remain substantively unchanged. References to companies other than those having a share capital have been omitted in the provisions dealing with the register of members. Some helpful new clarifications have been added. In *section 158(3)* the powers of the directors to exercise all power of management has been clarified so that it expressly includes the power to borrow money and mortgage and charge the company's property, etc. Committees of directors, as well as the full board of directors, may proceed by means of a unanimous written resolution (*section 161*).

*Chapter 5* deals with the register of members and law as it stood in this area prior to the Act has been substantially re-enacted. Provisions in relation to the inspection of the register and stipulating where the register must be kept are now provided for in *Chapter 10* of this Part.

*Chapter 6* addresses the recommendations in the First Report of the Company Law Review Group (CLRG) regarding the conditions applying to the holding of a general meeting and the recommendation that a written procedure, once agreed unanimously by the members, could be an alternative to an AGM. The applicable conditions are further simplified by allowing a general meeting to be held outside the State or in multiple locations. A new power of the court to order meetings at the request of interested parties (including personal representatives) has been inserted. The conditions applying to the appointment of proxies and representatives of corporate members have been incorporated, slightly adjusted from Regulation 71 of Part I of Table A, and section 139 of the Companies Act 1963.

The pre-existing concept of "ordinary" and "special" business at AGMs has been removed and the matters that shall be included in the agenda of the AGM are set out, with the freedom to omit or alter same in the constitution of any LTD. The regulations regarding the proceedings and voting at a general meeting based on Table A of the Companies Act 1963 are incorporated also. Earlier statute law did not define an ordinary resolution as such, *section 191* addresses this and proceeds to identify categories of resolution whether passed in general meeting or by written resolution. This dispenses with the expressions "the company in general meeting", and aligns the term with common usage. Pursuant to the recommendations in the First Report of the CLRG, *section 193* provides for unanimous written resolutions allowing a LTD to pass resolutions, including special resolutions, in writing and to file the same. Since there may be dissenting members, majority written resolutions, although allowed, require new provisions that provide that all members must be advised of the contents of such resolutions and receive notification of when they were passed by the requisite majority. A time lapse before such resolutions are deemed passed must be allowed for to give dissenting members the opportunity to initiate an action if they wish. *Section 197* extends the written resolution concept to resolutions to be passed at class meetings. Due to the requirement to have a permanent record of resolutions passed, at a meeting or by written resolution, copies are required to be kept in minute books and certain resolutions must be filed with the Registrar. Previously the law was that minute books for general meetings had to be available for inspection by members.

*Chapter 7* deals with certain transactions under the Companies Act 1963 (sections 60, 72, 149(5) and 256) and the Companies Act 1990 (sections 31 and 34) that require statutory declarations of directors, special resolutions of members and in certain instances, an independent person's report. The Summary Approval Procedure as set out in *Chapter 7* of this Part now applies to these transactions. This gives effect to the recommendations of the Company Law Review Group that a streamlined validation procedure be introduced (this has subsequently been called the Summary Approval Procedure in the Act), with minor variations depending on the transactions. *Section 202* sets out the Summary Approval Procedure based on the preceding sections with additional requirements for independent persons' reports where previously required in section 60 of the Companies Act 1990. This is the procedure to be followed in order to provide the corporate governance and approvals required for certain transactions such as the provision of financial assistance, the approval of guarantees of certain loans to directors and certain transactions involving the share capital of a private company.

*Chapter 8* provides remedies to shareholders in case of oppression and is based on section 205 of the Companies Act 1963.

*Chapter 9* re-enacts section 378 of the Companies Act 1963 and is also based on section 4 of the Companies (Amendment) Act 1977. The manner in which registers, minutes and such documents must be kept is set out, along with how they may be stored electronically.

*Chapter 10* contains harmonised procedures for the inspection of registers and documents and sets out where registers and documents are to be kept. The Chapter also provides for the charges for the inspection of registers and documents in certain circumstances and the service of notices under this Act on members.

## *Explanatory Memorandum*

### **Chapter 1** Preliminary

*Section 127* provides that where a company is obliged to open a document to inspection under this Part, not less than 2 hours in each day shall be allowed for such inspection. Once this section is complied with, a company may, in general meeting, impose such reasonable restrictions in relation to the inspection of documents as it sees fit.

### **Chapter 2** Directors and secretaries

*Section 128* provides that a company must have at least one director and lays down a category 3 offence for non-compliance with this requirement. It replaces section 174 of the Companies Act 1963. Under the previous law, all companies were required to have a minimum of 2 directors. This amendment to the pre-existing law was in accordance with the recommendations of the First Report of the Company Law Review Group that the new model private company limited by shares be permitted to have only 1 director to reflect the realities of the business of such companies. The Twelfth Company Law Directive (89/667/EEC), which was implemented by S.I. No. 275/1994 – European Communities (Single Member Private Limited Companies) Regulations 1994, provides for single member private companies limited by shares or by guarantee.

*Section 129* deals with secretaries. *Subsection (1)* provides that a company must have a secretary. That secretary is permitted to be one of the directors of the company. The circumstances in

which a deputy or assistant secretary or any officer of a company is authorised to act as secretary are set out in *subsection (2)*. *Subsections (1) and (2)* derive from section 175(1) and (2) of the Companies Act 1963. *Subsection (3)* imports Model Regulation 113 of Part I of Table A of the First Schedule to the CA 1963 and provides that the secretary is appointed by the directors and it is they who decide on the term, remuneration and conditions of this appointment. The secretary may also be removed by the directors.

*Subsection (4)* provides that the directors have a duty to ensure company secretary has the skills or resources necessary to discharge his or her statutory and other duties.

*Subsection (5)* states that the duty also applies where the person acting as secretary is a director of the company. The subsection is taken, in substance, from section 236 of the Companies Act 1990 which places a similar duty on the directors of a PLC.

*Subsection (6)* accords with the recommendations of the First Report of the Company Law Review Group that a sole director should not also be the company secretary.

*Section 130* provides that a company cannot have a body corporate as its director and any such appointment is void. It derives from section 176 of the Companies Act 1963 and is substantially unchanged however, the law is clarified in that an unincorporated body of persons – which itself does not have legal personality – cannot act as a director. This does not change the law, but simply makes it clearer. In *subsections (1) and (2)*, references to the operative date have been deleted, since that term is obsolete. Furthermore the provision that a body corporate which is a director at the operative date must vacate office has been deleted for the same reason.

*Section 131* is a new section. *Subsection (1)* provides that a director or secretary of a company may not be less than 18 years of age. *Subsection (2)* is similar to *section 131* regarding bodies corporate and provides that any purported appointment of a minor as a director is void. *Subsection (3)* provides that on the commencement of *subsection (1)*, any directors who have not attained the age of 18 years will cease to be so appointed.

*Section 132* prohibits undischarged bankrupts from acting as director or secretary or from directly or indirectly taking part in the promotion, formation or management of a company. *Subsection (2)* reproduces section 183(2) of the Companies Act 1963 and provides that where a person is convicted of an offence under this section, he or she shall be deemed to be subject to a disqualification order from the date of the conviction.

*Section 133* deals with a situation where the Director of Corporate Enforcement suspects that a person who is acting as a director or secretary of a company is an undischarged bankrupt. This section is an amended version of section 183A of the Companies Act 1963. The section has been extended in its application in that it now applies to both secretaries and directors. It provides a mechanism whereby the Director of Corporate Enforcement can intervene in such situations by requiring the person concerned to furnish a sworn statement of his or her financial position and, in particular, any matter pertaining to bankruptcy. In addition, it provides that the Director of Corporate Enforcement may have the person examined before the court and may apply to the court to have a disqualification order made against the person. The references in this section (but not throughout the Act) to “the Director” have been amended from the existing provisions in this circumstance to read “the Director of Corporate Enforcement” in accordance with the view of the Company Law Review Group that this was necessary to enhance clarity by further distinguishing between a company director and the Director of Corporate Enforcement in this particular section.

*Section 134* provides that, if an act is required to be carried out by both a director and the secretary of a company, it is not adequate that it is carried out by one person acting both as director and secretary. This is a re-enactment of section 177 of the Companies Act 1963.

*Section 135* extends section 178 of the Companies Act 1963 in its application as it now applies to both secretaries and directors. If persons are held out as, and act as, directors or secretaries, and shareholders do not prevent them from so doing, outsiders are entitled to assume that they are directors. As between the company and such outsiders, the acts of such directors *de facto* will bind the company [*County of Gloucester Bank –v- Rudry Merthyr Steam and House Coal Collieries Company (1895) and Mahony- v- East Holyford Mining Company (1875)*]. A stranger dealing with a company has a right to assume, as against the company that all matters of internal management have been duly complied with. [*Royal British Bank -v- Turquand (1855)*].

*Section 136* is inserted for clarity and provides that there is no statutory obligation on a company to require that directors should hold any share qualification. However, where directors are required to hold such shares, then they must be taken up within two months or such shorter time as may be fixed by the constitution.

*Section 137* sets out the rule that a company must have one director resident in an EEA state. *Subsection (2)* and the Table at the end of this section provide that, as an alternative to having a person as director who is resident in a state of the EEA, a company may instead put in place a bond to the value of €25,000. That bond must provide that, in the event of the failure of a company to pay a fine under the Taxes Consolidation Act 1997 (which arises from failure of the company to deliver certain information under section 882 or section 884 of that Act), or a penalty which the company has been held liable to pay under section 1071 or 1073 of the Taxes Consolidation Acts, the payment will be met from the bond. The Taxes Consolidation Act 1997 provisions are those which relate to information to be provided to the Revenue Commissioners in relation to the tax affairs of companies. Where a company defaults in any respect, the bond will be capable of being called upon to meet the fine or penalty as appropriate. A nominated person will be appointed by the Registrar or the Revenue Commissioners to draw down the bond and apply it in respect of the sums due. *Subsection (3)* provides that the sum of money which becomes payable to the “nominated person” referred to in *subsection (2)* is for the purpose of discharging the whole or part of the company’s liability in respect of any such fine or penalty. *Subsection (4)* states that the nomination referred to in *subsection (2)* shall be made by the Registrar or the Revenue Commissioners, or both, in accordance with the Table at the end of this section. *Subsection (5)* gives legal certainty to the fact that the company can enter into the bond and that the bond cannot be held to be ineffective because it is apparently indemnifying the directors of the company for something for which they may be held liable. Essentially, the subsection is designed to avoid circumstances arising where the person giving the bond might claim that it was unlawful that it be given, and thereby avoid the consequences of making payment. *Subsection (6)* is an offence provision and states that the company and any officer of the company in default of this section shall be guilty of a category 4 offence. *Subsection (7)* provides that an alternate director is not acceptable, for the purposes of this section, as fulfilling the requirement to have a resident director in a state of the EEA. This section was originally contained in section 43 of the Companies (Amendment) (No.2) Act 1999 and was subsequently amended by section 10 of the Companies (Amendment) Act 2009.

*Section 138* expands on the bond referred to in *section 137(2)*. The purpose of *subsection (2)* is to ensure that as well as meeting the fines and penalties mentioned in *subsection (3)*, the bond can be used to remunerate the person who is nominated to collect on foot of the bond. The amount which such a nominated person can collect will be controlled by the Revenue Commissioners and the

Minister, as appropriate. *Subsection (3)* requires that the person nominated to call in the bond and make the payments must keep proper records both of the monies received from the person giving the bond, and whatever payments are made, so as that the actual position can be determined with accuracy. *Subsection (4)* contains the enabling power for the Minister, after consultation with the Minister for Public Expenditure and Reform, and the Revenue Commissioners, and any other parties who the Minister thinks may have an interest in the matter, to prescribe arrangements in relation to the bond, and in particular the form that it will take and the minimum period for which it will operate. *Subsection (5)* contains details of the manner in which a copy of the bond and details thereof are submitted to the registrar of companies. *Paragraph (a)* states that where it is intended to incorporate a company without a resident director in a state of the EEA, the necessary details will have to be provided with the application for incorporation of the company. *Paragraph (b)* provides that where the last person who is a director of the company and is resident in a state of the EEA ceases to be a director, details of the bond will have to be notified to the CRO as part of the package of notifications of the cessation of the director holding the position that are made at that time. *Paragraph (c)* provides that details of the bond must be submitted with the annual return relating to a period during which there is no person as director who is resident in a state of the EEA.

*Section 139* contains the obligation on the last person who is a director of the company and who is resident in a state of the EEA and who ceases to be a director to make a notification in writing to the Registrar of the fact that he or she has ceased to be a director, as well as the fact that there are no other directors of the company who are resident in the State or he or she was the sole director of the company. This obligation is on the director as opposed to the requirements in *section 149* which fall at the present time on the company. The purpose of this requirement is essentially to alert the Registrar to the fact that a company no longer has a resident director in a state of the EEA. This would enable the Registrar to question whether the company has, in lieu, a bond, as required by *section 137 (2)* or whether there is an exemption certificate under *section 140*.

*Subsection (2)* corresponds with section 43(10) C(A)A (No 2) 1999. The purpose of this subsection is to offer protection to the outgoing resident director of a company, who notifies the registrar, that to his or her knowledge, there is no other director of the company, resident in the a state of the EEA. This protection is considered necessary, as the information notifying that there is no other director of the company resident in a state of the EEA may not be totally accurate. The absence of such protection might act as a deterrent to compliance with the obligation in *section 139(1)*.

*Subsection (3)* corresponds with the first part of section 43(11) C(A)A (No 2) 1999, which provides that where the last resident director in a state of the EEA fails to comply with *subsection (1)*, that person shall be jointly and severally liable with the company for any fine or penalty that may be imposed under *section 138(2)*. *Subsection (4)* corresponds with the end of section 43(11) C(A)A (No 2) 1999 and it provides that any such fine or penalty can be recovered from the person as a simple contract debt in any court of competent jurisdiction. The objective here is to provide the easiest possible mechanism for bringing proceedings against such errant director.

*Subsection (5)* here is the same as *section 137(7)* which corresponds with section 43(16) C(A)A (No 2) 1999. It is repeated here because it also applies to this section.

*Section 140* contains provisions which are supplemental to the requirement that every company must have a director who is resident in a state of the EEA. It provides a mechanism whereby a company which can show that it has a real and continuous link with one or more economic activities being carried on in the State can be exempted from the requirement to have a director who is resident in a state of the EEA. This determination will involve the Revenue Commissioners and the Registrar. Where a company can satisfy the Registrar that it has a real and continuous link with one or more economic activities that are being carried on in the State, the Registrar may grant a certificate under this section. Where the Registrar grants a certificate, it has the effect of exempting the company from

the necessity to have a director resident in a state of the EEA. The Registrar will not grant a certificate unless he or she is satisfied, on the basis of a statement which will be given in writing by the Revenue Commissioners to the company, that the company has a real and continuous link with one or more economic activities that are being carried on in the State. This section is an amended version of section 44 of the Companies (Amendment) (No.2) Act 1999.

*Subsection (1)* provides that the requirement that every company must have a director resident in a state of the EEA will not apply to a company which has been granted a certificate by the Registrar of companies under this section. The main reason for requiring every company to have a director who is resident in a state of the EEA is to identify a person who can be made responsible for compliance with, in particular, Revenue requirements in relation to a company which is registered in the State being treated as resident for tax purposes. While *sections 137* and *138* (which along with *section 139* correspond with section 43 CA 1999) set out the alternative of a bond which could also be called upon where a company is found not to comply with the basic requirement, this section (which corresponds with section 44 CA 1999) is designed to operate an alternative mechanism. Essentially, where the company can show that it has a real and continuous link with an economic activity in the State, the certificate can be granted. What this means, in effect, is that there will be some individual that can be identified within the State if a company fails to comply with its tax requirements.

*Subsection (2)* corresponds with section 44(2) C (A)A (No 2) 1999 and provides that the Registrar may grant a certificate to a company stating that the company has a real and continuous link with one or more economic activities that are being carried on in the State.

*Subsection (3)* corresponds with section 44(3) C(A)A (No 2) 1999 and it simply provides that the Registrar is not entitled to grant a certificate unless he or she is presented by the company with proof that it has a link with the State. The following subsection provides how that proof may be supplied to the Registrar. *Subsection (4)* corresponds with section 44(4) C(A)A (No 2) 1999 and it builds on the earlier requirements by providing that, where the Revenue Commissioners furnish a statement as set out in the following subsection, that will be deemed to be proof of the matter in question. This then will be a straightforward procedure of the Registrar accepting the statement as being proof of the matter in question.

*Subsection (5)* corresponds with section 44(5) C(A)A (No 2) 1999. It sets out the manner in which the statement will be obtained from the Revenue Commissioners. In the first place, the statement will have to be obtained in the period of two months preceding the date on which the application to the Registrar is made. Secondly, the Revenue Commissioners will be required to have reasonable grounds to believe that the company has the real and continuous link with one or more economic activities being carried on in the State. It will be for the Revenue authorities to determine the precise manner in which they will be able to be satisfied in this regard. *Subsection (6)* corresponds with section 44(6) C(A)A (No 2) 1999 and it deals with circumstances where, having already given a certificate, the Registrar receives information which shows that a company has ceased to have the real and continuous link with any economic activity being carried on in the State. In such circumstances, the Registrar is obliged to revoke the certificate. The next subsection deals with how such information could come into the domain of the Registrar. Essentially, it would be a notification from the Revenue Commissioners that this was now their view of the situation. *Subsection (7)* corresponds with the beginning of section 44(7) C(A)A (No 2) 1999 and it enables the Revenue Commissioners to inform the Registrar where information comes into their possession that a company no longer has a real and continuous link with an economic activity carried on in the State. *Subsection (8)* also corresponds with the end of section 44(7) C(A)A (No 2) 1999 and it clarifies that in making such disclosure to the Registrar, the Revenue Commissioners will not be breaching any obligations as to secrecy or any other restrictions upon disclosure under any statute under which they operate. *Subsection (9)* sets out the methods by which a company can prove that it has a real and continuous link with an economic activity that is being carried out in the State.

*Section 141* contains provisions for determining whether a director is resident in the State. *Paragraph (a)(i)* of *subsection (1)* provides that a person is resident if he or she has been present for an aggregate of at least 183 days or more in any twelve month period. The 183 days does not have to be consecutive. *Paragraph (a)(ii)* provides an alternative, and, put simply, provides that if a person has been present for an aggregate of 280 days over two twelve month periods, then he or she will also be regarded as resident, subject to the qualifications which follow in the next subsection. *Paragraph (b)* provides that where a person elects, under section 819(3) of the Taxes Consolidation Act 1997, to be treated as resident, this can also be accepted for the purposes of these provisions. *Subsection (2)* qualifies the aggregate of 280 days in the previous period of two twelve month periods, mentioned in *subsection (1)(a)(ii)*, and provides that in the immediate twelve month period, the person must have been present for at least 30 days. In other words, a person must have a minimum of 30 days in the previous twelve months - it would not be sufficient for that person to have 260 days in the penultimate twelve month period and then just 20 days in the immediate twelve month period.

*Subsection (3)* lays down what is meant by being present in the State. *Paragraph (a)* provides that the person must be personally present in the State. *Paragraph (b)* provides that the person is present where he or she is present in the State at any time during the day as opposed to at the end of the day. This change aligns the provision with the Taxes Consolidation Act 2001. This will ensure consistency of treatment as regards the residence of directors for taxation and company law purposes.

This section is drawn from section 44 of the Companies (Amendment) (No.2) Act 1999 and is subsequently amended by section 10 of the Companies (Amendment Act) 2009.

*Section 142* provides that the number of companies of which a person can be a director remains at 25, subject to certain exemptions. In certain instances, directorships of particular types of companies are excluded from the calculation (including PLCs); in other cases, an application must be made to the Registrar or the Minister who have to be satisfied that the company can be certified as falling within certain specified categories. The power to prosecute is covered in *Part 14* of the Act. *Subsections (2) to (5)* contain certain matters to be taken into account when determining whether a person is to be treated as a director at a particular time in the context of the limitation of 25 directorships. *Subsection (6)* provides that where a notice is submitted to the Registrar, the Registrar will be able to accept the information contained therein that a company falls into a category specified in the Table to this section where this information is set out in a declaration, in the prescribed form. The wording "statutory" is removed and replaced with "declaration" to bring the section in line with the rest of the Act. *Subsection (7)* provides an appeal mechanism in circumstances where the Registrar refuses to make or give the necessary certification under the previous *subsection 4(a)*. *Subsection (8)* provides for an administrative mechanism that allows a person who is proposing to become a director of a company to make application to the Registrar, and, effectively seek dispensation in advance. This facilitates certainty where doubt might otherwise arise in relation to the validity of the appointment. *Section 142* derives from section 45 of the Companies (Amendment) (No.2) Act 1999.

*Section 143* provides that an appointment as a director made in contravention of the limitation will be void and a person contravening the limitation will be guilty of a category 4 offence. It is the person accepting appointment rather than the company itself who commits the offence. An appointment which brings the number of a person's reckonable directorships above the permitted limit of 25 is automatically void. Each and every invalid appointment constitutes an offence. In the case of multiple appointments made on the same day or made at times which cannot be distinguished from one another, the order of appointment is deemed to be the same as the order in which the appointments are registered in the Companies Registration Office. This section derives from section 45(8) to (12) of the Companies (Amendment) (No.2) Act 1999.



*Section 144* requires a director to consent to his or her appointment – if the consent is not provided, the appointment is void. *Subsection (3)(a)* and *subsection (4)* import, in a slightly amended manner, Model Regulation 96 of Part I of Table A of the First Schedule to the Companies Act 1963. *Subsection (3)(a)* has been amended to state that it relates to the appointment by the members of subsequent directors in general meeting. If the person to be put forward is in their view undesirable in any way, they can then prepare their opposition to him or her more efficiently. A further object is to ensure that the newcomer expressly agrees in writing to being put forward as a director. *Subsections (3)(b)* and *(c)* import, in a slightly amended manner, Regulation 98 of Part I of Table A. The new director, provided for in *subsection (3)(c)* will hold office only until the next annual general meeting. The principle underlying this is that the filling of a casual vacancy by the directors shall be regarded only as a temporary measure until the company has the next opportunity of dealing with the situation. When the company meets at its next annual general meeting, it can continue the situation where this director is holding office as it is specifically provided that he or she will be eligible to re-election, although he or she is not to be taken into account by determining which directors are to retire by rotation. *Subsection (3)(d)* imports, in a slightly amended manner, Regulation 97 of Part I of Table A. The part of the regulation that refers to the retirement of directors by rotation has been deleted. *Subsection (3)(e)* imports, in a slightly amended manner, Model Regulation 100 of Part I of Table A. This relates to the replacement of directors removed under *section 146*. *Subsection (5)* states that, subject to *Subsection (1)*, in the case of a single-member company, the sole member may appoint a person to be a director of the company by serving a notice in writing on the company which states that the named person is appointed director.

*Section 145* provides that a motion for the appointment of 2 or more persons as directors by a single resolution shall not be made unless a resolution that it shall be so made has first been agreed to without any vote against it. *Subsection (2)* provides that a resolution moved in contravention of this section shall be void, whether or not this was objected to at the time. The purpose of *subsection (3)* is to ensure that the avoiding provision in *subsection (2)* will not prejudice the universal application of *section 135* (which provides that the acts of a director shall be valid notwithstanding any defect in his or her appointment or qualification which may be discovered afterwards) – in other words, if a director is improperly appointed in contravention of *subsection (1)* of this section, his or her acts will, by virtue of *section 135*, be valid. The effect of *subsection (4)* is that where a director is appointed improperly in contravention of *subsection (1)*, any provision to this effect in the company's constitution providing for automatic re-appointment of retiring directors will not apply to him or her. *Subsection (5)* deals with situations where, for instance, directors are appointed by some other person, subject to approval of the company, or where directors are nominated by the company subject to approval by some other person. *Subsection (6)* addresses situations where directors are named in the company's constitution and where it is desired to change their relevant provision. A resolution for the alteration of a company's constitution must be a special resolution requiring a majority of 75%; if such a resolution is passed in regard to a block of directors nominated in the constitution, it can fairly be said to represent the wishes of the company. This section is a slightly amended version of section 181 of the Companies Act 1963.

*Section 146* empowers shareholders to remove any director with whom they are not satisfied by passing an ordinary resolution. A director may be removed by ordinary resolution except in the case of a director who holds the office for life. *Subsection (3)* requires that even though directors may be removed by ordinary resolution requiring only a simple majority, extended notice (28 days) must be given of the resolution. A copy of the notice of a resolution to remove a director must also be sent to the director by the company. *Subsection (5)* sets out a situation where the time requirements in *subsection (3)(a)* have not been complied with, but the notice will be deemed to have been properly given nonetheless. The object of *subsection (6)* is to enable the director to defend him or herself by making representations. *Subsection (7)* deals with a situation where a copy of the representations is not sent as required by *subsection (6)*. *Subsection (8)* gives the court the power to disregard *subsections (6)* or *(7)*, if, on the application of either the company or any other person claiming to be

aggrieved, the court is satisfied that the representations contain defamatory matter and it is satisfied that there is no need to publish it. *Subsection (9)* relates to costs. *Subsection (10)* provides that where a director is removed from office, a director may be appointed to take his or her place at the same meeting. The effect of *subsection (11)* is to place the new director in the shoes of the old one, and enable him or her to finish out the old director's term of office. This section derives from section 182 of the Companies Act 1963.

*Section 147* derives from section 182(7) of the Companies Act 1963 and provides that the removal of a director from office shall not affect any rights to compensation or damages which he or she may have and it will not affect any power to remove a director that may exist apart from that section.

*Section 148* requires the office of director to be vacated if a director is adjudged bankrupt, or, if that director, being a bankrupt, has not obtained a certificate of discharge in the relevant jurisdiction, or, if that director becomes or is deemed to be subject to a disqualification order. *Subsection 2(a)* provides that, save to the extent that the company's constitution provides otherwise, the office of the director must also be vacated if the director resigns his or her office by notice in writing to the company. *Subsection 2(b)* provides that the office of director shall be vacated if the health of the director is such that he or she can no longer be reasonably regarded as possessing an adequate decision making capacity. The provision no longer utilises the outdated term "unsound mind". While the term is legally sound, it does not represent everyday language and understanding of situations where a director is no longer for medical reasons capable of fulfilling his or her functions as a company director. The wording utilised in this subsection is more in line with the wording used in the equality legislation in Ireland.

*Subsection 2(c)* provides that the office of director shall be vacated if a declaration of restriction is made in relation to the director. *Subsection 2(d)* is taken, in substance, from Model Regulation 91(f) of Part I of Table A of the First Schedule to the Companies Act 1963. A new requirement that the conviction must give rise to a sentence to a term of imprisonment (actual or suspended) has been inserted. *Subsection 2(e)* is taken, in substance, from Regulation 91(g) of Part I of Table A. *Subsection (3)* clarifies that in subsection (2)(d), the word "imprisonment" includes suspended prison terms. This section substantially reproduces Regulation 91 of Part I of Table A. Other subsections which are re-enacted in this section are section 183 CA 1963 and sections 150 and 160 of the Companies Act 1990.

*Section 149* is substantially derived from section 195 of the Companies Act 1963, as inserted by section 51 of the Companies Act 1990.

*Subsection (1)* sets out the basic rule that a company must keep a register of its directors and secretaries at its registered office. *Subsection (2)* provides the particulars that are required to be entered into the register concerning each director. However, this is now subject to the new *section 150(11)* which grants powers to make regulations in relation to the non-disclosure of residential addresses on the public register kept by the Registrar. In certain limited circumstances, company officers will be granted an exemption from listing their residential address on the public register. Such addresses will be kept separately by the Registrar who in turn will be granted powers to release such addresses to relevant authorities, for example, the Revenue Commissioners and An Garda Síochána.

The time period in *subsection (4)* has been amended from 10 years to 5 years. *Subsection (3)* states that rights of inspection etc. provided for elsewhere in the Act apply to the register.

*Subsection (5)* provides what the register must show for secretaries – being the name, former name, his or her date of birth and usual residential address in the case of an individual. If the secretary is a

body corporate, its corporate name, its registered office, the register in which it is registered and the number under which it is registered therein is also required.

*Subsection (6)* states that where all the partners of a firm are joint secretaries, the name and principal office of the firm may be stated instead.

*Subsection (7)* is new and provides the particulars that are required to be contained in the register as required by *subsection (5)* shall be the same for any assistant or deputy secretary.

*Subsection (8)* deals with the notification requirements to the Registrar when there have been changes in a director or secretary or assistant or deputy secretaries or any related particulars.

*Subsection (9)* deals with the case where a person is the director of more than one company and applies specific provisions in relation to notification in this regard.

*Subsection (10)* deals with the consent signed by the person who is acting as director, secretary, joint secretary, assistant or deputy secretary and it is slightly amended compared with section 195(7) CA 1963 as it also now deals with the situation where all the partners in the firm have been appointed joint secretaries of a company. In this situation, one partner on behalf of the firm shall sign the consent which accompanies the notification referred to in *subsection (8)*.

*Subsection (11)* cross-references *sections 223* and *226* on directors and secretaries duties respectively and highlights the requirement to include a particular statement in the forgoing consent by the director or secretary.

*Subsection (12)* is drawn from section 195(15) CA 1963 and clarifies the use of the terms “surname” and “former forename”. The subsection now makes provision for a ‘married person’ and ‘civil partner’ and makes the section gender neutral by providing his/her.

*Section 150* contains provisions supplemental to *section 149* above. It deals with the situation where a director is disqualified under the law of another state from being appointed or acting as director or secretary of a body corporate or an undertaking. Where this occurs, he or she must ensure that the statement delivered to the Registrar is accompanied by a separate document in the prescribed form, signed by him or her specifying the jurisdiction in which he or she is disqualified, the date on which he or she became disqualified and the period of his or her disqualification. This section derives in part from section 195 of the Companies Act 1963.

*Subsection (3)* provides that it is the duty of each director and secretary and assistant or deputy secretary of a company to give information in writing as soon as may be of such matters to enable the company to comply with the requirements of *section 149*.

*Subsection (4)* provides that in default of compliance with *section 149(1), (2), (5), (7), (8)* or *(10)*, a category 3 offence will apply. Under *subsection (5)*, a category 3 offence applies for default of compliance with *section 150(1)*. Similarly, *subsection (6)* states that a category 3 offence applies for default of compliance by the second mentioned person under *section 150(2)*.

*Subsection (8)* states that it is the duty of a company to make reasonable enquiries of a person, on his or her appointment as director, to ascertain whether the requirements of *subsection (2)* should be complied with by that person in relation to that appointment. However, a failure of a company to make these enquiries will not relieve the person of his or her obligations under *section 150(2)*.

*Subsections (9)* and *(10)* are new and make provisions for foreign disqualification orders under the Act. In this section directors who have become subject to disqualification under the law of another

state are required to declare that fact to the Companies Registration Office within a prescribed period of time of the commencement of the relevant provisions of the Act. Failure to comply with the disclosure requirement will constitute an offence. It is now provided that foreign disqualification orders made before the commencement of the Act are declared. Prior to the introduction of the amendment, there was a gap in the law concerning the position of a director who, after the appointment to the board of directors of the Irish company but prior to the commencement of the Act, had become subject to a disqualification order under the law of another state. The Act had only required disclosure of the foreign order made after commencement of the Act. This amendment addresses this gap by providing that foreign disqualification orders made before the commencement of the Act are declared.

*Subsection (11) and (12)* are new. The Minister is granted powers to make regulations in relation to the non-disclosure of residential addresses on the public register kept by the Registrar. In certain limited circumstances, company officers will be granted an exemption from listing their residential address on the public register, provided their address has not been previously published on the CRO. Such addresses will be kept separately by the Registrar who in turn will be granted powers to release such addresses to relevant authorities, for example, the Revenue Commissioners and An Garda Síochána.

*Section 151* deals with the particulars to be shown on all business letters of the company and derives from section 196 of the Companies Act 1963 and Regulation 9 (1) and (2) of the European Communities (Companies) Regulations 1973 as amended by the European Communities (Companies) (Amendment) Regulations 2007 (S.I. No. 49 of 2007). *Subsection (1)* sets out the rule as to what is required on business letters of companies regarding information on directors. *Subsections (2) and (3)* are amended versions of Regulation 9(1) and (2) of the European Communities (Companies) Regulations 1973. *Subsection (2)* sets out further information required in addition to that in *subsection (1)*. If there is a reference to the share capital of the company on its letters or forms, *subsection (3)* requires that the reference only be to the issued share capital of the company that is paid up. If the company has a website, *subsection (4)* provides for what information must be stated on it in relation to the company. *Subsection (5)* is the same as section 196(2) CA 1963 and allows the Minister to grant an exemption from these requirements. *Subsection (6)* states that the company and any officer of the company, who is in default of the provisions of this section will be guilty of a category 4 offence. *Subsection (7)* contains definitions to aid in the interpretation of this section.

*Section 152* is a slightly amended version of section 195(11A) to (11D) of the Companies Act 1963, as inserted by section 47 of the Companies (Amendment) (No. 2) Act 1999. These subsections have been given a new stand-alone section to enhance clarity as section 195 CA 1963 was seen as too long. *Subsections (1), (2) and (3)* provide that where the company fails to send the notification of a person having ceased to be a director or secretary, the person concerned is then empowered to serve a notice on the company as set out in *section 3(a) and (b)*. *Subsection (4)* corresponds with section 195(11B) CA 1963 - this provides that the former director or secretary may supply evidence directly to the Registrar together with evidence that they have informed the current officers in accordance with *subsection (3)(b)*. *Subsection (5)* corresponds with section 195(11C) CA 1963. It was designed to ensure that the Registrar is not obliged to accept any notifications other than those which comply completely and fully with the requirements of *subsections (1) to (4)* or *section 140*. This is to ensure that the Registrar will not be inundated with half complete notifications, and can insist on having everything complete in every respect before he or she takes such notification into account. *Subsection (6)* corresponds with section 195(11D) CA 1963 and provides that no representation made pursuant to this section to the Registrar will be regarded as constituting defamatory matter.

*Section 153* provides that any assignment of office by the directors has no effect until approved by a special resolution of the company. It is derived from section 199 of the Companies Act 1963.

### **Chapter 3** Service Contracts and Remuneration

*Section 154* makes provision for inspection by members of a company of copies of directors' service contracts, or memoranda of those contracts not in writing. This is to give the members a true and complete indication of the obligations of the company to the director. These must be kept at the company's registered office, the place where the register of members is kept if this place is not the registered office, or its principal place of business. *Subsection (1)* states that a company shall keep the documents specified in *paragraphs (a) to (d)* at the same place. *Subsection (4)* deals with the situation where a director is required by his or her contract to work wholly or mainly outside the State. *Subsection (5)* is the offence provision and provides any officer who is in default shall be guilty of a category 3 offence. *Subsection (6)* describes contracts that are not required to be kept for inspection. This section derives from section 50 of the Companies Act 1990.

*Section 155* provides for the remuneration of directors where a company's constitution does not deal with these matters. *Subsection (2)* provides that the remuneration will be determined from time to time by the board of directors and that it will be deemed to accrue from day to day. *Subsection (3)* makes provision for the payment to directors of their expenses properly incurred.

*Section 156* derives from section 185 of the Companies Act 1963. Tax-free payments to directors are prohibited – an exception is made in the case of contracts in force on 31st March 1962. A reference to the universal social charge is newly inserted.

### **Chapter 4** Proceedings of directors

*Section 157* was inserted to aid the readability of the subsequent sections. Each of the subsequent provisions of this Chapter (other than *sections 166* and *167*) applies save to the extent that the company's constitution provides otherwise. The sections concerned derive from the Model Regulations in the Schedules (Table A) to the Companies Act 1963.

*Section 158* relates to general power of management and delegation. *Subsections (1)* and *(2)* import Model Regulation 80 of Part I of Table A of the First Schedule to the Companies Act 1963. *Subsection (1)* states that the business of a company must be managed by its directors and that the directors may exercise all such powers of the company as are not, by this Act or by the constitution, required to be exercised by the company in general meeting. The delegation of the powers of management is subject to three express qualifications; (a) any regulations contained in the constitution; (b) the provisions of this Act, and; (c) subject to directions given by the members. *Subsection (2)* provides that any directions made by the members to the directors will not invalidate prior acts of the directors. *Subsection (3)* reflects the law as it stood prior to the introduction of the Act but it also helpfully clarifies that directors are granted powers to borrow money and create charges. Prior to the introduction of the Act, virtually all companies' articles of association adopted a modified form of Regulation 79 of Part 1 of Table A which provides that the directors are authorised to borrow money and create security. The purpose of the default statutory provisions is to cover the

maximum possible provisions which will be common to most companies. *Subsection (4)* derives from Regulation 105 of Part I of Table A and provides directors with a power to delegate to committees.

*Section 159* sets out provisions relating to the appointment of a managing director. The words “...(by whatever name called)...” have been inserted in recognition of the fact that the title of managing director may be phrased in different ways (for example, “CEO”). *Subsection (3)* replicates Model Regulation 111 of Part I of Table A of the First Schedule to the Companies Act 1963 and it provides that managing director’s remuneration shall be as the directors determine. *Subsections (4) to (6)* apply Regulation 112 of Part I of Table A and they deal with the powers that may be conferred upon managing directors.

*Section 160* concerns meeting of directors and committees and replicates various provisions of the Model Regulations of Part I of Table A of the First Schedule to the Companies Act 1963. It also gives effect to certain recommendations of the First Report of the Company Law Review Group. *Subsections (1) to (5)* import, in an amended manner, Regulation 101 of Part I of Table A. The requirement of “reasonable notice” of any meeting of the directors has been included in *subsection (4)*. The reason for this is that the courts, in *Holland v McGill* (16th March 1990, Unreported High Court decision) have held that such a requirement already exists. Thus, the common law requirement is now being included for the purpose of completeness. It is also stated in *subsection (5)* that no person other than a director may object to the notice given for directors’ meetings. This safety measure has been included to prevent third parties or outsiders challenging a resolution of the directors on the basis that insufficient notice for the meeting at which it was passed was given.

*Subsection (6)* brings forward Regulation 102 of Part I of Table A. Certain amendments were necessary in order to recognise the possibility of a single-director private company limited by shares. *Subsection (7)* is similar to Regulation 103 of Part I of Table A. The reference to the fixing of the quorum by “the regulations” has been replaced by a reference to the quorum instead being fixed by “this Act”. *Subsection (8)* applies Regulation 104 of Part I of Table A. The time period which is allowed for the chairperson to arrive at the meeting has been extended from 5 to 15 minutes. *Subsection (9)* provides that the directors may establish one or more committees consisting in whole or in part of members of the board of directors. *Subsection (10)* applies Regulation 106 of Part I of Table A. Again, the time period which is allowed for the chairperson to arrive at the meeting has been extended from 5 to 15 minutes. *Subsections (11) and (12)* apply Regulation 107 of Part I of Table A. They provide that a committee may meet and adjourn as it thinks proper, and that questions arising at any meeting of a committee shall be determined by a majority of votes of the members. Where there is an equality of votes, the chairperson shall have a casting vote.

*Section 161* contains supplemental provisions about meetings. The purpose of *subsection (1)* is to enable the directors to decide on any particular matter without coming together at a formal meeting. Meetings of a committee of directors have also been included in this section. A clarification regarding committees has been newly inserted. As committees are also to be allowed use written resolutions, reference to them is included. Therefore, committees of directors, as well as the full board of directors, may proceed by means of a unanimous written resolution.

*Subsections (2) to (4)* are new. *Subsection (2)* provides that where a minority of the directors are (pursuant to statute, the company’s constitution or a rule of law) unable to vote on a resolution of the directors, that minority may nonetheless sign such a resolution in writing.

*Subsection (5)* is new and gives effect to the recommendation of the Company Law Review Group in its First Report that the possibility of the directors signing a written resolution on separate pieces of paper be recognised. *Subsection (6)* is also new and provides that a directors meeting shall be valid if it consists only of telephone or other suitable electronic means, once all the directors can hear and be

heard. *Subsection (7)* replicates Model Regulation 7 of Part II of Table A of the First Schedule to the Companies Act 1963. It gives a general authority to directors to vote in respect of contracts, appointments or arrangements in which they are interested. *Subsections (8) and (9)* import Regulation 8 of Part II of Table A and deal with the issue of the use of the votes to which the company is entitled by virtue of shares which it holds in any other company. These subsections authorise the use of these voting powers in favour of a resolution appointing the directors as directors or officers of the other company. In addition, any director is empowered to vote in favour of the exercise of the company's voting powers in a manner which will be beneficial to him or herself.

*Section 162* provides that a director may hold some other office or place of profit in the company. In this regard, a secretary of the company may also be one of the directors. The office of auditor is specifically excluded as there is a statutory prohibition in the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 (S.I. No. 220 of 2010) to the effect that an officer or servant of the company shall not be qualified to act as auditor (by definition "officer" includes "director"). It should be noted that while a director is authorised by this section to hold an office of profit under the company, he or she cannot, under the following *section 163* (which was the old Model Regulation 86 in Part I of Table A of the First Schedule to the Companies Act 1963), vote on his or her own appointment to such an office, although that person may be counted in the quorum.

*Section 163* brings forward Model Regulation 86 of Part I of Table A of the First Schedule to the Companies Act 1963. It provides that a director may be counted in the quorum present at any meeting at which that director or any other director is appointed or where the terms of appointment are arranged. A director is not however permitted to vote on his or her own appointment or the arrangement of the terms thereof.

*Section 164* provides that such instruments listed in *paragraphs (a) and (b)* (i.e. cheques, promissory notes, receipts etc.) must be executed in whatever manner appropriate by such person or persons and in such manner as the directors of the company shall from time to time determine. This section brings forward Model Regulation 88 of Part I of Table A of the First Schedule to the Companies Act 1963.

*Section 165* provides for the appointment of an alternate director. This section is derived from Model Regulation 9 of Part II of Table A of the First Schedule to the Companies Act 1963.

*Section 166* provides that every company shall keep minutes of all appointments of officers, names of directors present and all resolutions and proceedings at all meetings. *Subsection (5)* has the effect of giving the Director of Corporate Enforcement access, on demand, to the minute books of a company in order to inspect or take copies of their contents. It is an offence for a company to refuse to allow inspection of its minute books by the Director of Corporate Enforcement. This section derives from section 145 of the Companies Act 1963, as amended by section 19 of the Company Law Enforcement Act 2001.

*Section 167* requires the establishment of audit committees by boards of directors of large companies. The term "large company" means a company whose balance sheet total exceeds €25 million (or such other amount prescribed under *section 943(1)(i)*) and whose amount of turnover exceeds €50 million (or such other amount prescribed under *section 943(1)(i)*) in both the most recent financial year and the immediately preceding financial year, or if the company and all of its subsidiary undertakings together meet the above balance sheet and turnover criteria. *Subsection (3)* requires the board of directors of a large company to state in their report under *section 325* whether the company

has established an audit committee or, if the company has decided not to establish such a committee, the reasons for that decision. *Subsection (4)* and *(5)* stipulate that at least one independent director must sit on the committee and lay down other applicable criteria in relation to this independent director. *Subsection (6)* requires the independent director to have competence in accounting or auditing, or, where there is more than one independent director, at least one of them must have such competence. The responsibilities of the audit committee are set out in *subsection (7)*. *Subsection (10)* states that a non-executive director is a director who is not engaged in the daily management of the large company or body concerned, as the case may be. *Subsection (11)* states that where a director of a large company fails to take all reasonable steps to comply with the requirements of *subsection (3)*, that director shall be guilty of a category 3 offence.

This section amends section 205B of the Companies Act 1990, as inserted by section 42 of the Companies (Auditing and Accounting) Act 2003.

## Chapter 5 Members

*Section 168* re-enacts section 31 of the Companies Act 1963 and gives the definition of “member”. The subscribers to the constitution shall be deemed to have agreed to become members of the company and, on its registration, shall be entered in the register of the company as members. Every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company.

*Section 169* outlines the information that is required to be entered on the register of members. *Subsections (3)* and *(4)* provide a time limit within which the required entries in *subsection (1)(a)* to *(c)* must be made by the company. *Subsection (5)* provides that in cases where shares have been converted into stock and have been notified to the Registrar, the register must show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares specified in *subsection (1)(a)*. This section derives from section 116 of the Companies Act 1963 as amended by section 20 of the Companies (Amendment) Act 1982.

*Section 170* states that trusts are not to be entered on the register of members or any register kept by the Registrar. This derives from section 123 of the Companies Act 1963.

*Section 171* re-enacts section 124 of the Companies Act 1963 and provides that the register is *prima facie* evidence only of the matters contained therein.

*Section 172* provides that liability attaches to a third party agent on default of compliance with *section 169* or *section 216* of the Act or with any of the provisions regarding production of the register. This derives from section 120 of the Companies Act 1963.

*Section 173* sets out the circumstances in which a person, member or company may apply to the court for rectification of the register. *Subsections (5)* and *(6)* provide that the company has a statutory power to rectify any error or omission in the register but rectification will not be allowed to affect adversely any person unless they agree to the rectification being made. The company must give notice in the prescribed form of the rectification to the Registrar within 21 days. *Subsection (6)* now allows the Minister to prescribe the form of notice to be given under this subsection. This will minimise the risk of the Companies Registration Office being sent non-standard and ambiguous notice of repetition of errors under *subsection (6)* of this section. *Subsection (7)* is new and provides that an



error or omission relating to the amount of the company's issued share capital may be rectified subject to *subsection (6)*. This section re-enacts section 122 of the Companies Act 1963.

*Section 174* re-enacts section 121 of the Companies Act 1963 and it permits a company to close the register for up to 30 days per year, if this is advertised in advance.

## **Chapter 6**

### General meetings and resolutions

*Section 175* sets out the requirements and the formalities to be adhered to in the conduct of annual general meetings (AGMs). There remains the obligation on and LTD to hold an AGM within 18 months of its incorporation, it need not hold it in the year of its incorporation, or in the following year. *Subsection (3)* is new and was inserted in accordance with the recommendations of the First Report of the Company Law Review Group to allow a multi member private limited company to dispense with the requirement to hold an AGM. Now every LTD and not only single member LTDs may avail of the exemption which provides they need not hold an AGM in any year where all the members entitled to vote at such general meeting sign, before the latest date for the holding of that meeting, a unanimous written resolution under *section 193* –

- (a) acknowledging receipt of the financial statements that would have been laid before the AGM;
- (b) resolving all such matters as would have been resolved at that meeting; and
- (c) confirming no change is proposed in the appointment of the person (if any) who, at the date of the resolution stands appointed as statutory auditor of the company.

*Subsection (4)* provides that without prejudice to any specific provisions providing for the contingency of an AGM being dispensed with, where a provision of the Act requires that a thing is to be done at an AGM then, if it is dealt with in the foregoing resolution (whether by virtue of the matter being resolved in the resolution, the members' acknowledging receipt of a notice, report or other documentation or, as the case may require, howsoever otherwise) that requirement shall be regarded as having been complied with.

*Subsections (8)* and *(9)* provide that where a meeting is not held in the year in which the default in holding the AGM occurred, the meeting so held shall not be treated as the AGM for the year in which it was held unless at the meeting the company resolves that it shall be so treated. Where a company decides that a meeting shall be so treated, a copy of the resolution must be delivered to the register within 21 days after it was passed. *Subsections (10)* and *(11)* contain the offence provisions for contravention of *subsections (1), (5)* or *(9)* and state it will be a category 3 or category 4 offence to act in contravention of this section. This section derives from section 131 of the Companies Act 1963.

*Section 176* allows for AGMs or EGMs of a company to be held inside or outside the State. *Subsections (2)* and *(3)* provide that all the members must consent in writing to the meeting being held outside of the State and, if they do not so consent, there is a duty on the company to incur the cost of participation (by technological means) for the members without having to leave the State. *Subsection (4)* gives effect to the recommendations of the First Report of the Company Law Review Group that it should be possible to hold general meetings in more than one venue. This section is new and replaces section 140 of the Companies Act 1963.

*Section 177* states that all general meetings of a company, other than annual general meetings shall be known as extraordinary meetings (EGMs). *Subsection (2)* provides that the directors of a company may call an EGM. Previously, the articles of association of most companies provided that the directors could convene an EGM: they were not obliged so to provide, but the vast majority did. This has been changed by *subsection (2)* which provides that the directors of a company may, whenever they think fit, convene an EGM, and while not expressly stated, it is implicit that this is irrespective of what the constitution provides. Moreover, *subsection (3)* provides where there are

insufficient directors capable of acting to form a quorum for a directors' meeting, then any director or any member may convene an EGM in the same manner (as nearly as possible) as that in which meetings may be convened by the directors. This section derives from Model Regulations 49 and 50 of Part I of Table A of the First Schedule to the Companies Act 1963.

*Section 178* deals with the way in which members can convene extraordinary general meetings. *Subsection (1)* states the extent to which the various rights conferred by this section have effect. *Subsection (2)* amends section 134(b) CA 1963. It now provides that where one or more members of a company hold not less than 50% of the paid up share capital (or such other percentage as may be specified in the constitution of the company), they will have the right to vote at general meetings and the right to convene extraordinary general meetings. *Subsection (3)* provides for the directors duty to convene an extraordinary general meeting when requisitioned by members holding not less than 10% of the paid up share capital of the company. This re-enacts section 132(1) CA 1963. *Subsections (4) to (8)* re-enact section 132(2), (3), (5), (6) and (4) CA 1963 respectively and contain additional provisions in relation to the requisition of meetings under this section. The section is drawn from section 132 and section 134(b) of the CA 1963.

*Section 179* provides for the enhancement of the power of the court to convene a meeting of a company. Under the 2014 Act, the court may make an order requiring a general meeting to be called, held and conducted in any manner that it thinks fit, where it is satisfied that for any reason it is impractical or otherwise undesirable for any person to call a general meeting in any manner in which meetings of that company may be called, or to conduct a general meeting of the company in any manner provided by the Act or the constitution. *Subsection (3)* specifies the people that may apply to the court for such an order, and it includes personal representatives of deceased members and the assignee in bankruptcy or a bankrupt member of the company (which member would be entitled to vote at such a meeting). This excludes, for example, preference shareholders without voting rights, who are more like creditors than shareholders in nature, and generally do not have the right to participate in the governance of the company. *Subsection (6)* states that a meeting under this section shall for all purposes be deemed to be a meeting of the company duly called, held and conducted. This section derives from section 306 of the UK Companies Act 2006 and it replaces section 135 of the Companies Act 1963.

*Section 180* confers a statutory right on the persons entitled to receive a notice of every general meeting. It states that every member (whether or not they are entitled to vote), the personal representative of a deceased member who has the right to vote, the assignee in bankruptcy of a bankrupt member (who has the right to vote), and the directors and secretary of the company are entitled to receive a notice of every general meeting. *Subsection (2)* deals with joint holders of shares. *Subsections (3) and (4)* apply Model Regulation 135 of Part I of Table A of the First Schedule to the Companies Act 1963 and deal with the practicalities of the giving of notice to persons entitled to a share in the company as a result of the death or bankruptcy of a member. *Subsection (5)* imports the final phrase of Regulation 136 of Part I of Table A in providing that no persons other than those mentioned in this section shall be entitled to notice of a general meeting. *Subsection (6)* makes provision in relation to the giving of notice to statutory auditors and is drawn from section 193(5) of the Companies Act 1990. Where a company has auditors they too shall be entitled to attend, receive notices and other communications relating to general meetings and be heard at general meetings.

*Section 181* contains provisions regarding the periods of notice of general meetings and the details which such notices must specify. *Subsection (1)* states that not less than 21 days' notice should be given in the case of an annual general meeting or an extraordinary general meeting for the passing of a special resolution and not less than 7 days' notice in the case of any other extraordinary meeting.

It also provides that companies are entitled to increase the periods of notice. *Subsection (2)* derives from section 133(3) of the Companies Act 1963 and makes provision for the giving of shorter notice than that specified in *subsection (1)*. *Subsections (3) and (4)* set out the circumstances when a notice of a meeting is deemed to have been received. The recommendation of the Company Law Review Group in its First Report that service of notice shall be deemed to have been received 24 hours after it has been posted is incorporated into this section. *Subsection (5)* provides for particular details which a notice must specify. *Paragraph (d)* in relation to voting rights and proxies has been inserted here and such requirement is taken from section 136(3) CA 1963. *Subsection (6)* provides for accidental failure to give notice of a meeting or resolution. *Subsection (7)* provides that the depositing of the instrument of proxy referred to in *subsection (5)* may, rather than its being effected by sending or delivering the instrument, be effected by communicating the instrument to the company by electronic means, and this subsection likewise applies to the depositing of anything that was referred to in *subsection (5)*.

*Section 182* deals with the quorum necessary for meetings. *Subsection (1)* imports Model Regulation 54 of Part I of Table A of the First Schedule to the Companies Act 1963 and states that a quorum of members must be present at general meetings in order to conduct business. *Subsection (3)* deals with the situation for single-member companies and it is an enactment of Regulation 10(1) of the EC (Single-Member Private Limited Companies) Regulations 1994 (as implemented by S.I. No.275/1994). *Subsection (4)* imports Regulation 55 of Part I of Table A. The time in relation to the initial meeting has been shortened from a half an hour to 15 minutes, however, a company can allow for the period to be modified by the company's constitution.

*Section 183* governs the area of proxies. *Subsections (1) and (2)* re-enact section 136(1) of the Companies Act 1963 and allow for the appointment of a proxy. *Subsection (3)* states that a company may not appoint more than one proxy to attend the same meeting on the same occasion, unless the constitution of that company provides otherwise. *Subsections (4),(5) (6) and (8)* incorporate Model Regulations 69 and 70 of Part I of Table A of the First Schedule to the Companies Act 1963 and set out the formalities involved in relation to the instrument appointing a proxy. *Subsection (7)* is new and provides that the deposition of an instrument of proxy, power of attorney or other authority at the registered office of a company may be effected by communicating the instrument by electronic means for LTDs and other companies to which *section 183* applies. *Subsections (9) and (10)* re-enact Regulation 73 of Part I of Table A and cover situations where the appointer of the proxy has died or is insane or where the proxy has been revoked. *Subsections (11) and (12)* re-enact section 136 (5) and (6) CA 1963 respectively and deal with offences under this section.

*Section 184* provides for the form of proxy and slightly amends Model Regulation 71 of Part I of Table A of the First Schedule to the Companies Act 1963.

*Section 185* derives from section 139 of the Companies Act 1963 and makes provision for the representation of bodies corporate at meetings of companies. Where a body corporate is a member of a company it may attend and vote at meetings in the following way. Its board of directors or other governing body may appoint someone to act as its duly authorised representative. The authorised person shall be entitled to exercise the same powers on behalf of the company as that body corporate could exercise if it were an individual member, creditor or holder of debentures of the company. In the case of creditors meetings the body corporate is similarly entitled to appoint a duly authorised representative to attend and vote on its behalf. *Subsection (4)* is new – it provides a means by which a company may require proof of authority by an “authorised person” that a person is authorised to so act at that meeting.

*Section 186* concerning the business of the annual general meeting is new. Model Regulation 53 of Part I of Table A of the First Schedule to the Companies Act 1963 sets out the business of the AGM and this has been substantially followed and expanded on in this new section.

*Section 187* makes provision for the proceedings at general meetings. *Subsections (2) and (3)* set out the procedure regarding the selection of the chairperson. *Subsections (4) to (6)* deal with adjournments of meetings. *Subsections (7) and (8)* provide for the voting on resolutions.

*Section 188* concerns votes of members and incorporates various provisions of the Model Regulations of Part I of Table A of the First Schedule to the Companies Act 1963. *Subsection (3)* deals with votes of joint holders of a share. Where there are joint holders of a share, the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted. *Subsections (4) and (5)* amend Regulation 65 of Part I of Table A, with the addition of *(4)(b) and (c)* in relation to votes of members who have made an enduring power of attorney and members in respect of whom a court order has been made on the issue of unsound mind. *Subsections (6), (7) and (8)* carry forward Regulations 66 and 67 of Part I of Table A and provide for the qualification of members to vote at general meeting. No member shall be entitled to vote where there are outstanding calls or other sums immediately payable by him or her in respect of the shares he or she holds. Objections to the qualification of voting members can only be raised at the meeting or an adjourned meeting at which they vote and every vote not disallowed shall be valid; objections must be referred to the chairperson whose decision is final and conclusive.

*Section 189* provides for the right to demand a poll by certain persons. *Subsections (1), (2) and (3)* are similar to Model Regulation 59 of Part I of Table A of the First Schedule to the Companies Act 1963 and make provision for who may demand a poll and how it may be demanded. *Subsection (4)* replicates Regulation 60 of Part I of Table A and provides for the taking of the poll by the chairperson. *Subsections (5) and (6)* re-enact Regulation 62 of Part I of Table A and provide that where the poll is demanded with regard to the election of a chairperson, it shall be taken forthwith, but otherwise a poll will be taken at such time as the chairperson directs, whether before or after any other business. *Subsection (7)* is a re-enactment of section 137(2) of the CA 1963 and provides for the position of proxies. A proxy's demand counts equally with that of a member because an instrument of proxy is deemed to confer authority to demand or join in demanding a poll.

*Section 190* is a re-enactment of section 138 of the Companies Act 1963 and provides that on a poll taken at a meeting, a member entitled to more than one vote, whether present in person or by proxy, need not use all his or her votes or cast all the votes he or she uses in the same way.

*Section 191* deals with resolutions, both ordinary and special, and derives from section 141 of the Companies Act 1963. *Subsection (1)* is new in that it defines an ordinary resolution as a resolution passed by a simple majority of the votes cast by members of a company as, being entitled to do so, vote in person or by proxy at a general meeting of the company. *Subsections (2) and (3)* are drawn from section 141(1) CA 1963. It has been amended insofar as a special resolution is no longer defined by reference to the notice of the resolution, but it is a resolution that is required to be passed as a special resolution, whether by this Act, by a company's constitution or otherwise. *Subsection (4)* is based on section 141(2) CA 1963 and states that if less than 21 days' notice is given, a special resolution may still be passed, provided that a majority of members are in favour (majority being defined in the subsection). *Subsection (5)* makes further provision for the passing of special resolutions where less than 21 days' notice of the meeting has been given. *Subsection (6)* is a re-enactment of section 141(5) CA 1963 and provides for the amendment of the terms of any resolution. *Subsection (7)* states that any reference to an extraordinary resolution contained in any statute which

was passed or document which existed before 1 April 1964 shall, in relation to a resolution passed on or after that date, be deemed to be a reference to a special resolution. *Subsection (8)* is a new subsection. It sets out the meaning of a written resolution by cross-reference to *sections 193* and *194* of the Act.

*Section 192* provides that resolutions are deemed to have been passed by the members on the actual day on which they are, in fact, passed by the members and shall not be deemed to have been passed on any earlier date. This section is derived from section 144 of the Companies Act 1963.

*Section 193* concerns unanimous written resolutions. The section also implements the recommendations in the First Report of the Company Law Review Group in relation to written resolutions and procedures for their execution. *Subsection (1)* derives from section 141(8) (a) CA 1963 and provides that any resolution required to be passed at any general meeting should be able to be achieved by unanimous written resolution. *Subsection (3)* is new. It has been inserted in accordance with the recommendations of the First Report of the CLRG that any resolution required to be passed at any general meeting should be able to be achieved by unanimous written resolution, consisting of more than one piece of paper. *Subsection (4)* is a re-enactment of section 141(8)(b) of the Companies Act 1963. *Subsection (5)* is new. It has been inserted in accordance with the recommendations of the First Report of the CLRG that, in the event that the resolution is not contemporaneously signed (with separate documents being circulated to shareholders), the company should notify the members of the passing of the resolution within 21 days of the delivery to the company of the documents constituting the written resolution. *Subsections (6)* and *(7)* are new. They require the delivery of the documents constituting the written resolution to the company within 14 days of its passing. Those documents shall be deemed to constitute the proceedings of the general meeting. *Subsection (8)* is new and confirms that it is immaterial, as regards the validity of the resolution, as to whether *subsections (5)*, *(6)* or *(7)* have been complied with. *Subsections (9)* and *(10)* are also new and lay down a category 4 offence for default of *subsection (5)* and *subsection (6)*. As stated in *subsection (11)*, resolutions to remove a director or auditor do not fall within the scope of this section. *Subsection (12)* clarifies that this section does not affect any rule of law as to the circumstances laid down in *(a)*, *(b)* and *(c)* of that subsection.

*Section 194* is new and gives effect to majority written ordinary and special resolutions. Prior to this section being introduced only unanimous written resolutions were allowed. The section itself distinguishes between ordinary and special written resolutions in *subsections (1)* and *(4)*. The form and procedure of majority written resolutions is set out in *section 193* for unanimous written resolutions, subject to two major safeguards; firstly, *subsection (7)* requires that for the resolution to be valid and effective, all members must receive a copy of the proposed resolution and an explanation of its main purpose. Secondly, *subsection (9)* provides that the resolution will be deemed to have been passed at a later date (either 7 days or 21 days depending on whether it is an ordinary or special resolution). This provides a moratorium for dissenting shareholders to challenge the resolution, if they desire.

*Section 195* contains supplemental provisions in relation to *section 194*. It provides that *section 194* does not apply to a resolution to remove a director or auditor. *Subsections (2)* to *(6)* contain procedural matters relating to the notification of resolutions. *Subsection (7)* sets out the offence for not complying with *subsection (2)*.

*Section 196* re-enacts Regulation 9 of the European Communities (Single-Member Private Limited Companies) Regulations 1994 (S.I. No. 275 of 1994) and it provides that there is no requirement for single-member companies to hold general meetings. It is now clarified that there can

be a sole member company notwithstanding a stipulation in the constitution that there be 2 members, or a greater number. Statutory auditors may not, however, be removed by a sole member without holding the requisite meeting provided for in *section 180* of the Act.

The distinction between resolutions and written decisions is re-enacted in *subsection (4)* such that any provision of the Act which enables or requires any matter to be done or to be decided by a company in general meeting or requires any matter to be decided by a resolution, shall be deemed to be satisfied by a decision of the sole member drawn up in writing and notified to the company.

*Section 197* is new. The provisions of Part 4 and of companies' constitutions relating to general meetings shall as far as applicable apply to any meeting of any class of member of the company

*Section 198* concerns the registration and supply of copies of resolutions and agreements. Special resolutions and certain ordinary resolutions must within 15 days of their passing be forwarded to the Registrar of Companies for recording. The fee charged in respect of forwarding a copy of a resolution to a member has been raised to €10. Furthermore, the application of the section has been extended in *subsection (4)(k)* as it now applies to resolutions converting share capital into stock and stock into share capital. Failure to comply with *subsections (1) to (3)* renders the company and any officer of it who is in default guilty of a category 4 offence. The section is derived from section 143 of the Companies Act 1963, as amended by section 5(1) of the Companies (Amendment) Act 1982 and Paragraph 15 of the First Schedule to the Companies (Amendment) Act 1983.

*Section 199* deals with the minutes of proceedings of meetings of a company and derives from section 145 of the Companies Act 1963, as amended by section 19 of the Company Law Enforcement Act 2001. The references to the directors' meeting and the meetings of committees of directors have been removed as *section 160* of the Act deals with directors meetings. The section requires that the minutes of all proceedings of general meetings and the terms of all resolutions of it be entered into books kept for that purpose as soon as possible after their holding or passing. Where the minutes are signed by the chairperson of the meeting (or by the chairperson of the next meeting) those minutes shall be evidence of the proceedings. *Subsection (4)* provides that, until the contrary is proven, the meeting shall be deemed to have been duly held and convened, and all proceedings had at the meeting shall be deemed to have been duly had, and all appointments of directors or liquidators shall be deemed to be valid. *Section (5)* empowers the Director of Corporate Enforcement to obtain copies of all minutes.

## **Chapter 7**

### **Summary Approval Procedure**

*Section 200* provides definitions for the purposes of the Summary Approval Procedure which is set out in this Chapter of the Act. These sections are new and give effect to the recommendations of the Company Law Review Group concerning creditor and shareholder protection. The CLRG believes that there is no justification for having two or more validation procedures and recommended that there should be one Summary Approval Procedure which is capable of being invoked in the case of a number of specific problems. The Summary Approval Procedure itself is taken, in substance, from sections 60(2) to (11) of the Companies Act 1963 and section 34 of the Companies Act 1990, as inserted by section 78 of the Company Law Enforcement Act 2001. The Summary Approval Procedure is comprised of a special resolution and a declaration by the directors in a preceding meeting. Provision is made for the passing of the resolution by a written resolution, as was previously the case.

*Section 201* sets out the purpose of this Chapter and operates by way of a synopsis for the following sections. This section accommodates the provisions in *sections 203 to 207*, the effect of which is that the deadlines in *sections 203 to 207* be subject to an exception at the discretion of the court.

*Section 202* sets out the conditions that need to be fulfilled to avail of the Summary Approval Procedure. Shareholder approval by special resolution must be obtained. The directors then make the required declaration and the declaration is delivered to the CRO not later than 21 days after the date on which the carrying on of the restricted activity is commenced. In the case of a merger, a resolution of each of the merging companies which every member of the company entitled to vote at a general meeting of it has voted in favour of is required. This special or unanimous resolution shall be passed not more than 12 months prior to the commencement of the carrying on by the company of the restricted activity or as the case may be by each of the merging companies. The declaration required must be made at a meeting of the directors held no earlier than 30 days before the date of the meeting at which the special resolution is to be considered (or 30 days before the signing of the written resolution if that procedure is being used). The following sections detail what information must be included in this declaration.

*Subsections (2) and (3)* detail how the 12 month period referred to above should be calculated in certain circumstances.

*Section 203* lists the information that must be included in a declaration that is to be made in the case of financial assistance for the acquisition of shares or a transaction with directors. The scope of the directors' declaration to be made in the context of the Summary Approval Procedure regarding the company's ability to discharge its debts will be limited to a period of 12 months after the date of the relevant act. A copy of this declaration must be delivered to the Registrar not later than 21 days after the date on which the carrying on of the restricted activity commenced. Where the directors fail to make a declaration in respect of a restricted activity, the court may nonetheless declare the activity valid if it is just and equitable to do so.

*Section 204* provides that where the restricted activity is a reduction in company capital referred to in *section 84(1)* or a transfer or disposal referred to in *section 91(1)*, the declaration will state the information listed in *paragraphs (a) to (g)* of *section 204* of the Act. Again, a copy of this declaration must be delivered to the Registrar not later than 21 days after the date on which the carrying on of the restricted activity commenced. Where the directors fail to make a declaration in respect of a restricted activity, the court may nonetheless declare the activity valid if it is just and equitable to do so. It is only the liabilities existing at the latest practicable date before the date of the making of the declaration and in any event at a date not more than 3 months before the date of that making, that are covered by the directors' declaration.

*Section 205* deals with the declaration required to be made in the context of providing a treatment in the company's financial statements of profits or losses attributable to shares of a subsidiary that would, but for the procedure, be prohibited by *section 118(1)* of the Act. *Subsection (2)* provides that in making a determination as to whether the company will be able to pay its debts as they fall due, the persons making the declaration must have regard to the likelihood that the company will be required to pay money on foot of a guarantee. The scope of the directors' declaration to be made in the context of the Summary Approval Procedure regarding whether the company will be able to pay its debts as they fall due will be limited to a period of 12 months after the date of the relevant act. A copy of this declaration must be delivered to the Registrar not later than 21 days after the date on which the carrying on of the restricted activity commenced. Where the directors fail to make a declaration in

respect of a restricted activity, the court may nonetheless declare the activity valid if it is just and equitable to do so.

*Section 206* provides for what a declaration must state in a case of a merger of a company. Each declaration by the directors must state the assets and liabilities of the merging company, that the declarants have made a full enquiry into the affairs of the company and the other merging companies, and having done so they have formed the opinion that the successor company will be able to pay the debts of the transferor company or companies as they fall due. A copy of this declaration must be delivered to the Registrar not later than 21 days after the date on which the carrying on of the restricted activity commenced. Where the directors fail to make a declaration in respect of a restricted activity, the court may nonetheless declare the activity valid if it is just and equitable to do so.

*Section 207* provides that, where the restricted activity concerned is to wind up a solvent company in a members' voluntary winding up, the declaration shall state the information listed in *paragraphs (a) and (b)*. A copy of this declaration must be delivered to the Registrar not later than 21 days after the date on which the carrying on of the restricted activity commenced. A copy of this declaration must be delivered to the Registrar not later than 21 days after the date on which the carrying on of the restricted activity commenced. Where the directors fail to make a declaration in respect of a restricted activity, the court may nonetheless declare the activity valid if it is just and equitable to do so.

*Section 208* provides that the declaration provided for in *sections 204, 205 or 207* must be accompanied by a report of a person who is qualified to be the independent auditor of the company stating in their opinion that the declaration is not unreasonable. This requirement was introduced by section 34 of the Companies Act 1990 as inserted by section 78 of the Company Law Enforcement Act 2001. No such provision was previously contained in section 60 of the Companies Act 1963.

*Section 209* refers to *section 206* concerning declarations to be made in cases of mergers and states that in such cases, the declaration must be accompanied by a document confirming, that the common draft terms of merger are specifically detailed enough to allow the effects listed at section 480(3) to be operated without difficulty or, where the common draft terms are not sufficiently detailed, additional information should be provided..

*Section 210* provides that the court may make a declaration of personal liability in circumstances where a director makes a declaration under *section 203(1)(f), 204(1)(f), 205(1)(c), 206(1)(b) or 207(1)(b)* without reasonable grounds.

*Section 211* places a moratorium on certain restricted activities being carried on and makes provision for applications to the court to cancel special resolutions. This section applies in all cases except in cases of merger and in situations where the Summary Approval Procedure is done by means of unanimous written resolution. The requirement for a 30 day waiting period can be disapplied where members holding more than 90% in nominal value of each class of issued shares and entitled to vote at general meeting have voted in favour of the special resolution. *Subsection (2)* provides the circumstances in which a company shall not proceed with the restricted activity. *Subsections (3) to (7)* provide for the procedure whereby an application to the court to cancel the special resolution may be made.



## **Chapter 8**

### Protection for minorities

*Section 212* provides a remedy in case of oppression of minority shareholders and derives from section 205 of the Companies Act 1963. *Subsection (1)* re-enacts section 205(1) CA 1963 and lays down the right of a member to apply to the court for an order under this section in cases of oppression. Section 205(2) CA 1963 has been deleted and the Minister no longer has the power under this section to apply for an order. *Subsection (3)(d)* amends the scope of what is in section 205(3) CA 1963 by expressly permitting the courts to make an award of compensation. Although section 205 CA 1963 stated that the courts were permitted to “make such order as it thinks fit”, it had been held by the Supreme Court in *Irish Press PLC -v- Ingersoll Irish Publications Ltd.* (1995) 2 IR 175 that section 205 CA 1963 does not empower the courts to make an award of damages. In reality the courts circumvented this by ordering the respondent to purchase the shares of the petitioner at an inflated price, thus in effect making an award of damages. As a result, the subsection has been amended to permit the courts to make an award of damages directly.

*Subsections (4) to (7)* deal with court orders providing for an amendment to the company’s constitution. *Subsection (8)* provides for the right of personal representatives and trustees to apply to the court for an order under this section. *Subsection (9)* states that proceedings commenced under this section may be heard *in camera*.

## **Chapter 9**

### Form of registers, indices and minute books

*Section 213* provides for the keeping of records. *Subsection (2)* provides that where the records are not kept in the form of bound books, adequate precautions shall be taken for guarding against falsification and facilitating discovery of such falsification, if it occurs. If a company or any officer of it is in default of this obligation, they will be guilty of a category 3 offence under *subsection (3)*. This section derives from section 378 of the Companies Act 1963.

*Section 214* deals with electronic storage of records. This section permits a company to keep its statutory records, other than the minute book, on computer rather than the ‘hard copy’ form. This is based on section 4 of the Companies (Amendment) Act 1977. *Subsection (6)* provides that servers storing company records shall be kept in a place in the state. *Subsection (7)* has been amended to provide for the use of cloud computing in relation to the keeping of company records and further states that the Minister may, as he or she considers appropriate, regulate the provisions in this section.

## **Chapter 10**

### Inspection of registers, provision of copies of information in them and service of notices

This Chapter is new and was introduced on foot of a Company Law Review Group recommendation that a harmonised procedure be adopted under the Act for the inspection of registers kept by a company. The Chapter introduces provisions equivalent to section 116 (“Right to inspect and require copies”) and section 117 (“Register of members: response to request for inspection or copy”) of the UK Companies Act 2006.

*Section 215* is new and contains definitions for purposes of *section 216*. The requirement to keep a register or other document at a place shall be met if it is capable, by means of computer, of being reproduced and inspected at that place.

*Section 216* contains provisions in relation to what types of documents and registers are covered by the section and where such documents and registers must be kept. Provision is made for the inspection and supply of copies of certain documents and registers and the fees associated with the inspection and supply of copies are set out.

Under *subsection (2)*, a person other than the company may keep the registers and documents on the company's behalf. The intention of *subsection (3)(c)* is to allow the company to designate one place other than the places listed in *(a)* to *(b)* at which all documents that are not kept at a location mentioned in *(a)* to *(b)* should be kept. It is made clear that all documents and registers must be kept within the State. *Subsection (4)* allows different registers and documents to be kept by different persons on behalf of the company and such registers and documents must be kept within the State. *Subsection (5)* clarifies that, where a company keeps several of the registers or documents at a place other than the registered office or the principal place of business of the company (i.e. keeps the documents or registers at "another place within the state"), such registers and documents must be kept at a single place.

*Subsection (6)* obliges the company to notify the Registrar of the location where the registers and documents are kept and to similarly notify the Registrar if that location changes. *Subsection (7)* provides for the inspection of registers and documents during business hours and *subsections (8)* to *(10)* allow for inspection of certain registers and documents by members, other persons and creditors. *Subsections (11)* to *(13)* deal with requests for copies of registers and documents.

*Section 217* contains supplemental provisions in relation to *section 216*. It gives a meaning for "relevant fee" and provides for the power of the Minister to alter the amount of the fee. It also lays down an offence for failure to comply with obligations under *section 216*. *Subsection (4)* concerns the power of the court to give an order to compel inspection in certain circumstances.

*Section 218* is new and contains provisions for all circumstances in the Act where service of notice on members is required and includes provisions for service by electronic means. The section is designed to improve the ability of companies to serve notice in a modern and effective manner.

## **Part 5 – Duties of Directors and Other Officers**

### *Preliminary Note*

*Part 5* makes provision for the statutory duties of directors and other persons such as company secretaries.

*Chapter 1* contains a number of definitions that relate primarily to transactions involving companies and their directors. There are also definitions of both “shadow directors” and “*de facto* directors”. The statutory label *de facto* director is new and relates to a person who occupies the position of director but who has not been formally appointed as such. The significance of these definitions is that the persons who fall to be either shadow directors or *de facto* directors will be treated for the purposes of *Part 5* as if they were formally appointed (also known as ‘*de jure*’) directors and will, for example, be subject to the same fiduciary and other duties as formally appointed directors. One change in the definition of shadow director is to implicitly acknowledge in *section 221(2)* that a body corporate may be a shadow director but to expressly provide that a body corporate is not to be regarded as a shadow director of its subsidiary companies.

*Chapter 2* details the general duties of directors and secretaries. In *section 223*, the duty of each director to ensure compliance with the Companies Acts is set out and will apply equally to shadow directors and *de facto* directors. *Section 225* contains the form of the directors’ compliance statement, as recommended in the report of the Company Law Review Group (“CLRG”) on Directors’ Compliance Statements (2005), which was approved by the Government in November 2005. *Section 226* addresses the duties of a company secretary. In accordance with the CLRG’s recommendation in its First Report, the office of company secretary as a separate office is retained. This section also seeks to distinguish between directors and secretaries in terms of their ability to achieve compliance with the Companies Acts. This section reflects the fact that the secretary is appointed and can be removed by the board of directors and will have such duties (for example, to secure the company’s compliance with the Companies Acts) only where delegated by the board of directors. Directors and secretaries are required to acknowledge their legal duties and obligations imposed by the Companies Acts.

The codification of directors’ fiduciary duties is one of the most significant changes proposed by the Act and is contained in *section 227*. *Subsection (1)* provides that the duties are owed to the company and are enforceable by the company. *Subsections (4)* and *(5)* confirm that the provenance of these duties are the common law and the law of equity and that the statutory duties should be interpreted and applied in the same way as the common law duties and equitable principles on which they are based. The actual duties are detailed in *section 228*. The requirement to act “honestly and responsibly in relation to the conduct of the affairs of the company” re-states section 150 of the Companies Act 1990 in positive terms and provides that directors who have not so acted will be restricted in their directorships.

*Section 232* is a new section and concerns directors’ liability to account to their companies for gains made and indemnify their companies for losses caused as a result of their breach of duty not to use corporate property and opportunities for their own purposes. This provision is modelled on remedies which were previously available in Part III of the Companies Act 1990 where directors act in breach of their duties. A necessary mitigating provision is contained in *section 233*, which is a re-statement of section 391 of the Companies Act 1990 and gives the court the power to grant relief from the liability in *section 232* to officers of the company where it is satisfied that a director has acted honestly and reasonably.

*Chapter 3* deals with evidential provisions in respect of loans and other transactions between a company and its directors. It follows the recommendation of the ODCE that, where it is claimed that a company has made a loan or quasi-loan in favour of a director of the company, and where the terms of the loan or quasi-loan are not in writing or where they are in writing but are ambiguous, there will be a rebuttable presumption in favour of the company that such a loan or quasi-loan is repayable on demand and that it bears interest at an appropriate rate. Where it is claimed that a director has made a loan or quasi-loan in favour of a the company, and where the terms of the loan or quasi-loan are not in writing, there will be a rebuttable presumption in favour of the company that it was not a loan or quasi-loan. Where it is proved that such a loan was made, if the terms are ambiguous, there will be a rebuttable presumption that it bears no interest, is not secured and is subordinate to the claims of other creditors.

*Chapter 4* substantially reproduces the pre-existing statutory regulation of transactions between directors and their companies that involve a conflict of interest. *Section 239* reproduces the prohibition on loans, quasi-loans, credit transactions and guarantees and the provision of security for these made by companies in favour of their directors or persons connected with directors. *Section 240 and sections 242 to 245* contain exceptions to the prohibition on loans to directors and *sections 246 to 248* deal with the civil and criminal consequences of acting in breach of *section 239*. *Section 249* concerns contracts of employment with directors. *Section 251* requires the approval of a company for the making of a payment to a director or a director's dependants for loss of office. *Section 252* requires the approval of a company for the making of a payment to a director of compensation in connection with the transfer of property. *Section 253* imposes a duty on directors to disclose to their company details of payments to be made in connection with the transfer of shares in a company to that director. *Section 255* concerns contracts between a single member company and its sole member.

*Chapter 5* substantially reproduces Part IV of the Companies Act 1990 and concerns the disclosure of interests in shares and debentures reflecting the reforms recommended by the Company Law Review Group in its First Report. *Section 257* defines "disclosable interest". The most significant change in the law provided for here is in *section 260* and is an exception from what is a disclosable interest in a case where the shares held amount to less than 1% of the issued share capital, or where the shares or debentures do not carry a right to vote at general meetings (save in specified circumstances). *Section 265* concerns the mode of disclosure by directors and secretaries. *Section 266* concerns the enforcement of the notification obligation. *Section 267* requires all companies to have a register of interests for the purposes of disclosure of interests in shares and debentures.

*Chapter 6* deals with officers' responsibilities and sets out provisions explaining the meaning of the term "officer in default" and presumptions regarding that matter. It is provided that company officers will be presumed to have permitted a default and so be "officers in default" where it is proved that they were aware of the basic facts concerning the default concerned, unless they show they took all reasonable steps to prevent it or that, by reason of circumstances beyond their control, they were unable to do so.

### *Explanatory Memorandum*

#### **Chapter 1**

#### Preliminary and Definitions

*Section 219* derives from section 25 of the Companies Act 1990, as amended by section 75 of the Company Law Enforcement Act 2001. *Subsection (1)* contains definitions for the purposes of *Part 5* which are drawn from section 25(1) CA 1990. 'Guarantee' is defined as including an indemnity.

*Subsections (2) to (9)* reproduce subsections (2) to (8) of section 25 CA 1990.

*Section 220* defines “connected person” for the purposes of *Part 5* and provides for when a director of a company is to be regarded as associated with or in control of a company. This section is drawn from section 26 of the Companies Act 1990, as amended by section 76 of the Company Law Enforcement Act 2001. *Subsections (1), (3), (5), (6) and (8)* substantially reproduce subsections (1) to (4) and (6) of section 26 CA 1990.

*Subsection (4)* is new. It has been inserted to clarify that *subsection (3)* does not interfere with the application of section 18(c) of the Interpretation Act 2005 to *subsection (1)(b)* of this section. In other words, this subsection clarifies that a body corporate can be a trustee under *subsection (1)(b)*.

The reference that was in subsection (6) of section 26 CA 1990 to the EC (Single-Member Private Limited Companies) Regulations 1994 (S.I. No.275 of 1994) has been deleted in *subsection (6)* in light of the fact that the Act now provides for a single member private company limited by shares.

*Section 221* deals with shadow directors and is drawn from section 27 of the Companies Act 1990. A shadow director is someone in accordance with whose instructions the directors act. *Subsection (2)* is new but is based on section 251(3) of the UK Companies Act 2006. It follows from the recommendation of the CLRG that it is appropriate to separate the law applicable to holding companies from the law applicable to directors and the view that holding companies should not be treated as shadow directors. *Subsections (3) and (4)* reproduce subsection (3) of section 27 CA 1990.

*Section 222* is new and it defines “*de facto* director”. The statutory label “*de facto* director” relates to a person who occupies the position of director but who has not been formally appointed as such. This section extends the High Court decision in *Re Lynnrowan Enterprises Ltd.* (31st July 2002) in that *de facto* directors shall now, for all the purposes of *Part 5*, be treated as directors of the company and not merely for the purposes of restriction orders. Thus, they will be under the same duties as ordinary directors without having been formally appointed. A saving provision for those giving professional advice, similar to that in the previous section dealing with shadow directors, is contained in *subsection (4)*.

## Chapter 2

### General duties of directors and secretaries and liabilities of them and other officers

*Section 223* sets out the general duty of each director of a private company limited by shares (“LTD”) to ensure compliance with the Act. It should be noted that this obligation now applies to directors who have been properly appointed and registered, shadow directors and *de facto* directors equally.

*Subsection (1)* is drawn from subsection (3) of section 383 of the Companies Act 1963, as substituted by section 100 of the Company Law Enforcement Act 2001. *Subsection (1)* provides that each and every director of a LTD is responsible for ensuring that the company complies with the requirements of this Act. *Subsection (1)* places the obligation to ensure compliance with this Act on directors only, whereas *subsection (3)* of section 383 CA 1963 imposed the obligation on both directors and secretaries.

*Subsection (2)* provides that a breach by a director of a duty under this section will not of itself affect the validity or enforceability of any contract or other transaction. However, a third party cannot benefit under this principle where he or she has been an accessory to a breach of duty or has knowingly received a benefit therefrom.

*Subsection (3)* is new and it implements the recommendation contained in the First Report of the CLRG that, upon registration, directors should be required to acknowledge the existence of their duties. This is achieved through requiring them to sign a declaration to that effect.

*Section 224* re-enacts section 52 of the Companies Act 1990. The section provides that, in addition to taking account of the interests of the members of a company, the directors will be under a general duty to have regard also to the interests of its employees.

*Section 225* provides that where both the balance sheet of the LTD exceeds €12,500,000 and the turnover of the LTD exceeds €25,000,000 (or such other amounts prescribed under *section 943(1)(i)* of the Act), the directors are required to produce a compliance statement to be included in the directors' report under *section 325*. This section sets out an amended version of the directors' compliance statement under section 205E of the Companies Act 1990, as inserted by section 45 of the Companies (Auditing and Accounting) Act 2003. The amendments to that section follow from the recommendations of the CLRG in its 2005 Report on the Directors' Compliance Statement.

*Subsection (1)* defines certain terms for the purposes of this section. The term "relevant obligations" which is used throughout the section is defined as the company's obligations under this Act (the breach of which gives rise to an indictable offence) and its obligations under tax law. *Subsections (2)* and *(3)* require the directors of a LTD to include in the directors' report under *section 325* a statement acknowledging their responsibility for securing compliance by the company with its relevant obligations and further, in circumstances where their obligations have not been met, their responsibility to explain their non-compliance. They must also confirm that a statement has been drawn up setting out the company's policies in respect of compliance with those obligations, confirming that the company has in place arrangements designed to achieve compliance with its relevant obligations, and confirming that the directors have reviewed the effectiveness of these procedures during the financial year to which the report relates.

*Subsection (4)* provides that the arrangements that must be put in place under *subsection (3)(b)* may include reliance on expert advice regarding compliance with the company's relevant obligations. *Subsection (5)* reproduces subsection (7) of section 205E of the Companies Act 1990 and elaborates upon what is meant by arrangements designed to achieve compliance with the company's relevant obligations. That requirement is satisfied if the arrangements put in place provide a reasonable assurance of compliance in all material respects with those obligations. *Subsection (6)* provides that directors who fail to produce a statement in accordance with *subsection (2)* will be guilty of a category 3 offence.

*Subsection (8)* exempts from the provisions of this section companies which are exempted under section 943(1)(g) which are (i) qualifying companies within the meaning of section 110 of the Taxes Consolidation Act 1997 (as inserted by section 48 of the Finance Act 2003) and (ii) classes of other companies and other undertakings, if the extent to which or the manner in which they are or may be regulated under any enactment makes it, in the Minister's opinion, unnecessary or inappropriate to apply those provisions to them.

*Section 226* is a new section. It sets out the duties and responsibilities of the company secretary. The section also reflects that the secretary is appointed by and can be removed by the board of directors. The secretary is not responsible for the compliance of the LTD with company law since they do not have the authority to cause the company to comply, such authority being vested in the board of directors.

*Subsection (1)* sets out and recognises the role of the secretary as the person who, by order of the board of directors, convenes meetings, records their proceedings, is custodian of the registers required

by this Act and the person to whom the directors are permitted and expected to delegate their responsibility to make filings under the Act. It also reflects that it is the directors who are primarily responsible for the management and direction of the company, and to that extent primarily responsible for compliance with the Act.

*Subsection (2)* imposes a duty on the directors to ensure that the secretary has the suitable skills to maintain records required by the Act. Such a duty is new. However, it is worth noting that a similar duty is imposed upon the directors of a PLC under section 235 of the Companies Act 1990. *Subsection (3)* clarifies that *subsection (2)* applies in the case where one of the directors of the company is appointed as company secretary.

*Subsection (5)* implements the recommendation of the First Report of the Company Law Review Group that an acknowledgement of the existence of a secretary's duties by the secretary upon registration is desirable. This is achieved through requiring the secretary to sign a declaration to that effect. The wording of such a declaration recognises that the secretary may be a corporate body.

*Section 227* is new and provides an introduction to *section 228*, which enumerates the fiduciary duties of directors. *Subsections (1)* and *(3)* provide that the directors of a LTD owe the duties set out in *section 228* to the company and that those duties may be enforced in the same way as any duties owed by the director to the company. *Subsection (2)* clarifies that a breach by a director of a duty will not of itself affect the validity or enforceability of any contract or other transaction. However, a third party cannot benefit under this principle where he or she has been an accessory to a breach of duty or has knowingly received a benefit therefrom. *Subsections (4)* and *(5)* provide that the fiduciary duties listed in *section 228* are derived from principles established by the courts and are to be interpreted as such. The duties listed in *section 228* are not intended to be exhaustive. Certain fiduciary duties namely, to act honestly and responsibly and the duty to have regard to the interests of its members derive from statute and are not subject to the same rules and principles as common law provisions would be.

*Section 228* sets out the principal fiduciary duties of directors. *Subsection (1)* enumerates the fiduciary duties of directors that have thus far been enunciated by the Irish courts. The duties are stated in general rather than specific terms and since they are derived from principles established by the courts, they are not intended to be exhaustive.

Directors duties are as follows:

1. Act in good faith in interests of company
2. Act honestly, responsibly in conduct of company's affairs
3. Act in accordance with company's constitution and the law
4. Not use company's property, information or opportunities for own/other third party benefit
5. Do not restrict director's power to exercise independent judgment
6. Avoid any conflict between director's duties and own interests
7. Exercise the care, skill & diligence that would be exercised by reasonable person with knowledge & experience a director expected to have and that director actually has
8. Have regard to interests of members, in addition to its employees in general

*Subsection (1)(e)(iii)* provides that the company may exercise its right in relation to a director's power to exercise independent judgment by a general resolution.

*Subsection (2)* elaborates on *paragraph (e)* of *subsection (1)*. *Subsections (3)* and *(4)* provide that a director of a company may have regard to the interests of a particular member if the director has been appointed or nominated for appointment by that member.

*Section 229* relates to other interests of directors. *Subsection (1)* permits a director of a company to become a director or officer of another company that is promoted by the first company or that the first company is interested in, save to the extent that the first company's constitution provides otherwise. However, this is subject to the overriding obligations in *section 228*. *Subsection (2)* provides that where a director has such an interest in a second company he or she shall not be required to be accountable to the first company for any remuneration or benefits that he or she receives by reason of such an interest, unless the first company otherwise directs. This section is similar to Model Regulation 78 of Part I of Table A of the First Schedule to the Companies Act 1963.

*Section 230* is intended to elaborate on the powers of directors. It provides that, save to the extent that the company's constitution provides otherwise, a director may act in a professional capacity, except as a statutory auditor, for the company, and he or she shall be entitled to remuneration for such services. This section derives from Model Regulation 87 of Part I of Table A of the First Schedule to the Companies Act 1963.

*Section 231* derives from section 194 of the Companies Act 1963, as amended by section 47(3) of the Companies Act 1990. It requires a director to disclose his or her interests in contracts made by the company. In order to avoid undue inconvenience for directors, provision is made for general declarations by directors to the effect that they are interested in all dealings with stated companies and firms. The duty of directors to disclose their interests in contracts has been clarified so that it does not apply to contracts which would not be entered into by the board of directors on behalf of the company (e.g. contracts in the ordinary course of business which employees would be entitled to transact).

*Section 232* is partly new and codifies the common law duty of account and indemnity. It makes clear that a breach of a director's duties not to exploit company property or opportunities can result in the director and others being liable to account to the company for any gain made by them, in addition to their liability to indemnify the company for any loss incurred by it as a result of such a breach. This section also sets out the civil consequences for breaching other sections contained in *Part 5*, such as those in connection with substantial property transactions and loans to directors. It is clarified that where directors act in breach of their duties under *section 228(1)(a), (c), (d), (e), (f) or (g)* they shall be liable – as would have been the case under the corresponding common law rule or equitable principle – to do either or both of the following: account for gains made or indemnify the company for losses resulting.

*Section 233* provides that relief may be granted by the court to officers of the company in respect of liability arising from breach of duty, negligence, default, or trust by the officer in any proceedings brought by the company. *Subsection (2)* provides relief cannot be granted unless the officer has acted honestly and reasonably. This derives from section 391 of the Companies Act 1963.

*Section 234* provides for a situation where an officer of a company anticipates that a claim will or might be made against him or her. He or she may make an application to court to be relieved of liability in respect of the wrong concerned. This derives from section 391(2) of the Companies Act 1963.

*Section 235* provides that any provision exempting officers of a company from liability shall be void. However, an exception is made in favour of an indemnity against liabilities incurred by an officer in defending any proceedings in which judgment is given in his or her favour or in which he or she is acquitted. This section derives from section 200 of the Companies Act 1963, as amended by



paragraph 16 of the First Schedule to the Companies (Amendment) Act 1983, and section 56 of the Companies (Auditing and Accounting) Act 2003.

### Chapter 3

Evidential provisions with respect to loans, other transactions, etc., between company and directors

*Section 236* is new. It follows the recommendation of the CLRG that, where it is claimed that a company has made a loan or quasi-loan in favour of a director of the company, and where the terms of the loan or quasi-loan are not in writing or where they are in writing but are ambiguous, there will be a rebuttable presumption in favour of the company that such loan or quasi-loan is repayable on demand. Until that loan or quasi-loan is repaid it bears interest at the appropriate rate. For the purpose of this provision “director” shall include a director of the company, a director of its holding company, a shadow or *de facto* director of either or a person connected with such a director.

*Section 237* is new. It follows the recommendation of the CLRG that, where it is claimed that a director or person connected with a director has made a loan or quasi-loan in favour of the company or the holding company and where the terms of the loan or quasi-loan are not in writing or where they are in writing but are ambiguous, there will be a rebuttable presumption in favour of the company that no loan or quasi-loan was in fact made to the company, and where it is shown that a loan or quasi-loan was made to the company, there shall be a further rebuttable presumption that any such loan or quasi-loan is interest free, unsecured and subordinated to all other indebtedness of the company.

### Chapter 4

Substantive prohibitions or restrictions on loans to directors and other particular transactions involving conflict of interest

*Section 238* is designed to regulate self-dealing by directors. The rationale for this provision is that if directors (on behalf of their company) enter into transactions in respect of non-cash assets with one of their number, there is a danger that their judgment may be distorted by conflicts of interest and loyalties. The provision includes a check against such distortions by requiring the members to approve the transaction. Arrangements within this section must first be approved by a resolution of the company in a general meeting and, if the director or connected person is a director of the company’s holding company, by a resolution of the holding company in a general meeting. This section stems from section 29 of the Companies Act 1990.

The relevant recommendations of the First Report of the CLRG have been implemented here. Section 29(7) CA 1990 has been amended by the addition of a third exemption regarding the disposal of the company’s assets by the receiver. The amounts specified in *subsection (2)* have been converted into euro and rounded up. *Subsection (7)* is new. It provides that no approval is required to be given under this section by a wholly owned subsidiary of any body corporate.

*Section 239* derives from section 31 of the Companies Act 1990. This generally prohibits companies from giving direct or indirect loans or loan-type finance to directors or a person connected with a director, subject to certain exceptions listed in *section 240*. A company shall not enter into a credit transaction as a creditor for such a director or a person connected with a director, nor shall a company enter into a guarantee or provide any security in connection with a loan, quasi-loan or credit transaction made by any other person for such a director or a connected person. The terms “quasi-loan” and “credit transaction” are defined in *section 219*.

*Section 240* provides for a *de minimis* exception where, if the value of an arrangement is less than 10 per cent of the company's assets, it is outside of the prohibition on the grounds that it is of insufficient value to justify the invocation of the *section 239* prohibition. This derives from section 32 of the Companies Act 1990. It is important to note that exemptions exist in relation to arrangements which have already been properly approved in accordance with the Summary Approval Procedure. 'Whitewashed loans' are excluded in the calculation of the aggregate amount of arrangements with directors or connected persons when considering the *de minimis* exemption contained in *section 241* at the time of the entering into the relevant arrangement.

*Section 241* provides for a situation where a company's relevant assets are reduced. Where this happens after an arrangement which is in breach of *section 239* has been entered into, and the company has relied upon *section 240*, the provisions of *section 241* apply. Where the relevant assets are reduced and the amount of the transaction or arrangement is no longer less than 10 per cent of the company's relevant assets, the situation must be regularised within two months. This section derives from section 238 of the Companies Act 1990, as amended by section 77 of the Company Law Enforcement Act 2001.

*Section 242* is new. It provides that *section 239* does not prohibit a company from making a loan or quasi-loan, entering a credit transaction or entering into a guarantee or providing any security of the kind described in *subsection (1)* of *section 239* if the Summary Approval Procedure is followed in respect of the doing of any of the actions as the case may be.

*Section 243* derives from section 35 of the Companies Act 1990, as amended by section 79 of the Company Law Enforcement Act 2001. Any member of a group of companies can, in favour of another member of that group, make or enter into any of the transactions or arrangements that are otherwise prohibited by *section 239* of this Act.

*Section 244* derives from section 36 of the Companies Act 1990. *Subsection (1)* states that *section 239* shall not prohibit a company from doing anything to provide any of its directors with funds to meet expenses for the purposes of the company or for the purpose of enabling him or her to perform his or her duties or to enable any of its directors to avoid incurring such expenditure. *Subsection (2)* provides that where a company enters into a transaction that is permitted by *subsection (1)*, such loans must be repaid within six months from the date on which any liability was incurred. Failure to comply with *subsection (2)* results in the person concerned being guilty of a category 4 offence. *Section 244* has application to all the transactions or arrangements prohibited by *section 239*.

*Section 245* states that *section 239* does not prohibit a company from making a loan or quasi-loan, or entering into a credit transaction, or entering into a guarantee or giving any security, provided the conditions laid down in *subsection (2)* are satisfied. Those conditions are that the company enters into the transaction in the ordinary course of its business and the value of the transaction is not greater (and the terms on which it is entered into are no more favourable) than those which the company ordinarily offers or which it is not unreasonable to expect the company to have offered. This section derives from section 37 of the Companies Act 1990.

*Section 246* provides that a transaction or arrangement entered into by a company in contravention of *section 239* is voidable at instance of the company. A transaction or arrangement in contravention of *section 239* will not be voidable if restitution of any money or other assets the subject of the transaction or arrangement is no longer possible, or if the company has been indemnified in pursuance of *section 232* for the loss and damage suffered by it. Alternatively, the

transaction will not be voidable where any rights acquired *bona fide* for value without notice of the contravention by any person other than the person for whom the transaction was made would be affected. This stems from section 38 of the Companies Act 1990.

*Section 247* provides that personal liability can be imposed in respect of company debts in the event of its subsequently being wound up and is unable to pay its debts. *Subsections (1) and (2)* provide that, where a company being wound up is insolvent, a court may, if it thinks proper to do so, declare that any person for whose benefit an arrangement of the kind described in *section 240(2)(a)* was made shall be personally liable without limitation of liability for all or certain specified debts and other liabilities of the company.

*Section 248* provides that if a company enters into a transaction or arrangement that contravenes *section 239*, any officer of it who is in default will be guilty of a category 2 offence.

*Section 249* imposes restrictions on directors' employment contracts with a company. It is derived from section 28 of the Companies Act 1990. *Subsection (3)* provides that a company shall not incorporate in any agreement a "relevant term" within the meaning of the section, unless the term is first approved by a resolution of the company in general meeting, and in the case of a director of a holding company, by a resolution of that company in general meeting. *Subsection (5)* is new. It has been inserted to provide that, where the LTD replaces the general meeting with a written resolution, the proposed written resolution must first be circulated to the members. *Subsection (7)* provides that no approval is required to be given under this section by anybody corporate unless it is a company formed and registered under this Act, an existing company or a wholly owned subsidiary of a body corporate. This incorporates subsection (6) of the Companies Act 1990.

*Section 250* sets out an anti-avoidance provision regarding *section 249* and deals with circumstances where a person is employed with a company under an agreement which cannot be terminated by the company by the giving of notice (or can be so terminated only in specified circumstances) and the company enters into a further agreement with that person in relation to that employment more than 6 months prior to the original termination date. In such circumstances, the term "relevant term" as used in *section 249* will apply as if to the period for which the person is to be employed under that further agreement there were added a further period equal to the unexpired period of the original agreement.

*Section 251* is drawn from section 186 of the Companies Act 1963 and provides that approval of the company must be obtained for payment by the company to a director or director's dependents for loss of office.

*Section 252* provides that the approval of the company must be obtained for payment to a director of compensation in connection with the transfer of property. This section applies whether the payment is to be made by the company or by other persons and it derives from section 187 of the Companies Act 1963.

*Section 253* imposes on a director the obligation to bring to the notice of the company the amount of any payment which is to be made to him or her by way of compensation for loss of office arising out of a transfer to any person of the company's shares. This provision applies whether the payment is to be made by the company or by the person acquiring the shares. This section is drawn from section 188 of the Companies Act 1963.

*Section 254* seeks to prevent the making of disguised payments to the directors in an attempt to circumvent *sections 251 to 253* of this Act. *Subsection (1)* provides a definition for “existing legal obligation”.

*Section 255* re-enacts with minor amendments Regulation 13 of the 1993 EC (Single-Member Private Limited Companies) Regulations 1993 (S.I. No.275 of 1994) and deals with contracts with sole members.

## **Chapter 5**

### **Disclosure of interests in shares and debentures**

*Section 256* provides a general interpretation for *Chapter 5*.

*Section 257* is new and prescribes a meaning for the term “disclosable interest”. This section is comprised of a slightly amended version of sections 54 and 55 of the Companies Act 1990. *Subsections (2)* and *(3)* in substance, re-enact sections 54 (2), (11) and (12) CA 1990.

*Section 258* sets out the circumstances in which a person is to be regarded as having a disclosable interest in shares or debentures. *Subsections 1(a)* and *(c)* re-enact section 54(4) of the Companies Act 1990. The holding by a person of a mortgage or charge of shares should be regarded as having an interest in shares or debentures. *Subsection 1(d)* re-enacts sections 54(5) and (6) CA 1990. A shadow director should be regarded as having an interest in any shares held by the body corporate. *Subsection 1(e)* re-enacts section 54(7) CA 1990. *Subsection 1(f)* re-enacts section 54(3) CA 1990. Where shares are held in the name of a nominee, the person on whose behalf the nominee acts will be treated as having an interest in the shares. *Subsection (2)* re-enacts section 54(8) CA 1990.

*Section 259* sets out the circumstances in which a person is to be regarded as having ceased to have a disclosable interest in shares or debentures. This section re-enacts section 54(13) of the Companies Act 1990.

*Section 260* lists the interests that are not disclosable for the purposes of this Chapter. *Paragraphs (a)* to *(d)* are drawn from section 55(1) of the Companies Act 1990. An interest in an investment company has been included as a non-disclosable interest. *Paragraph (e)* is a new provision stating which powers or discretion vested in a person constitute a non-disclosable interest. *Paragraph (e)(i)* is new and includes an attorney of a person with an interest in shares or debentures. *Paragraph (f)* is new and it introduces an exception to the requirement of disclosure of shares or interests. This exception applies where the shares held amount to less than 1 per cent of the share capital of the company, or where the shares or debentures do not carry a right to vote at general meetings, save in special circumstances. *Paragraph (g)* derives from section 55(e) CA 1990.

*Section 261* is new and sets out the first of the 5 cases in which the duty to notify arises. It is taken in substance from section 53 of the Companies Act 1990 insofar as it imposes an obligation on directors and secretaries to notify their interests in shares or debentures of the company held by themselves, or by their spouse or minor children. The latter requirement was previously contained in section 64 CA 1990. The duty contained in *subsection (2)* to notify the relevant company in writing of the disclosable interest does not arise if the nature of the disclosable interest concerned is such as to

constitute an interest of the kind specified in section 54 CA 1990 and the relevant company has, before the commencement of this section, been notified in accordance with Part IV CA 1990 or received (not later than 5 days after the commencement of this section) such particulars in relation to that interest by way of such a notification.

*Section 262* is new and sets out the second and third cases in which a duty to notify arises. Where the disclosable interest acquired or ceasing to be held relates to the director or secretary themselves, or to their spouse, civil partner or child, that director or secretary must notify the company in writing of the particulars of that disclosable interest (whether held or ceasing to be held). Furthermore, a person who becomes a director or secretary of a company must similarly notify the company in writing if he or she becomes aware that a director or secretary of the company or a spouse, civil partner or child of a director or secretary of the company has a disclosable interest in shares in, or debentures of a company or body corporate of the same group.

*Section 263* is new and sets out the fourth and fifth cases in which a duty to notify arises. It imposes an obligation to notify on a director or secretary of the relevant company who is granted (by another body corporate of the same group) or exercises a right to subscribe for shares or debentures of that other body corporate or becomes aware of a spouse, civil partner or child of the director's or secretary's having been granted or exercising such a right. *Subsection (3)* states that if a director or secretary is not aware of the fact of the thing being done then the duty only arises when they subsequently become aware of the relevant fact.

*Subsections (6) and (7)* impose an obligation on directors and secretaries who enter into a contract to sell shares in, or debentures of, the relevant company or any body corporate of the same group; assigns a right granted to him or her to subscribe for shares or debentures of the relevant company or any body corporate of the same group; or becomes aware of a spouse or civil partner of the director's or secretary's or a child of the director's or secretary's having entered into a contract to sell such shares or debentures; or having assigned a right that has been granted to the spouse, civil partner or child by the relevant company or such body corporate to subscribe for shares in, or debentures of, the relevant company or such body corporate. The director or secretary has a duty to notify the relevant company in writing. When a one per cent or less share option is granted by parent companies to a director it is not required that it is reported to the company. *Subsection (8)* states that if a director or secretary is not aware of the fact of the thing being done then the duty only arises when they subsequently become aware of the relevant fact.

*Section 264* deals with the application of *section 261* to *263* and the exceptions to them. *Subsection (1)* provides that the making of a notification by a person under these sections shall not be proof in itself that the person making the notification is a shadow director or *de facto* director. *Subsection (2)* states that nothing in *sections 261* to *263* shall operate so as to impose an obligation with respect to shares in a body corporate which is the wholly owned subsidiary of another body corporate. *Subsection (3)* states that nothing in *sections 261* to *263* shall operate to impose an obligation on a director or secretary of the company who is granted an option to subscribe for shares in, or debentures of, that company to make any notifications to that company in respect of such a grant.

*Section 265* is new and concerns the mode of notification by directors and secretaries. *Subsection (1)* states that, in relation to the acquisition or disposal by a director or secretary of the company, the means specified in *subsection (2)* constitute a sufficient notification if the director or secretary opts to use those means. Those means involve the delivery of an instrument of transfer in respect of the shares or debentures to the company within 30 days of the date of the instrument and that instrument of transfer must contain the particulars listed in *subsection (2)*.

*Subsection (3)* states that in any case not falling within *subsection (1)* or where the director or secretary opts not to use the foregoing means in a case falling within *subsection (1)*, the means laid down in *subsection (4)* must be used to notify in writing, for the purpose of *section 261* or *262*, the fact of a disclosable interest being held or of its being acquired or being ceased to be held. Those means are that a statement in writing by the director or secretary must be delivered to the company concerned within 8 days after the date of the event giving rise to the duty to make the notification. The statement must say that the person in question has acquired or has ceased to have (as the case may be) a disclosable interest in shares in, or debentures of, the company or a body corporate of the same group. It also must give details in relation to the shares or debentures in question such as the number, class and consideration paid therefor.

*Subsection (5)* deals with the notification referred to in *section 263(2)* or *(7)* – such notification shall be made to the company within 5 days after the date of the event giving rise to the duty to make the notification. In a case where the circumstances referred to in *subsection (3)* or *(8)* of *section 263* apply, the date of the event giving rise to the duty to make the notification is the date on which the director or secretary becomes aware of the relevant fact referred to in that *subsection (3)* or *(8)*.

*Subsection (6)* provides that a shadow director or *de facto* director giving a notification under this Chapter must give his or her address in that notification.

*Section 266* is new and concerns the enforcement of the notification obligation. This section is taken in substance from *section 58* of the Companies Act 1990. In circumstances where a person has authorised an agent to acquire or dispose of shares or debentures on his or her behalf, that person must ensure that the agent notifies him or her of any such acquisitions or disposals immediately where such an acquisition or disposal would give rise to a notification duty under this Chapter. *Subsection (2)* provides a sanction where the relevant persons do not comply with the requirements and fail to notify within the required time. This will result in the rights and interests in the shares and debentures being unenforceable. *Subsection (3)* deals with circumstances where rights or interests are so curtailed and re-enacts *section 58(4)* and *(5)* of the CA 1990.

*Subsections (4)* and *(5)* provide an exception to the curtailment of rights and interests under *subsection (2)* by reason of a failure to notify in circumstances where the identity of the director or secretary and the details of his or her holding, acquisition or disposal of shares or debentures has been clear on the face of all the relevant registers and documents of the company from not later than 30 days after the date on which the duty to disclose arose.

The most significant change to the previous legislation is contained in *subsection (6)* which allows a company's members to address a breach of the disclosure obligation by passing a special resolution which will offer protection to third parties dealing with the company so that that third party will be entitled to assume that all the requirements of this Chapter in relation to disclosure have been complied with and that the registered holder is entitled to deal with the shares or debentures in question.

Failure to comply with the provisions of this section in relation to ensuring an agent appointed informs the person appointing them of any relevant acquisitions or disposals will result in a category 3 offence for that person. A further category 3 offence is laid down in *subsection (9)* for failure to comply with the duty of disclosure found in *sections 261, 262* or *263*.

*Subsection (10)* deals with the scenario where there has been a failure to comply with the provisions of *section 53* of the Companies Act 1990 prior to the commencement of this *section 266* of the Act.

*Section 267* deals with the contents and entries in the register of interests. It re-enacts various subsections of sections 59 and 60 of the Companies Act 1990. *Subsections (1) and (3) to (5)* re-enact section 59(1) to (4) of the CA 1990. The 3 day notification requirement in *subsection (3)* has been taken from section 60(2) of the CA 1990. *Subsections (6) to (8)* re-enact sections 60(1), (3) and (4) of the CA 1990. *Subsection 6* provides that the entries in the register shall be in chronological order. *Subsection (9)* lays down a category 3 offence for failure to comply with the provisions of this section.

*Section 268* contains provisions supplemental to *section 267* above and re-enacts section 60(7) and 60(9) of the Companies Act 1990. It states that, unless the register of interests is in the form of an index, the company must keep an index of the names entered in the register and such an index must be updated within 14 days of any changes to entries in the register. This register must be kept open for inspection in the 15 minutes prior to the commencement of and during any AGM of the company. Default in complying with the provisions of this section will result in a category 3 offence for the company and any officer of it who is in default.

*Section 269* deals with removal of entries from the register of interests. It provides that a company may remove an entry against a person's name if more than 6 years has elapsed and either (a) the entry recorded the fact that the person in question has ceased to have a notifiable interest or (b) it has been superseded by a later entry made under *section 267*. This section is derived from section 61 of the Companies Act 1990. Default in complying with the provisions of this section will result in a category 3 offence for the company and any officer of it who is in default

## **Chapter 6**

Responsibilities of officers of company – provisions explaining what being “in default” means and presumption regarding this matter

*Section 270* provides a definition for “in default” in the context of sanctions specified in respect of officers. *Subsections (1) and (2)* reproduce subsections (1) and (4) of section 383 of the Companies Act 1963, as substituted by section 100 of the Company Law Enforcement Act 2001. *Subsection (1)* provides that, where a provision of the Act makes reference to an officer who is in default, this is to be interpreted as any officer who authorises or who, in breach of his or her duty as such officer, permits the default in question. *Subsection (2)* provides that the word “default” includes a refusal to do something or a contravention of a provision. The defence in section 271 is not available where a defence is provided for elsewhere in the Act.

*Section 271* provides that company officers will be presumed to have permitted a default and so be “officers in default” where it is proved that they were aware of the basic facts concerning the default concerned, unless they show they took all reasonable steps to prevent it or that, by reason of circumstances beyond their control, they were unable to do so. The pre-existing officer in default provision under the previous law is maintained. The section provides clarity to the fact that an officer may have a legitimate excuse as to why something happened, or did not happen, as the case may be, for example, the officer may have been absent at the time of the default in question. This section derives from section 383 of the Companies Act 1963, as substituted by section 100 of the Company Law Enforcement Act 2001.

## **Part 6 – Financial Statements, Annual Return and Audit**

### *Preliminary Note*

*Part 6* contains provisions regarding the accounting records to be kept by companies, the financial statements to be prepared by them, the periodic returns to be made by companies to the Registrar and the auditing of the financial statements of companies. It also covers other matters related to auditors, particularly rules governing the appointment of statutory auditors and their removal from office. This Part pulls together the various requirements of different Acts in relation to accounting records, financial statements and the audit of those financial statements. The requirements in the past were contained in the Companies Act 1963, Companies Act 1990 and Companies (Amendment) Act 1986. To a large extent, the requirements are unchanged from existing law, however, the relevant provisions have been redrafted in order to make them easier to understand and they have been restructured into a more easily readable format.

*Chapter 1* is concerned with interpretation provisions that are specifically relevant to this Part of the Act. Many of the interpretation provisions exist already, although there are some newly defined terms introduced. This Chapter also gives the power to the Minister to specify which accounting standards should generally be used in the preparation of financial statements in the jurisdiction and also provides that US Accounting Standards may be used in certain limited cases for a transitional period. The Chapter also gives the Minister power to recognise other internationally accepted accounting standards.

*Chapter 2* contains provisions relating to the preparation and retention of accounting records. The content of this Chapter is effectively the re-enactment of section 202 of the Companies Act 1990. That section has been broken down into its constituent parts and reworded slightly to deal more fully with records kept in computerised form. Section 202 CA 1990 referred to the requirement that companies keep “proper books of account”. This Chapter modernises this term to “adequate accounting records”.

*Chapter 3* introduces a new term “financial year”. A financial year of a company is the accounting period that falls between two balance sheet dates. Previously, section 148 of the Companies Act 1963 required accounts to be drawn up within 18 months of incorporation and thereafter, each calendar year. This Chapter defines a financial year and requires that a company’s first financial year be within 18 months of its date of incorporation and thereafter should generally be for a period of 12 months or 52 weeks. It introduces a requirement that a holding company should try to align the financial year end dates of the subsidiary undertakings in the group with the financial year end date of the holding company. This Chapter also introduces a power for a company to change its financial year end date by notice in a prescribed form given to the Registrar. This power, except in certain limited circumstances, may only be exercised once every five years.

*Chapter 4* requires statutory financial statements to give a true and fair view. This Chapter also incorporates the obligation to prepare entity and group financial statements in the form of Companies Act financial statements or IFRS financial statements. These provisions were previously contained in section 148 to section 150C of the Companies Act 1963. The requirements of this Chapter have been reworded and restated but remain, in essence, the same as the requirements under the Companies Act 1963.

*Chapter 5* introduces certain exemptions from the preparation of group accounts by a holding company. These exemptions are already contained in regulations 7, 8, 9, 9A and 10 of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992). This Chapter essentially contains the same exemptions, however, they have been restated and reworded in order to conform with the terminology used in the Act. This Chapter also provides that the entity profit and loss account of a holding company need not be published where the holding company prepares group



financial statements. This latter exemption was previously contained in section 148(8) of the Companies Act 1963.

*Chapter 6* sets out provisions regarding disclosure of director's remuneration and other transactions with directors of the company. This Chapter is essentially a re-enactment of the requirement in section 191 of the Companies Act 1963 to disclose director's remuneration and of the requirements set out in section 41 to 45 of the Companies Act 1990 regarding loans, quasi-loans and credit transactions with directors.

*Chapter 7* sets out disclosure requirements to be given in the notes to the financial statements of a company. The information has been required by various enactments and these have been amalgamated and brought together in one place in order to make the preparation of financial statements clearer. The main matters which are required to be disclosed are:

- information on related undertakings (previously section 16 and 16A of the Companies (Amendment) Act 1986);
- particulars of staff (paragraph 42 of the Schedule to the Companies (Amendment) Act 1986);
- details of authorised share capital, allotted share capital and movements therein (previously contained in paragraphs 25 to 28 of the Schedule to the Companies (Amendment) Act 1986);
- financial assistance for purchase of own shares (previously contained in paragraph 37(2) of the Schedule to the Companies (Amendment) Act, 1986);
- holding of own shares or shares in holding undertaking (previously section 43 of the Companies (Amendment) Act 1986 and paragraph 46 of the Schedule to the Companies (Amendment) Act 1986). The definition of treasury shares has also been extended to agree with the new requirements in *Part 3* of the Act;
- disclosure of accounting policies (previously section 205C of the Companies Act 1990);
- disclosure of remuneration of auditor (previously section 161D of the Companies Act 1963, as inserted by regulation 120 of the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 (S.I. No. 220 of 2010));
- information on arrangements not included in balance sheet (previously paragraph 36A of the Schedule to the Companies (Amendment) Act 1986).

*Chapter 8* deals with approval and signing of statutory financial statements by the board of directors. This Chapter is a slightly amended re-enactment of sections 156 and 157 of the Companies Act 1963. It has been amended to provide for a company that only has a single director.

*Chapter 9* deals with the content of the directors' report that is required to be prepared for every financial year, the approval and signing of the directors' report and the obligation to lay it before the members in a general meeting. This Chapter is an amended re-enactment of section 13 of the Companies (Amendment) Act 1986, as amended by the European Communities (Accounts) Regulations 1993 (S.I. No. 396 of 1993) and section 158(iii) to (iv) of the Companies Act 1963, as amended by section 90 of the Company Law Enforcement Act 2001. This Chapter also includes a requirement to provide information on the acquisition or disposal of own shares and on directors' interests in shares and debentures. These are amended re-enactments of section 14 of the Companies (Amendment) Act 1986, as amended by section 233(1)(a) of the Companies Act 1990 and also section 63 of the Companies Act 1990. The Chapter also introduces a new requirement for directors, in that

they now have to make a statement to the effect that they have provided all relevant audit information to the auditor in respect of that financial year.

*Chapter 10* deals with the obligation to have statutory financial statements audited. This Chapter sets out a clear obligation to have the statutory financial statements for each financial year audited by a statutory auditor. It also contains a sign-post to the audit exemption which is set out in *Chapter 15*. The Chapter also provides for the members to require an audit despite qualifying otherwise for the audit exemption and includes disclosures to be included in the financial statements if the audit exemption is availed of. A new obligation is set out that requires a company that has availed of the audit exemption in respect of a financial year to provide the Director of Corporate Enforcement, if requested, such access to and facilities for inspecting and taking copies of the books and documents of the company and to furnish to the Director any such information as the Director may reasonably require to satisfy the Director that the company was entitled to avail of the audit exemption.

*Chapter 11* deals with the preparation, content and signing of the auditors' report. This Chapter is an amended re-enactment of section 193(4) to (4F) of the Companies Act 1990 and sets out the items to be addressed in the statutory auditors' report.

*Chapter 12* deals with publication of financial statements. The Chapter requires that every member of the company is circulated with a copy of the statutory financial statements, directors' report and statutory auditors' report each year before they are laid before the members in general meeting. It also deals with the right of members to demand copies of financial statements and reports and permits companies to meet this demand by using electronic communications. The Chapter also clarifies that statutory financial statements must always be accompanied by the relevant directors' report and statutory auditors' report, however, if a company publishes non-statutory financial statements (i.e. any form of abbreviated financial statements), they must also publish a statement indicating that they are not statutory financial statements, where the statutory financial statements may be obtained and the opinion expressed in the report of the auditor on those statutory financial statements.

*Chapter 13* deals with the requirement for each company to make an annual return to the Registrar and with the documents that are required to be annexed to it. This Chapter is an amended re-enactment of various different requirements in existing company law regarding annual returns, annual return dates, and documents to be annexed to annual returns. While there has been substantial rewording of the requirements, there is no significant difference between the existing requirements and the requirements contained in this Chapter of the Act. In brief, this Chapter requires that a company has an annual return date in each year and within 28 days of that annual return date, it must lodge an annual return with the Registrar. The documents that must be attached to this annual return include the statutory financial statements, the directors' report and the statutory auditors' report thereon. Other documents may need to be attached where the company has availed of certain exemptions set out in this Part.

*Chapter 14* deals with exemptions from public disclosure of financial information in certain circumstances. *Sections 350 to 356* are substantial re-enactments of sections 8, 10, 11, 12 and 18 of the Companies (Amendment) Act 1986. These sections deal with the identification of small and medium companies and provisions that permit such companies to file abridged financial statements rather than full financial statements with the Registrar. They also deal with the audit report that must accompany such abridged financial statements. *Section 357* substantially re-enacts section 17 of the Companies (Amendment) Act 1986 providing an exemption for subsidiary undertakings from filing their statutory financial statements where a holding undertaking provides a guarantee covering all of the liabilities of the subsidiary.

*Chapter 15* identifies companies that can and cannot avail of the audit exemption. The audit exemption regime as set out in *sections 358, 359, 360, 361, 362, 363 and 364* has been streamlined to ensure the audit exemption criteria are in line with article 52 of Directive 2013/34/EU which must be transposed into national law by July 2015. The aim of the Directive is to simplify the accounting

requirements for small companies and improves the clarity and comparability of companies' financial statements within the European Union. The new Directive takes the small company or group as the starting point and imposes additional requirements on medium-sized companies and groups and even more requirements on large companies and groups as well as on “public interest entities” (essentially listed companies as well as banks and insurance undertakings whether listed or not, regardless of size). This is described as a “think small first” approach.

*Chapter 16* provides for a special audit exemption for dormant companies.

*Chapter 17* deals with the voluntary revision of defective statutory financial statements. This entire Chapter is new to Irish company law. It is similar to requirements found in the UK Companies Act 2006. Prior to this, there was no mechanism in Irish company law whereby the directors, if they became aware of a deficiency in their latest statutory financial statements, or directors' report, could revise the reports filed with the Registrar. The Chapter sets out the procedures available to the directors to remedy deficiencies and where the company has a statutory auditor appointed, the statutory auditor is required to report on the revised financial statements and revised report. The Chapter also contains procedures for the revision of abridged financial statements filed by small and medium companies.

*Chapter 18* deals with the appointment of statutory auditors to a company. This Chapter is a substantial re-enactment of the requirements contained in section 160 of the Companies Act 1963. Once appointed, statutory auditors continue thereafter unless they have indicated their unwillingness to be reappointed, they are not qualified for reappointment, a resolution has been passed at a general meeting appointing someone else or the company becomes eligible to avail of the audit exemption.

*Chapter 19* deals with the rights, obligations and duties of statutory auditors. This Chapter is substantially a re-enactment and restatement of the requirements set out in sections 193 to 197 of the Companies Act 1990.

*Chapter 20* deals with the removal and resignation of statutory auditors. This Chapter is substantially a re-enactment and restatement of requirements set out in sections 160 to 161 of the Companies Act 1963 and sections 184 to 186 of the Companies Act 1990.

*Chapter 21* deals with the notifications that must be forwarded by the auditor and the company where a statutory auditor ceases to hold that office. The Chapter also prohibits a person who is subject to a disqualification order (within the meaning of *Chapter 4 of Part 14*) from being involved in the audit of a company.

*Chapter 22* deals with false statements in returns, financial statements etc. This Chapter re-enacts section 37 of the Companies (Amendment) (No. 2) Act 1999, stating that if any person knowingly makes a false statement in any return, statement, financial statement or other document required by this Part, they shall be guilty of a category 2 offence.

*Chapter 23* contains a transitional provision to provide that existing companies may opt to prepare financial statements in accordance with the provisions of the Sixth Schedule to the Companies Act 1963, for the financial year which begins before, but ends after, the commencement of this section.

## *Explanatory Memorandum*

### Chapter 1 Preliminary

*Section 272* sets out, in general terms, the issues that are dealt with in this Part. *Subsection (2)* introduces the financial reporting frameworks under which financial statements of companies can be drawn up. These will be either in accordance with International Financial Reporting Standards and certain provisions of this Part, or in accordance with this Part and the requirements of *Schedules 3 and 4* (where applicable) to the Act. This section identifies that the prefix “IFRS” will be used to refer to financial statements drawn up in accordance with International Financial Reporting Standards and the prefix “Companies Act” will be used to refer to those financial statements that are prepared in accordance with this Part, *Schedules 3 and 4* (where applicable) to this Part, and any accounting standards that are prescribed by the Minister.

*Section 273* is new and places a limitation on the discretions of a company under *Part 4* with respect to holding an Annual General Meeting and this Part with respect to the length of its financial year or to its annual return date.

*Sections 274 and 275* contain definitions for a number of terms used in *Part 6*. These sections take account of the recommendation of the first report of the Company Law Review Group which provided that greater use should be made of defined terms in order to make the legislation more succinct. The terminology has also been updated to accord with current terminology used in practice. Examples of this are that:

- (i) the term “accounts” has been substituted by the term “financial statements”;
- (ii) the term “proper books of account” has been substituted by the term “adequate accounting records”; and
- (iii) the term “auditor” has been substituted by the term “statutory auditor”.

Additionally, the term “entity financial statements” has replaced the term “individual accounts” to differentiate between the financial statements of a single entity holding company and the group financial statements that the holding company will also, generally speaking, be required to prepare.

*Section 274* contains the definitions set out in the following paragraphs in *subsection (1)*.

The definition of “abridged financial statements” replaces the definition of “abridged accounts” previously in section 19 of the Companies (Amendment) Act 1986.

The definition of “balance sheet” is new for completeness and in order to facilitate references throughout this Part. The definition clarifies, for the avoidance of doubt, that the expression means a statement of financial position when the financial reporting framework is IFRS.

The definition of “Companies Act financial statements” replaces the previous definition of “Companies Act accounts” which was contained in section 2 of the Companies Act 1963. Similarly, the definitions of “Companies Act entity financial statements” and “Companies Act group financial statements” replace the terms “Companies Act individual accounts” and “Companies Act group accounts” in section 2 CA 1963.

The definition of “entity financial statements” is an expanded definition of the term “individual accounts” previously in section 2 CA 1963.

The definition of “financial reporting framework” is a new definition and has been included in order to facilitate an understanding of the possible financial reporting frameworks that can be used in the preparation of financial statements.

The definition “financial statements” replaces the definition of “accounts” previously contained in section 2 CA 1963.

The definition of “group financial statements” is an expanded definition of the term “group accounts” defined in section 2 CA 1963.

The definition of “IAS Regulation” is the same as that contained in section 2 CA 1963, however, it has been extended to clarify that Article 4 refers to public companies and Article 5 of that regulation refers to private companies.

The definition of “IFRS” is the same as that contained in section 2 CA 1963.

The terms “IFRS entity financial statements”, “IFRS financial statements”, and “IFRS group financial statements” replace the terms “IFRS individual accounts”, “IFRS accounts”, and “IFRS group accounts” in section 2 CA 1963.

The term “International Financial Reporting Standards” is the same as that included in section 2 CA 1963.

The definition of “non-statutory financial statements” is a new definition that has been introduced in order to facilitate references to such financial statements throughout this Part and also to clearly distinguish non-statutory financial statements from statutory financial statements, which are those required to be prepared under this Part.

The definition of “profit and loss account” is an expanded definition from that found in section 2 CA 1963. The definition clarifies, for the avoidance of doubt, that the expression means an income statement when the financial reporting framework is IFRS.

The definition of “statutory financial statements” is a new definition introduced to differentiate financial statements prepared in accordance with this Part from other financial statements or accounts that may be prepared by a company.

*Subsection (2)* is an amended re-enactment of section 2(1B) CA 1963. The terminology used has been changed in order to be consistent with the terminology used in this Part.

*Subsection (3)* is an amended re-enactment of what was previously contained in section 148(10)(a) CA 1963.

*Subsection (4)* is an amended re-enactment of what was previously contained in section 148(10)(b) CA 1963.

*Subsection (5)* is an expanded and amended re-enactment of the definition of “undertakings dealt with in group accounts” which was contained in regulation 3(1) of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

*Subsection (6)* has been inserted to acknowledge that directors can meet their obligations by delegating certain matters to other people.

*Section 275* contains the definitions set out in the following paragraphs in *subsection (1)*.

The definition of “accounting standards” is derived from the definition contained in section 205 A(1) of the Companies Act 1990, as inserted by section 41 of the Companies (Auditing and Accounting) Act 2003.

The definition of “associated undertaking” is a slightly amended version of the definition included in regulation 3(1) of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

The definition of “audit committee” is a newly defined term being introduced to facilitate reference to the committee established under *section 167* of this Act.

The definition of “audit exemption” is based in substance on the definition of “the exemption” that was contained in section 31 of the Companies (Amendment) (No. 2) Act 1999, although the cross-references have been updated to reflect the new structure of this Act.

The definition of “audit of the statutory financial statements” is a newly defined term being introduced to facilitate reference to this work throughout the Act.

The definition of “credit institution” re-enacts the definition that was contained in section 2(2)(a)-(d) of the Companies (Amendment) Act 1986.

The definitions of “EEA Agreement” and “EEA State” are re-enactments of the definitions contained in section 2 of the Companies Act 1963.

The definition of “equity share capital” or “equity shares” is a newly defined term introduced into this Act.

The definition of “fellow subsidiary undertaking” is an amended re-enactment of the definition of “fellow subsidiary” contained in paragraph 63 of the Schedule to the Companies (Amendment) Act 1986.

The definition of “group undertaking” is an amended re-enactment of the definition of “group undertaking” contained in paragraph 64 of the Schedule to the Companies (Amendment) Act 1986.

The definition of “higher holding undertaking” is a newly defined term introduced in order to facilitating the drafting of this Part.

The definition of “holding undertaking” is an amended version of the definition of “parent undertaking” contained in regulation 3 of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

The definition of “insurance undertaking” is a newly defined term to identify those undertakings that fall within the scope of the European Communities (Insurance Undertakings: Accounts) Regulations 1996 (S.I. 23 of 1996).

The definition of “net assets” is a newly defined term introduced in order to facilitate drafting of this Part.

The definition of “participating interest” is a newly defined term but is consistent with the meaning given to this phrase in regulation 35(1) of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

The definition of “publish” is a re-enactment of the definition of the same term contained in section 19(4) of the Companies (Amendment) Act 1986.

The definition of “regulated market” has the same meaning as that term held in section 2 of the Companies Act 1963.

The definition of “subsidiary undertaking” extends the meaning of subsidiary as set out in *section 7* of the Act to include partnerships and unincorporated bodies and persons in addition to companies. It is consistent with the definition of a subsidiary undertaking included in regulation 4 of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

The definition of “turnover” is a slightly amended re-enactment of the definition of “turnover” set out in paragraph 75 of the Schedule to the Companies (Amendment) Act 1986. It has been amended to provide additional guidance for companies whose ordinary activities include the making or holding of investments.

The definition of “undertaking” is consistent with the definition of “an undertaking” as set out in regulation 3 of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

*Subsection (2)* extends the definition of wholly-owned subsidiary in *section 8(2)* of the Act to refer to undertakings rather than companies.

*Subsection (3)* extends the meaning of shares to certain rights and interests in undertakings with no share capital. This subsection is based on paragraph 35(2) of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

*Subsection (4)* is an enactment of paragraph 77 of the Schedule to the Companies (Amendment) Act 1986.

*Subsection (5)* is an enactment of paragraph 78 of the Schedule to the Companies (Amendment) Act 1986.

*Section 276* derives from the definition of realised profits that was contained in paragraph 72 of the Schedule to the Companies (Amendment) Act 1986. That paragraph has been broken down into two subsections and the terminology used in the paragraph has been changed to be consistent with the terminology used throughout this Part. The section is given clarity as a missing reference to the word ‘entity’ is now included in front of the words financial statements in *subsection (1)* to clarify rather than change the law.

*Section 277* clarifies for the avoidance of doubt that where any provision of this Part provides for an exemption from a requirement of this Part, it is optional for the company to avail of that exemption or not.

*Subsection (2)* extends that section to other forms of words such as “shall be exempt” or “need not”.

*Section 278* provides for the power of the Minister to specify the accounting standards which should be applied in the preparation of financial statements.

*Subsection (1)* gives the Minister the power to specify by Regulation, the accounting standards in accordance with which statutory financial statements are to be prepared.

*Subsection (2)* states that if a company is required or opts to prepare financial statements in accordance with IFRS or opts to avail of the option under *section 279* to use US Accounting Standards, then those Standards shall be used.

*Section 279* provides that in limited cases for a particular transitional period, US Accounting Standards may be used by certain companies.

*Subsection (1)* sets out various definitions used in this section. The definition of “relevant holding company” is an amended re-enactment of the definition of “relevant parent undertaking” contained in section 1 of the Companies (Miscellaneous Provisions) Act 2009 as amended by the Companies (Amendment) Act 2012.

The definition of “relevant financial statements” replaces the definition of “accounts” in section 1 C(MP)A 2009.

The definition of “US Accounting Standards” replaces the definition of “US Generally Accepted Accounting Principles” used in the C(MP)A 2009, but otherwise is exactly the same.

*Subsection (2)* is a re-enactment of section 1(2) C(MP)A 2009 as substituted by section 2(b) of the Companies (Amendment) Act 2012.

*Subsection (3)* re-enacts section 1(3) C(MP)A 2009 and states that US Accounting Standards may be used to the extent that they are not incompatible with any requirement of this Part. In other words, where there is an inconsistency between the requirements of this Part and US Accounting Standards, then the requirements of this Part have priority.

*Section 280* provides that the Minister may permit the use of other internationally recognised accounting standards for a particular transitional period.

*Subsection (1)* is a re-enactment of section 2(1) of the Companies (Miscellaneous Provisions) Act 2009 except that the term “relevant financial statements” has been substituted for the term “accounts” and other terminology has been amended to be consistent with this Part.

*Subsection (2)* is a re-enactment of section 2(2) C(MP)A 2009 except that some terms have been changed to be consistent with the terminology used in this Part.

*Subsection (3)* is a re-enactment of subsection 2(3) C(MP)A 2009 except that certain terms have been amended to be consistent with the terminology used in this Part.

## Chapter 2 Accounting records

*Section 281* requires that a company shall keep or shall cause to be kept adequate accounting records. This requirement was previously contained in section 202(1) of the Companies Act 1990 and referred to “proper books of account” rather than “adequate accounting records”.

*Section 282* sets out the basic requirements that accounting records must meet in order to be considered adequate accounting records.

*Subsection (1)* is in substance a re-enactment of the requirements set out in section 202(1) of the Companies Act 1990 and requires that the accounting records are sufficient to correctly record and explain the transactions of the company such that financial statements can be prepared at any time in accordance with the requirements of this Act and that those financial statements can be audited.

*Subsection (2)* re-enacts the requirements of section 202(2) CA 1990 and requires those records to be kept on a continuous and consistent basis. The subsection introduces a new requirement that where



the records are not kept by making entries in a bound book but by some other means, then adequate precautions must be taken to safeguard against falsification and facilitate the discovery of any such falsification.

*Subsection (3)* is an amended re-enactment of section 202(3) CA 1990 and requires that the accounting records shall contain details of monies received and expended, a record of the assets and liabilities of the company, if the company deals in goods, a record of all transactions whereby goods are purchased and sold together with statements of stock held by the company at the end of each financial year and, if the company's business involves the provision or purchase of services, a record of all transactions whereby the services provided or purchased. The section gives certainty that all transactions must be recorded in writing, especially in cash businesses. This aligns the company law requirements with those in regulation 27(1)(b) of the VAT Regulations and s886 of the Taxes Consolidation Act 1997 in relation to the keeping of records. This will not result in an extra burden on business as companies are keeping this information anyway for tax purposes, for example, till rolls must be maintained by shops.

*Subsection (4)* states that adequate accounting records shall be deemed to have been kept if they comply with *subsections (1),(2) and (3)*, provided that they explain the company's transactions and facilitate the preparation of financial statements that give a true and fair view of the assets, liabilities, financial position and profit or loss of the company and, where relevant, the group, and include sufficient information from accounting records kept outside the State to enable statutory financial statements to be prepared. Similar requirements were previously contained in section 202(4) CA 1990.

*Subsection (5)* requires the accounting records to be kept in written form in an official language of the State or in a manner that allows them to be converted easily and readily into such written form. This was previously contained in section 202(8) CA 1990.

*Subsection (6)* is a new subsection and requires that where accounting records and other information and returns are kept on a computer that computer shall be kept in the State unless the accounting records are kept outside the State.

*Subsection (7)* is a new subsection and states that in any case where the accounting records are kept outside the State, then the Minister may, by regulation, impose requirements on the companies to keep their accounting records in such a manner that will provide for effective access to those records.

*Subsections (8) and (9)* require a holding company, which has a subsidiary undertaking in relation to which this section does not apply, to take steps to ensure that the subsidiary undertaking keeps such accounting records as will enable the directors of the holding company to ensure that any group financial statements required to be prepared under this Part comply with the requirements of this Act and, where applicable, Article 4 of the IAS Regulation. These requirements are also new requirements.

*Section 283* deals with where accounting records of a company are to be kept.

*Subsection (1)* states that the company's accounting records may be kept at its registered office or at such other place as the directors think fit. This is a re-enactment of section 202(5) of the Companies Act 1990.

*Subsection (2)* is an amended re-enactment of part of section 202(6) CA 1990. *Subsection (2)* requires that if the accounting records are kept outside the State, they must be sent to a place in the State, such information and returns as would enable financial statements to be prepared at not more than six

month intervals and the information must be sufficient to enable the preparation of statutory financial statements and a directors' report required by *section 325*.

*Section 284* deals with access to the accounting records of a company.

*Subsection (1)* is a re-enactment of *section 202(8)* of the Companies Act 1990 except that the terminology has been changed to be consistent with the Act. It states that the accounting records of a company should be available for inspection at all reasonable times by officers of the company and other persons entitled to inspect the accounting records.

*Subsection (2)* clarifies that where the accounting records are kept in a manner other than written form, they must be made accessible in written form to any person who has the right to request access to them.

*Subsection (3)* states that members (not being directors) generally have no right to inspect the accounting records of a company except where this is conferred by statute or by the company's constitution or authorised by the directors under this section.

*Subsection (4)* requires the directors of a company to determine whether and to what extent and under what conditions or regulations, financial statements and accounting records of a company will be open to the inspection of its members that are not directors of the company.

*Section 285* requires that a company shall preserve their accounting records, information or returns for a period of at least six years after the end of the financial year containing the latest date to which the record relates. This section is an amended re-enactment of *section 202(9)* of the Companies Act 1990.

*Section 286* deals with offences in relation to keeping adequate accounting records. This section is an amended re-enactment of the provisions of *section 202(10)* of the Companies Act 1990.

*Subsection (1)* states that where a company contravenes any requirement of *sections 281, 282, 283, 284 or 285*, then it shall, subject to *paragraph (b)*, be guilty of a category 2 offence, however, *paragraph (b)* requires that if the contravention falls within a case to which *subsections (3),(4) or (5)* apply then it shall be considered a category 1 offence.

*Subsection (2)* imposes the same level of offences on a director of the company if that director failed to take reasonable steps to secure compliance by the company with the requirements of the relevant sections or if his or her own intentional act is the cause of the default by the company.

*Subsection (3)* identifies the first circumstance in which a contravention would be considered to be a category 1 offence. This is where the contravention arose in relation to a company that is subsequently wound up and is unable to pay its debts and the contravention has contributed to the company's inability to pay its debts or resulted in substantial uncertainty about the assets and liabilities of a company or substantially impeded the orderly winding up of a company.

*Subsection (4)* identifies the second circumstance under which a contravention is deemed to be a category 1 offence. This is where the contravention persists during a continuous period of three years or more.

*Subsection (5)* identifies the third circumstance under which the contravention is deemed to be a category 1 offence and this is where the contravention involved a failure to correctly record or explain

a transaction of a company which is for an amount exceeding €1 million or 10% of the net assets of the company, whichever is the greater.

*Subsection (6) and (7)* are new and provide for a more precise definition for “net assets” than existing law which is to be used when determining whether a company has not maintained adequate accounting records in accordance with the Act.

*Subsection (8)* provides a defence for directors of a company that are charged with failing to take reasonable steps to ensure compliance by a company with requirements of *sections 281 to 285* inclusive. This is an amended re-enactment of the defence previously provided in *section 202(10)(a)* of the Companies Act 1990. The defence is to prove both that the defendant had reasonable grounds for believing and did believe that a competent and reliable person was charged with the duty of undertaking those requirements and such a person was in a position to discharge that duty and also to prove that a director had monitored the discharge of that duty by such competent and reliable person.

### Chapter 3 Financial Year

*Section 287* defines that a “financial year end date” is a reference to the last day of the financial year of a company.

*Section 288* defines when a financial year of a company starts and finishes. It also introduces requirements regarding the frequency with which and the methodology whereby a company may change its financial year end date.

*Subsection (1)* states that a company’s first financial year begins with the date of its incorporation and must end on a date no later than 18 months after that date of incorporation. This is consistent with the requirements of *section 148(1)* of the Companies Act 1963.

*Subsection (2)* states that each subsequent financial year begins on a day immediately after the end of the previous financial year and continues, unless changed in accordance with *subsection (4)*, for a period of 12 months give or take seven days either side of that time period.

*Subsection (3)* requires that, except where there are substantial reasons not to do so, the directors of a holding company shall ensure that the financial year end dates of each of the subsidiary undertakings included in the consolidation coincide with that of the holding company. This is a new requirement although previously *regulation 26 (2)* of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992) required that if the financial year of the subsidiary undertaking did not coincide with that of the holding company, then additional financial statements had to be drawn up for the subsidiary undertaking to coincide with the year end date of the holding company.

*Subsection (4)* states that a company may, by giving notice in the prescribed form to the Registrar, alter its financial year end date.

*Subsection (5)* states that where a financial year end date is changed, then subsequent financial year end dates shall also be changed so that they fall on the anniversary of that new financial year end date.

*Subsection (6)* explains that the company’s “previous financial year end date” is the date immediately preceding its current financial year.

*Subsection (7)* states that a financial year end date may not be changed if it would result in a financial year in excess of 18 months. This is different to what was required by *section 148(1)* of the Companies Act 1963 which required that a financial year end date must fall in every calendar year.

*Subsection (8)* states that an application to change a previous financial year end date must be made before the time period for delivering financial statements and reports to the Registrar has expired.

*Subsection (9)* states that a company may only change its financial year end date where a period of five years has elapsed from the previous change of financial year end date.

*Subsection (10)* provides three exemptions to the five year rule included in *subsection (9)*. These are that the reason for the new financial year end date is to bring a company into line with either the financial year end date of another EEA undertaking which is its subsidiary undertaking or holding undertaking; or where the entity is being wound up; or where the Director of corporate enforcement permits.

*Subsection (11)* defines what an EEA undertaking means being an undertaking established under the law of any EEA state.

#### Chapter 4 Statutory financial statements

*Section 289* clarifies in *subsection (1)* that the directors of a company shall not approve financial statements as the statutory financial statements of a company unless they give a true and fair view of the assets, liabilities, financial position as at the end of the financial year and profit or loss for the financial year of the company alone, in the case of the company's entity financial statements, and of the company and all its subsidiary undertakings taken as a whole, in the case of the company's group financial statements.

*Subsection (2)* requires the statutory auditors in performing their functions under this Act in relation to statutory financial statements to have regard to the director's duty under *subsection (1)*. This is consistent with the requirements set out in section 149(2) and section 150A(2) of the Companies Act 1963 that individual and group accounts shall give a true and fair value of the state of affairs at the end of the financial year and of the profit or loss for the financial year of both the company and the group.

*Section 290* deals with the obligation of the directors of a company to prepare entity financial statements for that company for each financial year under a relevant financial reporting framework.

*Subsection (1)* sets out the basic requirement for the directors of a company to prepare entity financial statements for the company in respect of each financial year. This was previously required by section 148(1) of the Companies Act 1963.

*Subsection (2)* introduces the term statutory financial statements and states that statutory financial statements of a company are its entity financial statements unless it prepares group financial statements. This term is a new term in the Act.

*Subsections (3)* and *(4)* introduce the two financial reporting frameworks that are generally, subject to the requirements of *subsections (5)* to *(8)* explained below, available to a company. The first framework is that of "Companies Act entity financial statements" which are financial statements prepared in accordance with *section 291* and the second framework is that of "IFRS entity financial statements" which are those prepared in accordance with International Financial Reporting Standards and *section 292*.

*Subsection (5)* requires that a company not trading for the acquisition of gain by its members must prepare its entity financial statements in accordance with *section 291*. This was previously contained in section 148(3) CA 1963.

*Subsection (6)* states that once the directors of a company have prepared IFRS entity financial statements for a company, all subsequent entity financial statements of that company must be IFRS entity financial statements unless there is a relevant change of circumstance. This enacts what was previously contained in section 148(4) CA 1963.

*Subsection (7)* spells out the relevant change of circumstances referred to in *subsection (6)* which are that (i) the company becomes a subsidiary undertaking of another undertaking that does not prepare IFRS financial statements, (ii) the company ceases to be a company with securities admitted to trading on a regulated market in an EEA state, or (iii) a holding undertaking of the company ceases to be an undertaking with securities admitted to trading on a regulated market in an EEA state. This enacts what was previously contained in section 148(5) CA 1963.

*Subsection (8)* states that where following a change of circumstance, Companies Act entity financial statements are prepared, the directors may subsequently prepare IFRS entity financial statements and *subsections (6)* and *(7)* apply again. This enacts what was previously contained in section 148(6) CA 1963.

*Section 291* deals with Companies Act entity financial statements. It sets out the composition of the financial statements, the provisions with which they must comply and the overriding requirement that the financial statements give a true and fair view of the assets, liabilities and financial position of the company as at the financial year end date and of the profit or loss of the company for the financial year. It requires the company to identify the body of accounting standards, complied with in the preparation of the financial statements. It also sets out offences for failing to comply with any of the requirements of the section. It is primarily based on section 149(1) to (4) of the Companies Act 1963 and section 3 of the Companies (Amendment) Act 1986.

*Subsection (1)* requires that Companies Act entity financial statements comprise a balance sheet as at the financial year end date, a profit and loss account for the financial year and any other additional statements and information required by the financial reporting framework adopted in relation to the company. The requirement for a balance sheet and a profit and loss account is set out both in section 149(1) of the Companies Act 1963 and section 3(1) of the Companies (Amendment) Act 1986. The requirement to include other additional statements and information is a new requirement to acknowledge that generally applicable accounting standards require further statements and information to be included in financial statements.

*Subsection (2)* sets out the general requirement that such Companies Act entity financial statements shall give a true and fair view of the assets, liabilities and financial position of the company as at the financial year end date and of the profit or loss of the company for the financial year. This requirement was previously contained in section 149(2) CA 1963 and section 3(1)(b) C(A)A 1986.

*Subsection (3)* states that Companies Act entity financial statements shall comply with the provisions of *Schedule 3* to the Act, applicable accounting standards and the other provisions of the Act. The requirement to comply with *Schedule 3* and provisions of the Act are based on the requirements set out in section 149(3) CA 1963 and section (3)(1)(a) C(A)A 1986. The requirement to comply with applicable accounting standards is based on the requirement of section 205A(2) of the Companies Act 1990, which section has not been commenced.

*Subsection (4)* states that mere compliance with the Act and applicable accounting standards is not enough if this does not result in the financial statements giving a true and fair view. Additional

information must be given in order to meet the standard of a true and fair view. That requirement was previously contained in section 3(1)(c) C(A)A 1986.

*Subsection (5)* states that where complying with the Act and giving the additional disclosures referred to in *subsection (4)* above still does not give a true and fair view of the financial position and profit of the company, the directors of a company may depart from provisions of this Act to the extent necessary to give a true and fair view. This was previously contained in section 3(1)(d) C(A)A 1986.

*Subsection (6)* requires that any departure under *subsection (5)*, the reason for it and its effect shall be given a note to the financial statements of the company. This requirement was previously contained in section 3(1)(e) C(A)A 1986.

*Subsection (7)* requires that a company should clearly state the accounting standards with which it has complied and also identify any material departure from those standards, the effect of the departure and the reason for it in their Companies Act entity financial statements. This is an amended re-enactment of the requirements of section 205A(2) CA 1990.

*Subsection (8)* specifies that accounting standards are applicable to a company's entity financial statements if they are relevant to the company's circumstances and those entity financial statements. This is a re-enactment of the requirements of section 205A(3) CA 1990.

*Subsections (9) and (10)* deal with offences. *Subsection (9)* states that if a company fails to comply with any of *subsections (2) to (7)*, the company and any officer of it who is in default, shall be guilty of a category 2 offence. *Subsection (10)* provides that in any proceedings against a person in respect of an offence under *subsection (9)* it shall be a defence to prove that the defendant believed that a competent and reliable person had been charged with carrying out the provision.

*Subsection (11)* clarifies that an "officer" includes any shadow director and *de facto* director.

*Section 292* deals with IFRS entity financial statements. It sets out that they must comply in full with International Financial Reporting Standards and also the additional information required by this Act except for that required by *Schedules 3 and 4* to the Act. It also sets out offences for failing to comply with requirements of the section. It is primarily based on section 149A of the Companies Act 1963.

*Subsection (1)* requires that IFRS entity financial statements must contain an unreserved statement in the notes to those financial statements that they have been prepared in accordance with International Financial Reporting Standards and requires the directors to ensure that they contain the additional information required by this Act.

*Subsection (2)* clarifies, for the avoidance of doubt, that the requirement for entity financial statements prepared in accordance with IFRS to present fairly, the assets, liabilities, financial position and financial performance and cash flows is deemed to be equivalent to the requirement to give a true and fair view as required by *section 292(2)*. This is an amended enactment of what was previously stated in section 2(1B) of the Companies Act 1963.

*Subsections (3) and (4)* deal with offences. *Subsection (3)* states that if a company fails to comply with *subsection (1)*, the company and any officer of it who is in default shall be guilty of a category 2 offence. *Subsection (4)* states that it shall be a defence to prove that a person had reasonable grounds for believing that a competent and reliable person had been charged with a duty of ensuring that the provisions of the subsection concerned were complied with.

*Subsection (5)* clarifies that the term "officer" includes any shadow director and *de facto* director.

*Section 293* deals with the obligation of the directors of a company that is a holding company to prepare group financial statements for the holding company and all its subsidiary undertakings for each financial year in addition to the entity financial statements required by *section 291*.

*Subsection (1)* sets out the basic requirement for the directors of a holding company to prepare group financial statements for the company and its subsidiaries in respect of each financial year. This was previously required by section 150 of the Companies Act 1963.

*Subsection (2)* defines the term statutory financial statements for a holding company and states that where a holding company prepares group financial statements, there shall be associated with those group financial statements, the entity financial statements prepared under *section 290* and together they shall constitute the statutory financial statements of the company.

*Subsections (3) and (4)* introduce two financial reporting frameworks that are generally, subject to the requirements of *subsections (5) to (9)* available to a holding company required to prepare group financial statements. The first framework is that of “Companies Act group financial statements” which are financial statements prepared in accordance with *section 294* and the second framework is that of “IFRS group financial statements” which are those prepared in accordance with International Financial Reporting Standards and *section 295*.

*Subsection (5)* requires that a group not trading for the acquisition of gain by its members must prepare its group financial statements in accordance with *section 294*. This was previously contained in section 150(4) of the Companies Act 1963.

*Subsection (6)* states that once the directors of a holding company have prepared IFRS group financial statements for the holding company, all subsequent group financial statements of that holding company must be IFRS group financial statements unless there is a relevant change of circumstance.

*Subsection (7)* spells out the relevant changes of circumstances referred to in *subsection (6)* which are that the company becomes a subsidiary undertaking of another undertaking that does not prepare IFRS group financial statements, the company ceases to be a company with securities admitted to trading on a regulated market in an EEA state, or a holding undertaking of the company ceases to be an undertaking with securities admitted to trading on a regulated market in an EEA state.

*Subsection (8)* states that where following a change in circumstance, Companies Act group financial statements are prepared, the directors may subsequently prepare IFRS group financial statements and *subsections (6) and (7)* apply again. This enacts what was previously contained in section 150(7) of the Companies Act 1963.

*Subsection (9)* makes the requirements of *subsection (1)* subject to the various exemptions available in *Chapter 5* for holding companies to exempt them from the need to prepare group financial statements.

*Section 294* deals with Companies Act group financial statements. It sets out the composition of the financial statements, the provisions with which they must comply and the over-riding requirement that the group financial statements give a true and fair view of the assets, liabilities and financial position of the company and the undertakings included in the consolidation taken as a whole, as at the financial year end date and of the profit or loss of the company and those undertakings for the financial year. It requires the company to identify the body of accounting standards complied with in the preparation of the financial statements. It also sets out offences for failing to comply with any of the requirements of the section. It is primarily based on section 150A of the Companies Act 1963 and regulation 5 of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

*Subsection (1)* requires that Companies Act group financial statements comprise a consolidated balance sheet as at the financial year end date, a consolidated profit and loss account for the financial year and any other additional statements and information required by the financial reporting framework adopted in relation to the group financial statements. The requirement for a consolidated balance sheet and a consolidated profit and loss account was previously set out in section 150(A) CA 1963. The requirement to include other additional statements and information is a new requirement to acknowledge that, normally, applicable accounting standards require further statements and information to be included in consolidated financial statements.

*Subsection (2)* sets out the general requirement that such Companies Act group financial statements shall give a true and fair view of the assets, liabilities and financial position of the company and the undertakings included in the consolidation taken as a whole, as at the financial year end date and of the profit or loss of the company and those undertakings for the financial year so far as concerns the members of the company. This requirement was previously contained in section 150A(2) CA 1963 and in regulation 14(1) of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

*Subsection (3)* states that Companies Act group financial statements shall comply with the provisions of *Schedule 4*, applicable accounting standards and the other provisions of the Act. The requirement to comply with *Schedule 4* was previously contained in section 150A(iii) of the Companies Act 1963. The requirement to comply with applicable accounting standards is based on the requirement of section 205A(2) of the Companies Act 1990 which section has not been commenced.

*Subsection (4)* states that mere compliance with the Act and applicable accounting standards is not enough if this does not result in the financial statements giving a true and fair view. Additional information must be given in order to meet the standard of a true and fair view. That requirement was previously contained in regulation 14(2) of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

*Subsection (5)* states that where complying with the Act and giving the additional disclosures referred to in *subsection (4)* above, still does not give a true and fair view of the financial position and profit of the group, the directors may depart from provisions of this Act to the extent necessary to give a true and fair view. This was previously contained in regulation 14(3) of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

*Subsection (6)* requires that any departure under *subsection (5)* the reason for it and its effect shall be given in a note to the financial statements. This requirement was previously contained in regulation 14(4) of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

*Subsection (7)* requires that a company should clearly state the accounting standards with which it has complied and also identify any material departure from those standards, the effect of the departure and the reason for it in their Companies Act group financial statements. This is an amended re-enactment of the requirements of section 205A(2) of the Companies Act 1990.

*Subsection (8)* specifies that accounting standards are applicable to a company's group financial statements if they are relevant to the company's circumstances and those group financial statements. This is a re-enactment of the requirements of section 205A(3) CA 1990.

*Subsections (9) and (10)* set out the offences under this section. *Subsection (9)* states that if a company fails to comply with any of *subsections (2) to (7)*, the company and any officer of it who is in default, shall be guilty of a category 2 offence. *Subsection (10)* provides that in any proceedings against a person in respect of an offence under *subsection (9)* it shall be a defence to prove that the defendant believed that a competent and reliable person had been charged with carrying out the provision.



*Subsection (11)* clarifies that an “officer” includes any shadow director and *de facto* director.

*Section 295* deals with IFRS group financial statements. It sets out that they must comply in full with International Financial Reporting Standards and also the additional information required by this Act except for that required by *Schedules 3 and 4* to the Act. It also sets out offences for failing to comply with requirements of the section. It is primarily based on section 150B of the Companies Act 1963.

*Subsection (1)* requires that IFRS group financial statements must contain an unreserved statement in the notes to those financial statements that they have been prepared in accordance with International Financial Reporting Standards and requires the directors to ensure that they contain the additional information required by this Act other than the requirements of *Schedules 3 and 4*.

*Subsection (2)* clarifies, for the avoidance of doubt, that the requirement for group financial statements prepared in accordance with IFRS to present fairly, the assets, liabilities and financial position, financial performance and cash flows is deemed to be equivalent to the requirement to give a true and fair view as required by *section 294(2)*. This is an amended enactment of what was previously stated in section 2(1B) CA 1963.

*Subsections (3) and (4)* set out the offences under this section. *Subsection (3)* states that if a company fails to comply with *subsection (1)*, the company and any officer of it who is in default shall be guilty of a category 2 offence. *Subsection (4)* states that it shall be a defence to prove that a person had reasonable grounds for believing that a competent and reliable person had been charged with a duty of ensuring that the provisions of the subsection concerned were complied with.

*Subsection (5)* clarifies that the term “officer” includes any shadow director and *de facto* director.

*Section 296* substantially re-enacts the requirements of section 150C of the Companies Act 1963. The contents are the same; however, terminology has been updated to be consistent with that used in this Act.

*Subsection (1)* contains the general requirement that entity financial statements of the holding company and each of its subsidiary undertakings should be prepared using the same financial reporting framework. There is a proviso that where the directors believe there are good reasons for not doing so, they can adopt different frameworks. However, the reasons for having those different frameworks should be disclosed in the entity financial statements of the holding company.

*Subsection (2)* the requirement to have a consistent framework applies only to subsidiary undertakings that are in the scope of this Act.

*Subsection (3)* specifies that the requirement for consistency only applies where the directors of the holding company prepare group financial statements for the holding company and also there is an exemption to the requirement for undertakings which do not trade for the acquisition of gain by the members.

*Subsection (4)* provides that where the holding company prepares IFRS group and entity financial statements, then only the financial frameworks of each of the subsidiary undertakings are required to be the same. In other words, this permits a holding company to use IFRS for its entity and group financial statements and use a different financial reporting framework for all of its subsidiary undertakings.

## Group financial statements: exemptions and exclusions

*Section 297* contains an exemption from the requirement to prepare consolidated financial statements where the group meets certain size criteria and is preparing Companies Act group financial statements. This section re-enacts the exemption available under regulation 7 of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992) for limited companies.

*Subsection (1)* clarifies that the exemption is not available to companies which have elected to prepare IFRS group financial statements.

*Subsection (2)* requires that a holding company qualifies for the exemption if it meets two of three qualifying conditions set out in *subsection (3)* both for the current financial year and the preceding financial year.

*Subsection (3)* sets out the three conditions and these are (i) that the balance sheet total of the holding company and its subsidiaries, taken as a whole, does not exceed €10 million; (ii) that the amount of the turnover of the holding company and its subsidiaries, taken as a whole, does not exceed €20 million; and (iii) that the average number of persons employed by the holding company and its subsidiaries, taken as a whole, does not exceed 250. The size criteria for the balance sheet total and the amount of turnover have been increased from those that were legislated for in regulation 7 of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

*Subsection (4)* clarifies that balance sheet total means the aggregate of the gross assets shown in the company's or undertaking's balance sheet.

*Subsection (5)* clarifies that the amount of turnover means the amount shown as turnover in the company's or undertaking's profit and loss account.

*Subsection (6)* clarifies that average number of persons employed shall be calculated as required by *section 317*.

*Subsection (7)* says that where the financial year is not in fact a 12 month period then the amount of turnover specified above shall be adjusted proportionately.

*Subsection (8)* states that this exemption is not available where any of the subsidiary undertakings have shares, debentures or other debt securities admitted to trading on a regulated market in an EEA state or where any of the subsidiary undertakings are a credit institution or an insurance undertaking.

*Section 298* sets out how to apply the exemption in *section 297* where it is the first financial year of a holding company.

*Subsection (1)* introduces the phrase "group requirement being met" and states that this is a reference to the company and all of its subsidiary undertakings, taken as a whole, satisfying at least two of the three conditions in *section 297(3)*.

*Subsection (2)* states that a new holding company may avail of the exemption referred to in this section for its first financial year where the holding company can show that 'the group requirement is met' in respect of that financial year.

*Subsection (3)* states that such a holding company will continue to qualify for the exemption unless, 'the group requirement is not met' for both the latest financial year of the company and the year immediately preceding the latest financial year.

*Section 299* provides for an exemption from consolidation for a holding company that is the subsidiary undertaking of an undertaking registered in an EEA State. This is an amended re-enactment of the exemptions contained in regulations 8 and 9 of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

*Subsection (1)* states that, a holding company is exempt from the requirement to prepare group financial statements if that holding company (the 'lower holding company') is itself a subsidiary undertaking and its holding undertaking is established under the laws of an EEA State and one of the following cases applies.

*Subsection (2)* those cases are that either (a) the holding company is a wholly owned subsidiary of that other holding company or (b) that other holding company holds more than 50% of the shares in the lower holding company and notice requesting the preparation of group financial statements has not been served on the lower holding company by shareholders holding in aggregate, more than half of the remaining shares in the lower holding company or 5% or more of the total shares in the lower holding company. The protection for the minority has been improved by reducing the size of the holding entitled to require consolidation from 10% to 5%.

*Subsection (3)* requires that the notice referred to above shall be served on the lower holding company not later than 6 months after the end of the financial year before that to which it relates.

*Subsection (4)* sets out a number of conditions that must be complied with before the exemption can be availed of. These are:

- (a) the lower holding company is included in consolidated accounts for a larger group drawn up to the same date or to an earlier date in the same financial year by a holding undertaking established under the laws of an EEA State;
- (b) the consolidated accounts of the larger group are drawn up and audited and the group's consolidated annual report is drawn up in accordance with the provisions of the 7<sup>th</sup> Directive or International Financial Reporting Standards;
- (c) the lower holding company discloses in its entity financial statements that it is exempt from the obligation to prepare and deliver group financial statements;
- (d) the lower holding company states in its entity financial statements, the name of the holding undertaking which draws up the consolidated accounts in which it is included and if the holding company is incorporated outside of the State, the country in which it is incorporated or if the holding undertaking is unincorporated, the address of its principle place of business;
- (e) the lower holding company delivers to the Registrar within the period allowed for delivery of its entity financial statements, copies of the consolidated accounts of the holding undertaking and the consolidated annual report, together with the auditors' report on them.

*Subsection (5)* states that shares held by director's for the purposes of complying with any share qualification requirement, shall be disregarded in determining whether the holding company is a wholly owned subsidiary of another.

*Subsection (6)* states that shares held by a wholly owned subsidiary of an undertaking or held on behalf of that undertaking or on behalf of its wholly owned subsidiary shall be attributed to that undertaking.

*Subsection (7)* clarifies that an undertaking established under the laws of an EEA state can be a company registered under this Act and references to consolidated accounts prepared by such an undertaking and other relevant matters are references to group financial statements prepared by the company under this Act and other matters referred to or provided for in this part or any other enactment.

*Subsection (8)* explains that “consolidated annual report” as used in this section means the management report prepared in accordance with the 7<sup>th</sup> Directive and is equivalent to the expression “directors’ report” as used in this Part. The 7<sup>th</sup> Directive means the 7<sup>th</sup> Council Directive, 83/349/EEC of 30 June 1983.

*Section 300* provides for an exemption from consolidation where a holding company (the ‘lower holding company’) is a subsidiary undertaking of another undertaking registered outside the EEA where certain conditions are complied with. This is an amended re-enactment of the exemption contained in regulation 9A of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

*Subsection (1)* states that, subject to the conditions set out in *subsection (4)*, a holding company is exempt from the requirement to prepare group financial statements if that holding company (the ‘lower holding company’) is itself a subsidiary undertaking and its holding undertaking is not established under the laws of an EEA state and one of the following cases applies.

*Subsection (2)* those cases are either that (a) the lower holding company is a wholly owned subsidiary of that holding undertaking or (b) that other holding undertaking holds more than 50% of the shares in the lower holding company and notice requesting the preparation of group financial statements has not been served on the lower holding company by shareholders holding in aggregate more than half of the remaining shares in the lower holding company or 5% or more of the total shares in the lower holding company.

*Subsection (3)* requires the notice referred to above shall be served not later than 6 months after the end of the financial year before that to which it relates.

*Subsection (4)* sets out the conditions that must be satisfied. These are as follows:

- (a) the lower holding company and all of its subsidiary undertakings are included in the consolidated accounts for a larger group drawn up to the same date or to an earlier date in the same financial year by a holding undertaking;
- (b) those consolidated accounts and, where appropriate, the group’s consolidated annual report are drawn up either in accordance with the provisions of the 7<sup>th</sup> Directive or in a manner equivalent to consolidated accounts and consolidated annual reports so drawn up;
- (c) the consolidated accounts are audited by persons authorised to audit accounts under the laws under which the holding undertaking which draws up the accounts is established;
- (d) the lower holding company discloses in its entity financial statements, that it is exempt from the obligation to prepare and deliver group financial statements;
- (e) the lower holding company states in its entity financial statements, the name of the holding undertaking which draws up the consolidated accounts referred to in (a) and if the holding undertaking as a body corporate, the country in which it is incorporated or if the holding undertaking is unincorporated, the address of its principle place of business;
- (f) the lower holding company delivers to the Registrar, within the period allowed for delivery of its entity financial statements, copies of the other holding undertakings consolidated accounts and, where appropriate, the consolidated annual report together with the auditors’ report on them.

*Subsection (5)* states that shares held by the directors’ of the lower holding company for the purposes of any share qualification requirement shall be disregarded in determining whether the company is a wholly owned subsidiary of another.

*Subsection (6)* states that shares held by a wholly owned subsidiary of an undertaking or held on behalf of that undertaking or its wholly owned subsidiary shall be attributed to that undertaking.

*Subsection (7)* states that “consolidated annual report” means the report prepared by management of the group in accordance with the 7<sup>th</sup> Directive or the report by management of the group prepared under laws or administrative measures that result in an equivalent report being prepared and, in either case, is equivalent to the expression “directors’ report” as used in this Part. It also specifies that “7<sup>th</sup> Directive” means the 7<sup>th</sup> Council Directive 83/349/EEC of 13 June 1983.

*Section 301* states that where all of the subsidiary undertakings qualify to be excluded from consolidation, then the holding company is exempt from the requirement to prepare group financial statements.

*Section 302* states that where a holding company elects to prepare IFRS financial statements, then it is exempt from the requirement to prepare group financial statements where the conditions specified in IFRS are complied with.

*Section 303* states that generally all the subsidiary undertakings of a holding company must be included in the group financial statements unless they meet the conditions of this section to be excluded from consolidation. This section is an amended re-enactment of the exclusions contained in regulations 10 and 11 of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992)..

*Subsection (1)* contains the general requirement to consolidate all subsidiary undertakings unless they meet the exceptions authorised in the following sub-sections.

*Subsection (2)* states that a subsidiary undertaking may be excluded from consolidation if its inclusion is not material for the purposes of giving a true and fair view, however, two or more undertakings may be excluded only if they are not material when taken together.

*Subsection (3)* contains three more circumstances under which a subsidiary undertaking may be excluded from consolidation in Companies Act group financial statements. The first of these is where severe long term restrictions substantially hinder the exercise of the rights of the holding company over the assets or management of that other subsidiary undertaking. The second is where the information necessary for the preparation of group financial statements cannot be obtained without disproportionate expense or undue delay. The final circumstance is where the interest of the holding company is held exclusively with a view to subsequent re-sale.

*Subsection (4)* specifies that the references to rights of the holding company and to interest of the holding company are to those rights and interest referred to in the definition of a subsidiary in *section 7* of the Act which are attributable to the holding company.

*Section 304* provides that where a holding company prepares group financial statements, it can claim an exemption from the requirement to circulate, lay before the members and annex to the annual return, its entity profit and loss account and certain information supplementing the profit and loss account. The entity profit and loss account must still be approved by the board of directors. This is an amended re-enactment of the exemption provided in section 148(8) of the Companies Act 1963.

*Subsection (1)* states that the exemption applies where the holding company prepares group financial statements and the notes to the company’s entity balance sheet show the company’s profit or loss for the financial year determined in accordance with this Act.

*Subsection (2)* states that the entity profit and loss account together with certain specified information must be approved by the board of directors in accordance with *section 324* but may be omitted from

the company's entity financial statements circulated in accordance with *section 338* and is also exempt from the requirements of *section 339* (right to demand copies of financial statements and reports), *section 341* (financial statements and reports to be laid before company in general meeting) and *section 347* (documents to be annexed to annual return all cases).

*Subsection (3)* states that the fact that the exemption has been availed of must be disclosed in the entity financial statements published with the group financial statements.

## Chapter 6 Disclosure of directors' remuneration and transactions

*Section 305* and the supplemental requirements in *section 306* set out the information that is required to be disclosed in relation to the remuneration of directors received from the company, any of the company's holding undertakings or subsidiary undertakings or any other person in a financial year for services rendered as director or while director of the company in connection with the management of the affairs of the company and any subsidiary undertakings. These sections are an amended re-enactment of the requirements set out in section 191 of the Companies Act 1963.

*Subsection (1)* states that the notes to the statutory financial statements of a company must disclose for the current and for the preceding financial year, the following amount, in aggregate, for all persons who were directors of the company at any time during the financial year:

- (a) the aggregate amount of emoluments paid to or receivable by directors in respect of qualifying services;
- (b) the aggregate amount of the gains by the directors on the exercise of share options during the financial year;
- (c) the aggregate amount of the money or value of other assets including shares but excluding share options, paid to or receivable by the directors under long term incentive schemes in respect of qualifying services;
- (d) the aggregate amount of any contributions paid, treated as paid or payable during the financial year to a retirement benefit scheme in respect of qualifying services of directors identifying, separately, the amounts relating to defined contribution schemes and defined benefit schemes;
- (e) the aggregate amount of any compensation paid or payable to directors in respect of loss of office or other termination payments in the financial year.

It is also required to state the number of directors to whom retirement benefits are accruing under defined contribution schemes and defined benefit schemes.

*Subsection (2)* requires disclosure in the notes to the statutory financial statements, again for the current and preceding financial year of the following amounts in relation to persons who are past directors of it or past directors of its holding undertaking:

- (a) the aggregate amount paid or payable for such directors retirement benefits;
- (b) the aggregate amount of any compensation paid or payable to such directors in respect of loss of office or other termination benefits.

*Subsection (3)* states that "qualifying services" in relation to any person means his or her services, as a director of the company and his or her services, while director of the company, as director of any of its subsidiary undertakings or otherwise in connection with the management of the affairs of the company or any of its subsidiary undertakings.

*Subsection (4)* states that for the purposes of *subsection (1)(a)* "emoluments" in relation to a director includes salaries, fees and percentages, bonuses, any sums paid by way of expense allowance so far as

those sums are chargeable to income tax, and the estimated money value of any other benefits received by him or her otherwise than in cash.

*Subsection (5)* clarifies that for the purposes of *subsection (1)(a)* “emoluments” does not include amounts relating to share options, contributions payable to retirement benefit schemes, benefits to which he or she is entitled from such scheme or any money or other assets receivable under any long-term incentive scheme.

*Subsection (6)* clarifies that in *subsections (1)(b)* and *(c)* and *(5)* “shares” means quoted shares or shares that are redeemable in cash or puttable in cash and “share options” means options over quoted shares or shares that are redeemable or puttable in cash.

*Subsection (7)* clarifies that in *subsection (1)(c)* “long-term incentive scheme” means any arrangement under which money or other assets may be earned by a director based on one or more qualifying conditions with respect to service or performance which cannot be fulfilled within a single financial year and there shall be disregarded bonuses which are determined by reference to performance within a single year, compensation for loss of office and other termination payments, and retirement benefits.

*Subsection (8)* clarifies that the requirement in *subsection (2)(a)* to disclose amounts paid or payable for past directors retirement benefits do not include amounts paid or receivable under a retirement benefits scheme if the scheme is substantially adequately funded.

*Subsection (9)* clarifies that the amount to be shown under *subsection (2)(a)* shall include all other retirement benefits paid or receivable in respect of any qualifying services of a past director of the company whether paid directly to him or to any other person on his nomination.

*Subsection (10)* states that the amount to be shown for the purposes of *subsection (2)(a)* shall distinguish between retirement benefits in respect of services as director whether of the company or its subsidiary undertakings and other retirement benefits.

*Subsection (11)* contains definitions of certain terms used in this section. “Contribution” in relation to a retirement benefit scheme is defined as meaning any payment (including an insurance premium) made to a scheme for persons rendering services in respect of which retirement benefits will or may become payable under the scheme, except that it does not include any payment in respect of two or more persons if the amount paid in respect of each of them is not ascertainable. “Retirement benefits” is defined to include any pension, superannuation allowance, superannuation gratuity or similar payment. “Retirement benefit scheme” means a scheme for the provision of retirement benefits in respect of services as director or otherwise which is maintained in whole or in part by means of contributions.

*Subsection (12)* states that the amounts to be shown for the purposes of *subsections (1)(e)* and *(2)(b)* shall include all amounts paid to or receivable by a director or a past director by way of compensation for loss of office or other termination payment as director of the company or, while director of the company, compensation for loss of any other office in connection with the management of the company’s affairs or in connection with the management of the affairs of any of its subsidiary undertakings. The subsection also requires that the amounts paid as compensation or termination payments in respect of the office of director, whether of the company or of its subsidiary undertakings, shall be distinguished from compensation or termination payments in respect of other offices. It is also clarified that termination payments include amounts paid on retirement from office.

*Subsection (13)* states that the amounts to be shown under each heading of *subsections (1)* and *(2)* include all relevant amounts paid by or receivable from the company, the company’s subsidiary undertakings, any holding undertaking of the company and any other person. This does not include any sums to be accounted for to the company or any of its subsidiary undertakings or, by virtue of *section 253* to past or present members of the company or any of its subsidiary undertakings or any

class of those members. This sub-section also requires that for the purposes of disclosing compensation for loss of office and other termination benefits, the amounts respectively paid by the company, the company's subsidiary undertakings, any holding undertaking of the company and any other person, shall be distinguished.

*Section 306* contains supplemental provisions in relation to *section 305*.

*Subsection (1)* states that the amount to be shown for the purposes of *section 305* includes all amounts paid or payable to persons connected with the director within the meaning of *section 220*.

*Subsection (2)* states that the amount to be shown for the purposes of *section 305* includes all amounts receivable in respect of that year or actually received in the year if they are not receivable in respect of any year. It also requires that where under *section 305(13)* they are considered to be liabilities of the director but these liabilities are subsequently released or remain unpaid for a period of two years or where an amount considered exempt from income tax becomes chargeable to income tax after the end of the relevant financial year, these shall be included in the first statutory financial statements in which it is practicable to show them.

*Subsection (3)* states that where it is necessary to do so, for the purpose of making any distinction required by *section 305* or this section, in any amount to be shown for the purpose of either section, directors may apportion any payment in order to make the disclosures required by *section 305*.

*Subsection (4)* states that if in the case of any of the statutory financial statements, the requirements of *section 305* has not been complied with, the statutory auditors have a duty to include the relevant particulars in their report on those statutory financial statements.

*Subsection (5)* states that for the purposes of *section 305* the amounts discloseable in relation to any director should include amounts received from any body corporate where he or she is a director of that body corporate by virtue of the company's nomination, either directly or indirectly. The subsection also clarifies that in *subsections (3) to (6) and (8) to (10) of section 305* a reference to a subsidiary undertaking means any subsidiary undertaking at the time the services were rendered and for the purposes of *subsection (12) of that section* refers to a subsidiary undertaking immediately before the loss of office.

*Subsection (6)* clarifies that the term "director" includes any shadow director and *de facto* director.

*Section 307* and the supplementary requirements of *section 308* set out information that must be disclosed about benefits a director has received as a result of being the beneficiary of loans, quasi-loans, credit transactions and guarantees given by a company. It also sets out disclosures that must be made in relation to any agreement by the company to enter into such transactions with or for its directors, directors of its holding undertaking or persons connected with such directors. These sections are an amended re-enactment of the requirements contained in *section 42 of the Companies Act 1990*.

*Subsection (1)* defines the type of transactions about which certain particulars specified in other subsections need to be given in the entity financial statements of a company, both for the current and the preceding financial year. Particulars are required for each of its directors, directors of its holding undertaking or persons connected with such directors of the following transactions:

- (a) loans, quasi-loans and credit transactions entered into by the company;
- (b) any agreement by the company to enter into any loans, quasi-loans and credit transactions;
- (c) guarantees entered into and security provided by the company in connection with a loan, quasi-loan or credit transaction entered into with or for those directors or those other persons;



- (d) any agreement by the company to enter into such guarantees or provide any such security;
- (e) any arrangement whereby a company assumes any rights, obligations or liabilities under a transaction which, if it had been entered into by the company, would have fallen into any of the preceding paragraphs or an arrangement under which another person enters into a transaction which would fall into any of the preceding paragraphs and that other person has obtained or is to obtain any benefit from the company or its holding undertaking or a subsidiary undertaking of the company or its holding undertaking.

*Subsection (2)* requires disclosure to be provided in group financial statements of a holding company both for the current and preceding financial year, the particulars specified in subsequent subsections of all similar transactions to (a) to (e) of *subsection (1)* entered into by the company or any of its subsidiary undertakings.

*Subsection (3)* sets out the particulars required in relation to arrangements comprising loans, quasi-loans or credit transactions. The particulars which must be given separately for each director or other person are as follows:

- (a) the name of the person for whom the arrangements were made and where that person is or was connected with a director of the company or undertaking, the name of the director;
- (b) the value of the arrangements at the beginning and end of the financial year;
- (c) advances made under the arrangements during the financial year;
- (d) amounts repaid under the arrangements during the financial year;
- (e) the amounts of any allowance made during the financial year in respect of any failure or anticipated failure by the borrower the repay the whole or part of the outstanding amount;
- (f) the maximum amount outstanding under the arrangements during the financial year;
- (g) an indication of the interest rate; and
- (h) the arrangements' other main conditions.

*Subsection (4)* sets out the particulars required in respect of an agreement to enter into loans, quasi-loans or credit transactions and these are to disclose separately for each director or other person, the following:

- (a) the name of the person for whom the agreement was made and where that person is or was connected with a director of the company or undertaking, the name of the director;
- (b) the value of the arrangements agreed to;
- (c) an indication of the interest rate; and
- (d) the agreement's other main conditions.

*Subsection (5)* requires the following particulars in respect of arrangements comprising guarantees entered into or security provided in connection with a loan, quasi-loan or credit transaction to be provided separately for each director or other person:

- (a) the name of the person for whom the arrangement was made and where that person is or was connected with a director of the company or the undertaking, the name of the director;
- (b) the amount of the maximum liability that may be incurred by the company (or any of its subsidiary undertakings);
- (c) any amount paid and any liability incurred by the company (or any of its subsidiary undertakings) for the purpose of fulfilling the guarantee or on foot of the provision of security; and
- (d) the arrangement's main terms.

*Subsection (6)* requires the following particulars in respect of agreements to enter into guarantees or provide security in connection with a loan, quasi-loan or credit transaction to be given separately for each director or other person:

- (a) the name of the person for whom the agreement was made and where that person is or was connected with a director of the company or the undertaking, the name of the director;
- (b) the amount of the maximum liability that may be incurred by the company (or any of its subsidiary undertakings); and
- (c) the agreement's main terms.

*Subsection (7)* sets out the particulars mentioned in *subsections (1)* and *(2)* in respect of an arrangements referred to in *paragraph (e)* of either subsection or:

- (a) in the case of an arrangement referred to in *subparagraph (i)* or *(ii)* of that *paragraph (e)* whichever of the particulars specified in any of *subsections (3)* to *(6)* would have to be disclosed if the arrangement had been entered into by the company; and
- (b) in addition, in the case of an arrangement referred to in *subparagraph (ii)* of that *paragraph (e)*, the amount of the benefit referred to in that sub-paragraph obtained, or to be obtained, by the other person referred to therein.

*Subsection (8)* requires disclosure both for the current and preceding financial year of aggregate amounts in the notes to the financial statements. In particular, a total must be provided for each of the disclosures required in *paragraphs (b)* to *(f)* of *subsection (3)*. A total must be provided of each of the amounts shown for the purposes of *paragraphs (b)* and *(c)* of *subsection (5)*. Additionally, the aggregate amount owed for the value of all arrangements comprising loans, quasi-loans or credit transactions, must be expressed as a percentage of the net assets of the company at the beginning and end of the financial year.

*Subsection (9)* indicates that aggregate disclosures are also required by *section 308(5)* to *(8)* for persons who are officers (but not directors) of the company, holding undertaking or subsidiary undertaking concerned.

*Subsection (10)* states that where any time during the financial year, the aggregate of the amounts outstanding under all arrangements of the type referred to in *subsections (3)(f)* and *(5)(b)* amount to more than 10% of the net assets of the company, the aggregate amount shall be stated and the percentage of net assets that that total represents shall also be stated.

*Section 308* sets out supplemental provisions in relation to *section 307*. These provisions are amended re-enactments of various provisions set out in the Companies Act 1990.

*Subsection (1)* clarifies that in *section 307* and this section references to a director are references to any person who was at any time during the financial year, a director of the company. It also clarifies that "director" includes any shadow director and *de facto* director.

*Subsection (2)* clarifies that the requirements of *section 307* apply in relation to every loan, quasi-loan, credit transaction or guarantee or agreement that subsisted at any time in the financial year to which the financial statements relate. This is regardless of when it was entered into, whether the person was a director at the time it was entered into, whether if it involves a subsidiary undertaking, that undertaking was a subsidiary at the time it was entered into and whether or not the transaction was prohibited by *section 239*. Similar requirements were contained in *section 41(8)* of the Companies Act 1990.

*Subsection (3)* provides an exemption to say that the disclosures are not required in relation to an individual director and persons connected with him or her if the aggregate value of all such agreements and arrangements did not at any time during the financial year exceed €7,500 for that director and those persons. *Section 43(3)* of the Companies Act 1990 provided a similar exemption where the aggregate amounts do not exceed €3,175.

*Subsection (4)* states that where a holding company avails of an exemption from the requirement to prepare group financial statements in relation to any financial year, then *section 307(2)* has effect in relation to the company as if entity financial statements were substituted for group financial statements. A similar requirement was contained in *section 41(4)* of the Companies Act 1990.

*Subsection (5)* requires separate disclosure for officers that are not directors of the company of the disclosures required by *subsection (8)* of *section 307* being the aggregate amount of loans, quasi-loans or credit transactions made to those officers during the financial year together with movements in the balance outstanding at the beginning of the year to the end of the year. It also requires an aggregate amount for all guarantees or other securities issued on behalf of such officers. This requirement was previously contained in *section 43(2)* of the Companies Act 1990.

*Subsection (6)* is included to clarify that in applying *subsection (5)* the references in *section 307* to “directors” are to be read as references to officers (not being directors) of the company, holding undertaking or subsidiary undertaking. The main purpose of this subsection is to assist in making *subsection (5)* operational.

*Subsection (7)* requires the disclosure of the number of officers who have arrangements in place which are within the scope of *subsection (5)*.

*Subsection (8)* contains a number of definitions. It clarifies that ‘quasi-loan’, ‘credit transaction’, ‘guarantee’ and ‘value of the arrangement’ have the meanings given to them by *section 219*; that *section 220* applies in determining whether a person is connected with a director and *section 219(7)* applies in determining whether a transaction or arrangement is made for a person.

*Section 309* deals with other arrangements or transactions in which directors had a material interest. This was previously dealt with in *subsection 41(1)(c)* of the Companies Act 1990.

*Subsection (1)* requires disclosure in entity financial statements of relevant transactions entered into by the company with a person who, at any time during the financial year, was a director, a director of its holding undertaking or a person connected with such a director.

*Subsection (2)* requires disclosure of any material interest such a person had in a transaction or arrangement entered into by the company or any of its subsidiaries in the group financial statements of a holding company.

*Subsection (3)* specifies particulars that must be disclosed, which are the principle terms of the arrangement or transaction, the name of the person with the material interest and the nature of that interest.

*Subsection (4)* states that a transaction is not material if, in the opinion of the majority of the directors, other than the director concerned, it is considered not to be material.

*Subsection (5)* provides an exemption from disclosing a transaction between one company and another where a director is considered to have an interest only by virtue of him being a common director with the other company. The sub-section also excludes a contract of service between a company and a director of its holding company or between the director and any of the company’s subsidiaries and arrangements which did not subsist at any time during the year. These exemptions are similar to those provided in *section 41(7)* of the Companies Act 1990.

*Subsection (6)* introduces certain *de minimus* exceptions from the disclosure requirements of this section. Transactions are not disclosable if the total interest of a director in such transactions did not, at any time during the financial year, exceed the aggregate of €5,000 or, if more, did not exceed

€15,000 or 1% of the value of the net assets of the company preparing the entity or group financial statements, whichever is the less.

*Subsection (7)* states that where a holding company claims an exemption from preparing group financial statements then the relevant disclosures must be made in its entity financial statements.

*Subsection (8)* cross refers to *section 220* in order to assess whether a person is connected with a director or not; confirms that an “arrangement” includes an agreement; and that “director” includes any shadow director and *de facto* director.

*Section 310* provides exceptions to disclosure by holding companies of credit institutions of the information required under *sections 307 to 309* in the case of persons connected with directors of the company and certain officers. These exemptions were previously contained in section 44 of the Companies Act 1990.

*Subsection (1)* contains the general exception that *section 307* does not apply in the financial statements of a holding company of a credit institution to any transactions to which the credit institution is a party and which were entered into with or for a person connected with a director of the holding company or institution. The exempted transactions are loans, quasi-loans, other credit transactions, agreements to enter into such a transaction, guarantees entered into or security provided or agreements to enter into a guarantee or provide security.

*Subsection (2)* exempts the financial statements of a holding company of a credit institution from the requirement to disclose any transaction arrangement or agreement made by that credit institution with any of its officers or any officers of the holding company.

*Subsection (3)* contains an exemption for the financial statements of the holding company of a credit institution from the requirements of *subsections (1) or (2) of section 309* with a person connected with any of the directors where the credit institution is a party to the transaction.

*Subsection (4)* states that where both a person connected with the director and a director have directly or indirectly a material interest in an arrangement which falls within the scope of *section 309* and to which the credit institution is a party, the name of the connected person nor the nature of his interest needs to be disclosed.

*Subsection (5)* confirms that words used in this Section have the same meaning as they have in *sections 307 to 309*.

*Section 311* provides that the holding company of a credit institution must provide aggregate information on transactions entered into with persons connected with directors of the company by the credit institution. *Subsection (1)* contains certain definitions.

“Relevant period” means the financial year to which the financial statements relate.

“Relevant persons” means persons who at any time during the financial year to which the financial statements relate were connected with a director of the company or the institution which is a subsidiary of the holding company.

“Relevant transaction arrangement or agreement” means any transaction, arrangements or agreements made by the institution and outstanding at the end of the relevant period.

“Transactions, arrangements or agreements” means any of the following classes of transactions, arrangements or agreements:

- (a) loans, quasi-loans or credit transactions entered into with or for relevant persons;
- (b) agreements to enter into any loans, quasi-loans or credit transactions with or for relevant persons;
- (c) guarantees entered into or security provided on behalf of relevant persons in connection with a loan, quasi-loan or credit transaction entered into with or for such persons;
- (d) agreements to enter into guarantees or provide any security on behalf of relevant persons in connection with a loan, quasi-loan or credit transaction entered into with or for such persons;
- (e) arrangements entered into by companies on behalf of the institution which, if they had been entered into by the institution, would have been a prescribed transaction under *section 307(1)* or (2).

*Subsection (2)* requires that the group financial statements of a company which is the holding company of a credit institution shall give certain information in the notes to those financial statements in relation to transactions, arrangements or agreements made by the credit institution with or for relevant persons.

*Subsection (3)* sets out the matters which are to be disclosed. These include the aggregate amounts outstanding at the end of the relevant period under transactions, arrangements or agreements made by the institution; the aggregate maximum amounts outstanding during the relevant period under the relevant transactions, arrangements or agreements made by the institution; the number of relevant persons for or with whom relevant transactions, arrangements and agreements that subsisted at the end of the relevant period were made by the institution; and the maximum number of relevant persons for or with whom relevant transactions, arrangements and agreements that subsisted at any time during the relevant period were made by the institution.

*Subsection (4)* states that where a transaction arrangement or agreement has been entered into in the ordinary course of the institution's business and on terms that are no more favourable than would be offered to persons unconnected with the institution, these need not be included in the aggregate amount required to be disclosed by *subsection (2)*.

*Subsection (5)* states that in calculating the aggregate amount required to be disclosed under *subsection (3)* above does not need to include transactions with relevant persons where the aggregate of relevant transactions outstanding during the relevant period does not exceed €7,500.

*Subsection (6)* clarifies that "amount outstanding" means the amount of the outstanding liabilities of the person for or with whom the transaction arrangement or agreement in question was made or, in the case of a guarantee of security, the amount guaranteed or secured.

*Subsection (7)* states that where a holding company avails of an exemption from preparing group financial statements, then the relevant particulars should be shown in its entity financial statements.

*Subsection (8)* states that words or expressions used in this section have the same meaning as they have in *sections 307 to 309*.

*Section 312* sets out our requirement for the holding company of a credit institution to maintain a register containing certain information and to make a statement containing certain particulars available at its registered office for inspection by its members. These were previously required by section 44 of the Companies Act 1990.

*Subsection (1)* states that subject to certain size criteria set out in *section 313*, a company, which is the holding company of a credit institution, must keep a register containing a copy of every transaction arrangement or agreement made by that institution, details of which are required by *section 307(1)* or (2) or *section 309(1)* or (2) to be disclosed; or would but for *section 310*, be required by any such

provision to be disclosed, in the company's entity or group financial statements for the current financial year and for each of the preceding ten financial years.

*Subsection (2)* states that a company does not have to keep, in its register, a copy of any transaction, arrangement or agreement made by the credit institution with a person connected to a director if it is entered into in the ordinary course of the institution's business and it is on no more favourable terms than would be offered to a person unconnected with the institution.

*Subsection (3)* requires that, subject to size criteria set out in *section 313*, the holding company of a credit institution shall make available before the Annual General Meeting at its registered office, a statement for inspection by its members.

*Subsection (4)* states that the period for which the statement must be made available is a period of not less than 15 days ending with the date of the Annual General Meeting.

*Subsection (5)* specifies that the statement referred to above should contain particulars of transactions, arrangements and agreements made by the credit institution and which would, except for *section 310* be required by *section 307(1)* or *(2)* or *section 309(1)* or *(2)* to be disclosed in its entity or group financial statements, for the last complete financial year before the Annual General Meeting.

*Subsection (6)* requires that the statement must also be made available for inspection by the members at the Annual General Meeting.

*Subsection (7)* contains an exemption from including in the statement, particulars of any transaction, arrangement or agreement made by the credit institution if it is entered into in the ordinary course of the institution's business and its terms are no more favourable than would be offered to a person unconnected with the institution.

*Subsection (8)* states that where, either voluntarily or because of some other rule or direction, a transaction has been disclosed by the company in its entity or group financial statements, then it need not be included in the statement.

*Subsection (9)* provides that the director of corporate enforcement has the right to inspect and take copies of the contents of the register required to be kept in accordance with *subsection (1)*.

*Subsection (10)* states that the statutory auditors of the company have a duty to examine any statement containing the particulars required by *subsection (5)* before it is made available to the members of the company and to make a report to the members on that statement. The report shall then be annexed to the statement before it is made available to the members.

*Subsection (11)* the report by the statutory auditors shall state whether in their opinion the statement contains the required particulars and where their opinion is that it does not, they shall include, in their report so far as they are reasonably able to do so, a statement giving the required particulars.

*Subsection (12)* states that where a company fails to comply with *subsection (1)*, *(3)* or *(9)* the company and the directors of the company shall be guilty of a category 3 offence.

*Subsection (13)* states that in any proceedings against a person it shall be a defence to prove that the defendant took all reasonable steps for securing compliance with the subsections.

*Subsection (14)* clarifies that words and expressions used in this section have the same meaning as they have in *sections 307* to *309*.

*Section 313* states that banking law is not prejudiced by *sections 307 to 312* and also sets out monetary thresholds for *section 312*.

*Subsection (1)* clarifies that nothing in *sections 307 to 312* prejudices the operation of any rule, instrument, direction, or requirement made, issued, granted or otherwise created under the Central Institution Acts 1942 to 2010 or any other enactment with which the holding company of a credit institution is required to comply.

*Subsection (2)* provides that where a transaction of the type referred to in *section 307(1) or (2)* is concerned, the register required by *section 312(1)* or the statement required by *section 312(3)* need not contain particulars of transactions with individuals where the aggregate value of all arrangements, transactions and agreements with those individuals did not, at any time during the financial year, exceed €7,500 for that individual director and those persons.

*Subsection (3)* states that in relation to other arrangements or transactions with a credit institution in which a director of the institution or of its holding undertaking or a person connected with such a director, had a material interest, these do not need to be included in the register required under *section 312(1)* or the statement required under *section 312(3)* if they meet certain size criteria. The size criteria are that the total value of arrangements made during the financial year together with any arrangements outstanding from the beginning of the year and not settled during the year, must not exceed the aggregate of €5,000 or if more, must not exceed €15,000 or 1% of the value of the net assets of the company, whichever is the lower.

## Chapter 7

### Disclosure required in notes to financial statements of other matters

*Section 314* requires that information should be provided in the notes to the financial statements about subsidiary undertakings, undertakings in which the company has an interest of 20% or more in the equity shares and undertakings where the company has an unlimited liability interest. The section requires information with regard to the name and registered office, the identity of the class of shares held, the aggregate amount of net assets, and the profit or loss of the subsidiary or other undertaking. There are certain exemptions from these disclosures which are set out in *section 315*. This section re-enacts the requirements set out in section 16 (1) and section 16A of the Companies (Amendment) Act 1986.

*Subsection (1)* states that where at the end of a financial year a company has a subsidiary undertaking or if it holds an interest of 20% or more in the equity shares of another undertaking (referred to as an “undertaking of substantial interest”) that is not itself a subsidiary undertaking, then certain information needs to be provided in the notes to the financial statements in relation to each category of interest. The information that must be given separately for subsidiary undertakings and undertakings of substantial interest is as follows:

- (i) the name and registered office or if there is no registered office the principal place of business of each subsidiary undertaking or undertaking of substantial interest and the nature of the business carried on by it;
- (ii) the identity of each class of shares held by the company in each subsidiary undertaking or undertaking of substantial interest and the proportion of the nominal value of the allotted shares in each entity represented by the shares held by the company;
- (iii) the aggregate amount of the net assets of each subsidiary undertaking and each undertaking of substantial interest at their financial year-end date ending last before the financial year of the company;
- (iv) the profit or loss of the subsidiary undertaking or undertakings of substantial interest for its financial year last ending before the financial year of the company to which the financial statements relate.

*Subsection (2)* requires that where a company is a member having unlimited liability in another undertaking the following information shall be provided for that undertaking unless it is not material to the true and fair view:

- (a) the name and registered office of each such undertaking;
- (b) if the undertaking does not have a registered office its principal place of business; and
- (c) the legal form of the undertaking.

*Subsection (3)* states that certain exemptions are provided in *section 315* from disclosing the aggregate amount of net assets and the profit or loss of the undertakings.

*Subsection (4)* states that there are further exemptions provided in *section 316* which can also be claimed by the company.

*Subsection (5)* clarifies that the normal requirement to provide comparable information for the preceding financial year does not apply in this case and that the information is required only for the financial year-end date.

*Subsection (6)* clarifies that where interests are held by persons acting on behalf of the company then those interests shall be deemed to be held by the company. It also clarifies that an interest in a class of equity shares includes an interest in an instrument that is convertible into equity shares as well as options to acquire equity shares.

*Section 315* gives certain exemptions from disclosing the net assets and profit or loss of subsidiary undertakings and undertakings of substantial interest. These exemptions were previously set out in section 16(2) of the Companies (Amendment) Act 1986.

*Subsection (1)(a)* states that where a company prepares group financial statements then if a subsidiary undertaking is consolidated in those group financial statements or included by way of the equity method of accounting then the company does not need to provide information about the net assets (*paragraph (iii)* of *section 314(1)*) or of the profit or loss (*paragraph (iv)* of *section 314(1)*) in relation to that subsidiary undertaking.

*Subsection (1)(b)* where a company is exempt from the requirement to prepare group financial statements because it is relying on consolidated accounts of a higher holding undertaking and where the subsidiary undertaking is consolidated into those higher consolidated accounts or included in those consolidated accounts by way of the equity method of accounting, the company is exempt from the requirement to disclose the net assets and profit or loss of that subsidiary undertaking.

*Subsection (1)(c)* deals with undertakings of substantial interest and states that if those interests are included in or in a note to the company's statutory financial statements by way of the equity method of accounting then the information on net assets or profit or loss of that undertaking of substantial interest does not need to be provided.

*Subsection (1)(d)* states that where the subsidiary undertaking or the undertaking of substantial interest are not required to publish their financial statements and the interest held by the company is less than 50% of all such interests the exemption from disclosing net assets and profit or loss may be claimed.

*Subsection (1)(e)* states that in any event if the disclosure of net assets and profit or loss as required by *section 314(1)* is not material to the true and fair view then the information is not required to be provided.



*Section 316* states that where in the opinion of the directors providing all the information required under *section 314* for each subsidiary undertaking and undertaking of substantial interest would result in a note to the statutory financial statements of excessive length, the information required by that section need only be given for undertakings that principally affect the amounts shown in the company's statutory financial statements and undertakings that were excluded from consolidation under *section 303(3)* (exemption from consolidation on the basis of severe long-term restrictions, undue expense and delay or held principally for resale). Instead, the section requires that the full list must be annexed to the annual return. A similar exemption was previously contained in section (16)(3) of the Companies (Amendment) Act 1986 which also required the full information to be annexed to the annual return.

*Subsection (1)* states that where the directors consider that disclosing all of the information required by *section 314* for each subsidiary and undertaking of substantial interest and undertakings in which we hold an unlimited interest would be of excessive length in the statutory financial statements, the information may be limited to those undertakings which principally affect the amounts shown in the company's statutory financial statements and undertakings excluded from consolidation under *section 303(3)*.

*Subsection (2)* states that where a company has availed of the exemption referred to in *subsection (1)*, it must state that fact in the notes to the company's statutory financial statements. This subsection also requires that a schedule giving the full information must be annexed to the annual return of the company to which the statutory financial statements are annexed.

*Subsection (3)* states that if a company fails to comply with *subsection (2)* the company and any officer of it who is in default is guilty of a category 3 offence.

*Subsection (4)* clarifies that the term "officer" includes any shadow director and *de facto* director.

*Section 317* requires disclosure of the average number of persons employed in the company during the financial year, analysed by category of employee and also the aggregate compensation incurred by the company in the financial year in relation to those persons. This requirement was previously contained in paragraph 42 of the Schedule to the Companies (Amendment) Act 1986.

*Subsection (1)* requires that the notes to the entity financial statements of a company disclose the average number of persons employed by the company in the financial year concerned, analysed by category of persons employed.

*Subsection (2)* requires the compensation cost incurred by the company in the financial year in respect of all persons employed by the company during the financial year. Compensation must be analysed between wages and salaries, social insurance costs, other retirement benefit costs, and other compensation costs incurred which should be specified by type.

*Subsection (3)* states that where any of the amounts identified in *subsection (2)* are capitalised into assets, this shall be disclosed. This is a new clarification introduced by this Act as it was not clear previously whether the analysis between expense and amount capitalised had to be provided.

*Subsection (4)* states that in analysing the average number of persons employed by category, the directors shall choose those categories by looking at how the company's activities are organised.

*Subsection (5)* states that the calculation of the average number of persons employed by the company is determined by dividing the "relevant annual number" (as determined in accordance with *subsection (6)* below) by the number of months in the financial year of the company.

*Subsection (6)* sets out how to calculate the “relevant annual number” as referred to in *subsection (5)*. This subsection requires that a company shall identify the number of persons employed under contracts of service in each month of the financial year, whether they are employed throughout the month or not, and the relevant annual amount is the total of all these monthly numbers.

*Subsection (7)* states that where a company prepares group financial statements, the average number of persons employed and the aggregate compensation cost for those employees shall be calculated for the company and its subsidiary undertakings taken as a whole. It also specifies that the method of calculation shall be the same as for the individual company.

*Subsection (8)* contains definitions used in this section. These are as follows:

“Retirement benefit costs” include any expense incurred by the company in relation to contributions to any retirement benefit scheme, amounts set aside for future payment of retirement benefits directly by the company, and any retirement benefits paid directly by the company to current or former employees.

“Social insurance costs” is defined to mean any contribution by a company to any state social insurance, social welfare, social security or retirement benefit scheme or to any fund or arrangement connected with such a scheme.

“Wages and salaries” is determined by reference to payments made or expenses incurred in respect of all persons employed by the company during the financial year who are taken into account in determining the number of employees in the company.

*Section 318* requires information about the authorised share capital, allotted share capital and movements in share capital during the period. These requirements were previously included in paragraphs 26 and 27 of the Schedule to the Companies (Amendment) Act 1986. The information on called-up share capital and paid-up share capital was required by a note to the balance sheet formats in that Schedule. The wording has been amended to recognise that some shares will now be included as a liability in the financial statements. The requirement has also been extended to include information about contingent rights to the allotment of shares.

*Subsection (1)* details the information that should be given in the notes to the entity financial statements of a company with regard to that company’s share capital. It requires disclosure of the number and aggregate nominal value of the shares comprised in the authorised (if any) share capital. It requires that where shares of more than one class have been allotted, the number and aggregate nominal value of shares of each class that have been allotted should be disclosed. It requires, in relation to each class of allotted share capital, disclosure of the amount that has been called up on those shares and of this, the amount that has been fully paid as at the financial year-end date. It also requires the allotted and called-up share capital to be analysed between (i) shares presented as share capital, and (ii) shares presented as a liability. In addition, it requires that where shares are held as treasury shares, the number and aggregate nominal value of each class of treasury share shall be disclosed. The requirement to disclose the nominal value of treasury shares was previously enacted in section 43A of the Companies (Amendment) Act 1983.

*Subsection (2)* sets out provisions in respect of redeemable share capital. It states that where any part of the allotted share capital consists of redeemable shares this subsection requires a company to disclose the earliest and latest dates on which the company has the power to redeem those shares. It also requires that disclosure must be made of who had the option to redeem the shares, whether this is the company or the shareholder. It also requires details of any premium payable on redemption. This information was previously required by paragraph 26(2) of the Schedule to the Companies (Amendment) Act 1986.

*Subsection (3)* requires that where a company has allotted any shares during a financial year, the notes to the entity financial statements should disclose the reason for making the allotment, the classes of shares allotted, for each class the number allotted, their aggregate nominal value and the consideration received by the company for the allotment and whether the shares are presented as share capital or as a liability in the balance sheet.

*Subsection (4)* sets out the position in respect of contingent rights to the allotment of shares. It requires that where a company has granted any contingent right to the allotment of shares the number, description and amount of the shares in relation to which that right is exercisable should be stated in the entity financial statements. It also requires disclosure of the period during which the contingent right is exercisable and the price to be paid for the shares allotted. This is a new requirement introduced in this Act.

*Subsection (5)* explains that the reference to “contingent right to the allotment of shares” in *subsection (4)* means any option to subscribe to shares or any other right to acquire shares whether on the conversion of a security into shares or otherwise.

*Subsection (6)* requires that, subject to *subsection (7)*, where a company is a holding company, any shares held in that company by subsidiary undertakings or their nominees and the consideration paid for those shares shall be disclosed in the notes to the entity financial statements of the company. Again, this is a new requirement introduced by this Act.

*Subsection (7)* states that in the case where the subsidiary undertaking is concerned as personal representative, or is concerned as trustee, then the requirement to disclose in *subsection (6)* does not apply.

*Subsection (8)* states that where the subsidiary undertaking is concerned as trustee but is also a beneficiary under the trust then the disclosure in *subsection (6)* has to be given.

*Section 319* requires disclosure in entity financial statements of any financial assistance given by the company in the financial year for the purpose of purchasing shares in the company; it also requires similar information to be given in group financial statements. This requirement was previously contained in paragraph 37(2) of the Schedule to the Companies (Amendment) Act 1986. The application of this paragraph in the group financial statements was required by regulation 15 of the European (Communities Companies Group Accounts) Regulations 1992 (S.I. No. 201 of 1992).

*Subsection (1)* requires the entity financial statements of a company to show the aggregate amount of financial assistance provided by the company in the financial year that was permitted by *section 82* of this Act. This should also include the aggregate amount of any outstanding loans guarantees and securities at the financial year-end date. It requires separate disclosure of any assistance provided in accordance with *section 82(6)(f)* (i.e. a scheme in force to provide for shares in the company or its holding company to be held for the benefit of employees or former employees) or amounts provided in accordance the *section 82(6)(g)* (i.e. loans made by the company to persons in the employment of the company with a view to enabling those persons to purchase or subscribe for fully paid shares in the company or its holding company to be held by themselves as beneficial owners).

*Subsection (2)* states that where a company prepares group financial statements then the group financial statements shall contain the information required by *subsection (1)* for the company and its subsidiary undertakings included in the consolidation.

*Subsection (3)* requires that comparative information should be given in relation to the preceding financial year.

*Section 320* deals with the treatment in a company's financial statements of any shares held in itself or in its holding undertaking. Previously section 43A of the Companies (Amendment) Act 1983 dealt with accounting for own shares.

*Subsection (1)* states that where a company or a nominee of a company holds shares in the company or an interest in such shares, such shares or interest shall not be shown as an asset but instead the consideration paid for the shares or interest will be shown as a deduction from the company's capital and reserves and the profits available for distribution shall be restricted by the amount of that deduction. This requirement was previously contained in section 43A of the Companies (Amendment) Act 1983.

*Subsection (2)* addresses the issue of limiting profits available for distribution. Where a company, or a nominee of the company, holds shares in its holding undertaking or an interest in such shares, the profits of the company available for distribution shall be restricted by the amount of the consideration paid for such shares or interest.

*Subsection (4)* requires that the notes to the company's entity financial statements must give, separately for shares held in the company and shares held in a holding undertaking, the number and aggregate nominal value of each class of such shares held and also particulars of any restriction on profits available for distribution. Section 14 of the Companies (Amendment) Act 1986 required similar information to be disclosed in the directors' report in relation to own shares held. Paragraph 46 of the Schedule to the Companies (Amendment) Act 1986 required disclosure of the number, description and amount of shares in a company held by its subsidiary undertakings.

*Section 321* requires disclosures, in the notes of its entity and group financial statements, the accounting policies adopted by the company in determining the items and amounts included in its balance sheet and the items and amounts to be included in its profit and loss account. This is an amended re-enactment of section 205C of the Companies Act 1990.

*Subsection 1* requires disclosure of the accounting policies in the entity financial statements of a company. *Subsection 2* requires disclosure of accounting policies in the group financial statements of a company.

*Section 322* sets out requirements for the disclosure of remuneration paid to the auditor for audit, audit-related and non-audit work. This is a slightly amended re-enactment of the requirements of section 161D of the Companies Act 1963. *Subsection (1)* contains some definitions used in this *Section*:

"Group auditor" means the statutory auditor carrying out the audit of group financial statements.

"Remuneration" includes benefits in kind, reimbursement of expenses and other payments in cash.

*Subsection (2)* requires that, subject to certain exemptions contained below in *subsection (5)*, a company should disclose the remuneration paid for all work in each category carried out for the company in respect of that financial year by the statutory auditors of the company. Comparative information is also required for the preceding financial year. Where part of remuneration is in the form of a benefit in kind, the nature and estimated monetary value of the benefit must be disclosed.

*Subsection (3)* requires that remuneration must be analysed into the following categories of work:

- (a) audit of entity financial statements;
- (b) other assurance services;
- (c) tax advisory services;

(d) other non-audit services.

*Subsection (4)* states that where the statutory auditors of the company are a statutory audit firm then any work carried out by a partner in the firm or a statutory auditor on behalf of the firm is considered for the purposes of this section to have been carried out by the audit firm.

*Subsection (5)* sets out certain exemptions available to companies from the requirement to disclose the remuneration as required by *subsection (2)*. Where a company qualifies as a small company in accordance with *section 350* or a medium company in accordance with the same section the company is not required to make the disclosure. Additionally where a company is a subsidiary undertaking of a holding company which is required to prepare and does prepare group financial statements then provided the subsidiary undertaking is included in the group financial statements and the information required by *subsection (8)* is disclosed in those group financial statements, the information need not be given in the entity financial statements of the subsidiary.

*Subsection (6)* states that, where a medium company has availed of the exemption in *subsection (5)* it shall provide such information to the Supervisory Authority when requested to do so.

*Subsection (7)* sets out that a holding company that prepares group financial statements. It requires that the notes to those group financial statements relating to each financial year must disclose the remuneration for all work in each category that was carried out in respect of that financial year by the group auditor for the holding company and the subsidiary undertakings included in the consolidation. It also requires that comparative information is given for the preceding financial year. Additionally, where all or part of the remuneration is in the form of benefit in kind, the nature and estimated money value of that benefit must be stated.

*Subsection (8)* identifies the categories of work for which the information is required under *subsection (7)*. These are as follows:

- (a) the audit of the group financial statements;
- (b) other assurance services;
- (c) tax advisory services;
- (d) other audit services.

*Subsection (9)* states that where more than one statutory auditor has been appointed as the statutory auditors of a company in a single financial year, separate disclosure shall be made of the remuneration of each of them in the notes to the company's entity financial statements.

*Section 323* requires disclosure of any off-balance sheet arrangement that the company is a party to during the financial year. It requires the financial impact on the company of those arrangements to be disclosed in the notes to the statutory financial statements if the risks or benefits arising from them are material and disclosure is necessary for a proper assessment of the financial position of the company. This is an amended re-enactment of the requirement contained in paragraph 36A of the Companies (Amendment) Act 1986. Regulation 15 of the European Communities (Companies: Group Accounts) Regulations 1992 (S.I. No. 201 of 1992) required the Schedule to the 1986 Act to be applied to group accounts with any necessary modifications to take account of the difference between group accounts and entity accounts.

*Subsection (1)* deals with entity financial statements and requires that the nature and business purpose of any arrangements of the company that are not included in its balance sheet and the financial impact on the company of those arrangements should be given in the notes to the statutory financial statements provided the risks and benefits arising from the arrangements are material and the disclosure of such risks and benefits is necessary for assessing the financial position of the company.

*Subsection (2)* extends the requirement to holding companies that prepare group financial statements. This sub-section requires similar disclosures to be made in group financial statements of similar arrangements entered into by the company or any of the subsidiary undertakings included in the consolidation.

## Chapter 8

### Approval of statutory financial statements

*Section 324* deals with the approval and signing of statutory financial statements by the board of directors prior to them being circulated in any manner. This section is a slightly amended re-enactment of section 156 and 157 of the Companies Act 1963.

*Subsection (1)* requires that when the directors of a company are satisfied that the statutory financial statements give a true and fair view and comply with the Act, or, where applicable, with Article 4 of the IAS Regulation, those statements shall be approved by the board of directors and signed on their behalf by two directors where there are two or more directors in the company.

*Subsection (2)* states that where there is a sole director, then provided that person is satisfied that the statutory financial statements give a true and fair view, that director should approve and sign the statutory financial statements. Section 156 of the Companies Act 1963 did not envisage having companies with a sole director.

*Subsection (3)* states that where group financial statements are prepared then both the group financial statements and the entity financial statements of the holding company shall be approved by the board of directors at the same time.

*Subsection (4)* states that the approval of the financial statements will be evidenced by including the signature or signatures on the face of the entity balance sheet and any group balance sheet. Previously section 156 of the Companies Act 1963 required both the balance sheet and profit and loss account to be signed by the directors.

*Subsection (5)* requires that every copy of every balance sheet laid before the members in general meeting or which is otherwise circulated, published or issued, shall state the names of the persons who signed the balance sheet on behalf of the board of directors.

*Subsection (6)* states that where statutory financial statements are approved that do not give a true and fair view, every director of a company who is a party to their approval and who knows that they do not give such a true and fair view or otherwise comply with the Act, or is reckless as to whether that is so, shall be guilty of a category 2 offence.

*Subsection (7)* states that for the purpose of *subsection (6)* every director of the company at the time the financial statements are approved shall be taken to be a party to their approval unless he or she can show that they took all reasonable steps to prevent them being approved.

*Subsection (8)* states that where a copy of the balance sheet is laid before the members or otherwise issued, circulated or published or is delivered to the Registrar without the balance sheet having been appropriately signed or without showing the signatories name, then the company or any officer of it who is in default is guilty of a category 2 offence.

*Subsection (9)* states that after the balance sheet has been approved and signed, it is then permissible for a company to issue, circulate or publish a summary of that balance sheet and a summary of the profit and loss account for the company's financial year.

*Subsection (10)* clarifies that in *subsection (8)* the term “officer” includes any shadow director and *de facto* director.

## **Chapter 9** Directors' Report

*Section 325* imposes an obligation on the directors of a company to prepare a directors' report dealing with certain matters. The following sections, *section 326* to *section 330* address the specific matters to be incorporated in the directors' report. Previously the contents of a directors' report was specified by *section 158* of the Companies Act 1963 and *section 13* of the Companies (Amendment) Act 1986.

*Subsection (1)* lists the matters to be included in a directors' report. These are:

- (a) general matters;
- (b) a business review;
- (c) information on the acquisition and disposal of own shares;
- (d) information on interests in shares or debentures; and
- (e) a statement on relevant audit information.

The specific matters to be dealt with under these headings are dealt with in the ensuing *sections 326* to *330*.

*Subsection (2)* states that where elsewhere in the Act there is an obligation to include certain matters in the directors' report then the requirements of *subsection (1)* are additional requirements and do not absolve the company of their obligations under those other sections. The obligations being addressed here are the requirement in *section 167(3)* referring to the establishment or otherwise of an Audit Committee in the case of a large private company, and *section 225(2)* referring to the inclusion of a Directors' Compliance Statement for various entities.

*Subsection (3)* requires that where a company is a holding company and prepares group financial statements, the directors shall prepare a directors' report dealing with the company and its subsidiary undertakings included in the consolidation taken as a whole.

*Subsection (4)* states that where group financial statements are published with entity financial statements it is sufficient to prepare the group directors' report, provided that any information specific to the holding company is given in that group directors' report.

*Subsection (5)* states that a group directors' report may give greater emphasis to matters that are significant to the company and its subsidiary undertakings taken as a whole.

*Subsection (6)* states that a director who fails to fulfil the obligation set out above in *subsections (1)*, *(3)* or *(4)* shall be guilty of a category 3 offence.

*Subsection (7)* states that it shall be the duty of a person who is a shadow director or *de facto* director to ensure that the requirements of *subsections (1)*, *(3)* and *(4)* are complied with in relation to the company.

*Subsection (8)* states that if a person fails to comply with the duty imposed under *subsection (7)* that person shall be guilty of a category 3 offence.

*Section 326* sets out a number of general matters that must be dealt with in a directors' report for a financial year. These items were set out in various pieces of legislation and the following

subsections set out the differences between what is required under this Act and what was previously required.

*Subsection (1)* requires that the directors' report for a financial year shall state:

- (a) the names of the persons who at any time during a financial year were directors of the company; (this is a new requirement introduced by this Act);
- (b) the principal activities of the company during the course of the year; (section 158(3) of the Companies Act 1963 previously required disclosure of changes in the nature of business carried out by the company or its subsidiaries);
- (c) a statement of the measures taken by the directors to secure compliance with the requirements of *sections 282 to 286* with regard to keeping accounting records and the location of those records; (this was previously required by section 158 (6A) of the Companies Act 1963);
- (d) the amount of any interim dividends paid by the directors during the year and the amount, if any, that the directors recommend should be paid by way of final dividend.

*Subsection (2)* requires that, where relevant, the directors' report shall state:

- (a) particulars of any important events affecting the company which have occurred after the year-end; (this was previously required by section 13(1)(b) of the Companies (Amendment) Act 1986;
- (b) an indication of the activities of the company in the field of research and development; (this was previously required by section 13(1)(d) of the Companies (Amendment) Act 1986;
- (c) an indication of the existence of branches of the company outside the State and the country in which each such branch is located; (this was previously required by section 13(1)(e) of the Companies (Amendment) Act 1986);
- (d) political donations made during the year that are required to be disclosed under the Electoral Act 1997; (this is a new sign-post to the requirements of the Electoral Act 1997).

*Subsection (3)* requires that where material for an assessment of the company's financial position and profit or loss, the directors' report shall describe the use of financial instruments by the company and discuss the financial risk management objectives and policies of the company, including, where hedge accounting is used, the policy for hedging each major type of forecasted transaction. The subsection also requires a discussion of the exposure of the company to price risk, credit risk, liquidity risk and cash flow risk. Similar requirements were previously contained in section 13(1)(f) of the Companies (Amendment) Act 1986.

*Subsection (4)* deals with a group directors' report and requires that the information specified above be given in relation to the company and its subsidiary undertakings taken a whole when preparing the group directors' report.

*Section 327* requires that a directors' report should give a fair review of the business of the company and a description of the principal risks and uncertainties facing the company. The requirement to give a fair review of the business of the company and a description of the principal risks and uncertainties was previously contained in section 13(1)(a) of the Companies (Amendment) Act 1986.

*Subsection (1)* states that a directors' report should contain a fair review of the business of the company and a description the principal risks and uncertainties facing the company.

*Subsection (2)* requires that the business review should be balanced and comprehensive. It should also analyse the development and performance of the business of the company during the financial year and the assets, liabilities and financial position of the company at the end of the financial year. This review is required to be consistent with the size and complexity of the business.



*Subsection (3)* states that where it is necessary for an understanding of the development, performance or financial position of the entity, the business review should contain an analysis of financial key performance indicators and, where appropriate, an analysis using non-financial key performance indicators including environmental and employee matters.

*Subsection (4)* requires that where appropriate additional explanations of amounts included in the statutory financial statements should be disclosed in the directors' report.

*Subsection (5)* requires the business review to include an indication of likely future developments in the business of the company.

*Subsection (6)* states that a group directors' report should include similar information but dealing with the company and its subsidiary undertakings taken as a whole.

*Subsection (7)* states that "key performance indicators" are factors by reference to which the development, performance and financial position of the company can be measured.

*Section 328* states that where at any time during the financial year a company owns or acquires shares in itself, or its shares are held or acquired by a subsidiary undertaking, then specific disclosures must be made in the directors' report. The disclosures to be made in the directors' report include the number and nominal value of any shares held by the company or any subsidiary undertaking at the beginning and end of the financial year, together with the consideration paid for such shares and a reconciliation of the number and nominal value of such shares from the beginning of the financial year to the end of the financial year showing all changes during the year including further acquisitions, disposals and cancellations. The consideration paid or received for each movement during the financial year must be disclosed. Similar information was previously required by section 14 of the Companies (Amendment) Act 1986.

*Section 329* requires that where the directors or secretary of a company have an interest in shares in, or debentures of, the company or any group undertaking these must be disclosed in the directors' report. This is an amended re-enactment of section 63 of the Companies Act 1990.

*Subsection (1)* requires that for every person who at the end of a financial year was a director of the company, the directors' report should state whether or not he or she was, at the end of that financial year, interested in shares in or debentures of the company or of any group undertaking of that company and if he or she was so interested, the number and amount of shares in and debentures of each company should also be disclosed. The subsection also requires that similar information should be provided at the beginning of the financial year or if he or she was not then a director at the date when they first became a director of the company.

*Subsection (2)* clarifies that in *subsection (1)* the reference to "the time when a person became a director" shall in the case of a person who became a director on more than one occasion mean the first time when he or she became a director.

*Subsection (3)* requires that similar information must be given in respect of the person who was the secretary of the company at the end of the financial year.

*Subsection (4)* states that the interests of a director or secretary in shares or debentures for the purposes of this section means all interests required to be recorded in the register of interests under *section 267* and also includes interests of shadow directors and *de facto* directors that are required to be so registered.

*Section 330* requires a statement in the directors' report that, in so far as each director is aware, there is no relevant audit information that has not been disclosed to the company's statutory auditors and that each director has taken all the steps that he or she ought to have taken in order to make himself or herself aware of any relevant audit information and to establish that the company's statutory auditors have that information. This is a new requirement which has been included in the Act and is based on section 418 of the UK Companies Act 2006.

*Subsection (1)* sets out the general requirement to include a statement in the directors' report that so far as each director is aware, there is no relevant audit information of which the company's statutory auditors are unaware; and that each director has taken all the steps that he or she ought to have taken to make himself or herself aware of any relevant audit information and to establish that the company's statutory auditors are aware of that information.

*Subsection (2)* states that the reference in the section to "relevant audit information" means any information which the company's statutory auditors require to prepare their report.

*Subsection (3)* states that a director would be regarded as having taken all appropriate steps if he or she had made such inquiries or taken such other steps as are required by his or her duty as a director of the company to exercise reasonable care, skill and diligence.

*Subsection (4)* states that this obligation on directors does not in any way reduce the statutory and professional obligations of the statutory auditors to form their opinion on the various matters specified in *section 336*.

*Subsection (5)* states that where a directors' report containing such a statement is approved in accordance with *section 332* but the statement is false, every director of the company who knew that the statement is false or was reckless as to whether it was false and failed to take reasonable steps to prevent the report from being approved, shall be guilty of a category 2 offence.

*Section 331* states that the directors' report shall contain a copy of any Disclosure Notice issued in respect of the company under section 33AK of the Central Bank Act 1942 during the financial year to which the report relates.

*Section 332* deals with the approval and signing of the directors' report. It also requires that the names of the directors signing the report should be included on any copy of the report which is issued, circulated or published or laid before the members. Previously section 158 (1) of the Companies Act 1963 required a directors' report to be prepared and section 158 (2) required that said report be signed on behalf of the directors by two of the directors of the company.

*Subsection (1)* requires that a directors' report and, where applicable, the group directors' report, shall be approved by the board of directors and signed on their behalf by two directors where there are two or more directors.

*Subsection (2)* states that where a company has a sole director that person is required to approve and sign the report.

*Subsection (3)* is new and requires that every copy of every directors' report which is laid before the members in general meeting or which is otherwise circulated, published or issued, shall state the names of the persons who signed it on behalf of the board of directors.

*Subsection (4)* is new and states that if any copy of a directors' report is laid before the members, or otherwise issued, circulated or published or delivered to the Registrar without the report having been

signed as required by this section or without the signatories names being included, the company and every officer of it shall be guilty of a category 3 offence.

*Subsection (5)* is new and clarifies that “officer” includes any shadow director and *de facto* director.

## Chapter 10

### Obligation to have statutory financial statements audited

*Section 333* is new and requires the directors of a company to arrange for the statutory financial statements for a financial year to be audited by statutory auditors, unless the company is entitled to, and chooses to avail itself of, the audit exemption. This was not specifically stated in previous legislation although section 160 of the Companies Act 1963 required that every company should at every annual general meeting appoint an auditor or auditors to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting.

*Section 334* provides protection for minorities by stating that a member or members holding one tenth or more of the voting rights in a company may serve notice that they do not wish the audit exemption to be availed of. Similar protection was previously contained in section 33 of the Companies (Amendment) (No.2) Act 1999.

*Subsection (1)* states that any member or members of a company that hold shares conferring in aggregate not less than one tenth of the voting rights in a company may serve a notice in writing on the company stating that that member or those members do not wish the audit exemption to be availed of by the company.

*Subsection (2)* states that the notice referred to in *subsection (1)* may be served on the company either during the financial year immediately preceding the financial year to which the notice relates or during that latter financial year but not later than one month before the end of that year.

*Subsection (3)* states that the reference in *subsection (1)* to a voting right is a right to exercise or cast or control the casting of a vote at general meetings of members of the company. It does not include a right that is exercisable only in special circumstances.

*Subsection (4)* states, for the avoidance of doubt, that where one or more members do not wish the audit exemption to be availed of by a company in a specified financial year, this is to be applied to that particular company. If that company is a subsidiary undertaking then it applies only to the subsidiary undertaking and is irrespective of whether its holding company or any other undertakings in the group have availed themselves of the audit exemption in that year.

*Subsection (5)* provides that in this section “audit exemption” does not include the dormant company audit exemption referred to in *section 365*.

*Section 335* states that if a company avails of an audit exemption then a statement must be included on the balance sheet of the company saying that it has availed of that exemption and providing certain other information. This derives from the requirements of sections 33(4),(2) and (6) of the Companies (Amendment) (No. 2) Act 1999.

*Subsection (1)* sets out the detail of what must be included in the statement on the balance sheet of a company that has availed of the audit exemption. The specifics that must be contained in the statement are as follows:

- (a) the company is availing itself of the audit exemption;

- (b) the company is availing itself of the exemption on the grounds that the conditions specified in *section 358 or 359* are satisfied;
- (c) no notice under *section 334* has been served on the company by shareholders; and
- (d) the directors acknowledge their obligations to keep adequate accounting records and prepare financial statements that give a true and fair view of the assets, liabilities and financial position of the company at the end of its financial year and of its profit or loss for the year and to otherwise comply with the provisions of this Act relating to financial statements.

*Subsection (2)* requires that this statement should appear on the balance sheet in a position immediately above the signatures of the directors that have approved the financial statements.

*Subsection (3)* states that if *subsection (1)* or *(2)* is not complied with, the company and any officer of it who is in default shall be guilty of a category 3 offence.

*Subsection (4)* states that if the company is a holding company that prepares group financial statements then *subsection (1)* applies to both its entity balance sheet and its group balance sheet.

*Subsection (5)* is new and it provides that companies that avail of the audit exemption can be required by the Director of Corporate Enforcement to allow access to their books and documents and furnish such information as required to satisfy the Director that the company did comply with the conditions for audit exemption.

*Subsection (6)* is new and states that if *subsection (5)* is not complied with, the company and any officer of it who is in default shall be guilty of a category 4 offence.

*Subsection (7)* states that where the audit exemption applies to a group and any subsidiary undertaking relies on that exemption and consequently does not have its statutory financial statements for the year audited, references in this section to a company availing itself of the audit exemption is read as including that subsidiary undertaking.

## **Chapter 11**

### Statutory Auditors Report

*Section 336* sets out the form and content of the statutory auditors' report on the statutory financial statements. The section is an amended re-enactment of the requirements of section 193 of the Companies Act 1990.

*Subsection (1)* sets out the general requirement to comply with the requirements of the section.

*Subsection (2)* requires that an auditors' report should include an introduction that identifies the financial statements on which the auditors are reporting and the financial reporting framework under which they have been prepared. The report is also required to give a description of the scope of the audit identifying the auditing standards in accordance with which the audit was carried out. This was previously enacted as section 193(4) of the Companies Act 1990.

*Subsection (3)* requires that the statutory auditors' report should state clearly the auditor's opinion as to whether the financial statements give a true and fair view of the assets, liabilities and financial position of the company or group as at the end of the financial year and of the profit or loss of the company or group for the financial year. The auditors' report is also required to state whether the statutory financial statements have been properly prepared in accordance with the relevant financial reporting framework and with the requirements of this Act. This is a slightly amended re-enactment of the requirements set out in section 193(4C) of the Companies Act 1990.

*Subsection (4)* sets out further matters that the statutory auditors' report should address. This includes whether the auditors obtained all the information and explanations necessary for the purposes of their audit; whether, in their opinion, the accounting records of the company were sufficient to permit the financial statements to be readily and properly audited; whether, in their opinion, information and returns adequate for their audit have been received from branches of the company not visited by them; and, in the case of entity financial statements, whether the company's balance sheet and profit and loss account (unless the exemption in section 304 is availed of) are in agreement with the accounting records and returns. This is a slightly amended re-enactment of the requirements set out in section 193(4B) of the Companies Act 1990.

*Subsection (5)* requires the statutory auditors' report to state whether, in their opinion, the information given in the directors' report for the financial year is consistent with the statutory financial statements. This requirement was previously set out in section 15 of the Companies (Amendment) Act 1986.

*Subsection (6)* requires that for each of the matters referred to in earlier subsections, the statutory auditors' report shall include an opinion which shall be either unqualified or qualified and also include a reference to any matters which the statutory auditor's wish to draw to the attention of users without qualifying the report.

*Subsection (7)* clarifies that the statement or opinion referred to above may be qualified to the extent of an adverse opinion where there is a disagreement or a disclaimer of opinion where there is a significant limitation on the scope of work carried out. This requirement was previously contained in section 193(4E) of the Companies Act 1990.

*Subsection (8)* requires that where statutory financial statements do not include any of the disclosures required by *sections 305 to 312*, the statutory auditor's shall, so far as they are reasonably able to do so, include the required particulars in their report. These sections deal with disclosure requirements of director's remuneration and other transactions with directors. The requirement to disclose director's remuneration in the audit report if it is not disclosed in the financial statements was previously contained in section 191(8) of the Companies Act 1963. The requirement to disclose other transactions with directors in the auditors' report was previously set out in section 46 of the Companies Act 1990.

*Subsection (9)* states that where the entity financial statements of a holding company are prepared and presented with the group financial statements, the statutory auditors' report on the group financial statements may be combined with a report on the entity financial statements. Provision for this was previously made in section 193(4F) of the Companies Act 1990.

*Section 337* deals with how the statutory auditors' report shall be signed and dated by the statutory auditor. It is an amended re-enactment of what was previously contained in section 193(4G) of the Companies Act 1990.

*Subsection (1)* requires that every statutory auditors' report must state the name of the statutory auditors, be signed by them and bear the date of such signature.

*Subsection (2)* states that every copy of the statutory auditors' report which is laid before the members in a general meeting or is otherwise circulated or published, shall state the name of the statutory auditors, their signature and the date of their signature.

*Subsection (3)* requires that the copy of the statutory auditors' report which is delivered to the Registrar shall have the name of the statutory auditor, their signature and the date of their signature on them.

*Subsection (4)* deals with offences and says that if any copy of a statutory auditors' report is laid before the members, otherwise issued, circulated or published, or delivered to the Registrar without being signed and dated as required by this section, then the company and any officer of it who is in default shall be guilty of a category 3 offence.

*Subsection (5)* clarifies that in *subsection (4)* officer includes any shadow director and *de facto* director.

## **Chapter 12**

### **Publication of financial statements**

*Section 338* requires that a copy of the statutory financial statements, directors' report and statutory auditors' report on those financial statements and that directors' report must be sent to every member of the company, every holder of debentures of the company and all other persons who are entitled to receive them not less than 21 days before the date of the meeting of the company at which those documents will be laid before the members. This section is an amended re-enactment of the requirements contained in section 159 of the Companies Act 1963.

*Subsection (1)* sets out the requirement that a copy of relevant documents must be sent not less than 21 days before the date of the meeting to the members of the company, the holders of debentures of the company and all other persons who are entitled to receive them.

*Subsection (2)* specifies that the relevant documents are (a) the statutory financial statements of the company for the financial year concerned, (b) the directors' report in relation to that financial year and (c) the statutory auditors' report on those financial statements and that director's report.

*Subsection (3)* provides that where all the members that are entitled to attend and vote at a meeting consent to short notice then the copies of the documents may be sent less than 21 days before the date of the meeting.

*Subsection (4)* states that copies of the documents specified in *subsection (2)* may be sent using electronic communications.

*Subsection (5)* also expands the meaning of "sent" to a person to include situations where the company and a person have agreed to his or her having access to the documents on a website (instead of them being sent to him or her) provided the documents are covered by the agreement and the person is notified of the publication of the documents on the website, the address of that website and how the documents may be accessed from the website.

*Subsection (6)* states that where documents are posted to a website in accordance with *subsection (5)* they shall be treated as having being sent to any person not less than 21 days before the date of a meeting if, and only if, they are published on the website throughout a period beginning at least 21 days before the date of the meeting and the notification given to the person of their publication on that website is given not less than 21 days before the date of the meeting.

*Subsection (7)* states that where, for some reason, which is outside the control of the company, the documents are not published on the website for the full period of 21 days before the date of the meeting. The meeting can still be validly held provided it would not be reasonable to have expected the company to prevent or avoid the non-publication of the documents.

*Subsection (8)* clarifies that where copies of documents are sent out over a period of days, references elsewhere in this Act to the day on which those copies are sent out is to be considered the last day of the period during which they were being sent out.

*Subsection (9)* states that if this section is not complied with, the company and every officer of it who is in default shall be guilty of a category 3 offence.

*Subsection (10)* clarifies that “officer” includes any shadow director and *de facto* director.

*Section 339* deals with the rights of members of a company and any holder of debentures of a company to be given on demand, a copy of certain financial statements and reports. This section is a new section and draws together a number of previous requirements. It includes an amended re-enactment of section 150(10) of the Companies Act 1963, sections 154(3) and (4) of the Companies Act 1963 and section 159(4) of the Companies Act 1963.

*Subsection (1)* states that any member of a company and any holder of debentures of a company are entitled to receive from the company, on demand and without charge, a copy of the company’s statutory financial statements for the most recent financial year, the directors’ report for that year and the statutory auditors’ report for that year on those financial statements and that directors’ report. This is an amended re-enactment of the requirements of section 159(4) of the Companies Act 1963.

*Subsection (2)* states that if group financial statements do not deal with a subsidiary undertaking of the company then any member of the holding company is entitled to demand, without charge, a copy of the statutory financial statements of such subsidiary undertaking for the most recent financial year together with a copy of the director’s and statutory auditors’ report for that year. This is an amended re-enactment of the right set out in section 150(10) of the Companies Act 1963.

*Subsection (3)* gives every member of a holding company a right to receive, within 14 days after a demand is made, a copy of any statutory financial statements or any directors’ or statutory auditors’ reports of any subsidiary undertaking of the holding company laid before any general meeting of such subsidiary undertaking. The maximum charge that can be imposed on members seeking copies of such financial statements or reports is €3.00 for each year’s financial statements received. This right was previously set out in section 154(3) of the Companies Act 1963. The amount of the permissible fee has been changed.

*Subsection (4)* limits the right of members to receive financial statements of subsidiary undertakings to those laid before an annual general meeting held within the last ten years. This limitation was previously contained in section 154(3) of the Companies Act 1963.

*Subsection (5)* states that if, on the application either of the company or of any person who claims to be aggrieved, the court is satisfied that the rights conferred by this section are being abused, the court may order that such copies need not be sent to members. This is an amended re-enactment of section 154(4) of the Companies Act 1963.

*Subsection (6)* provides that the court may order the company’s costs to be paid, in whole or in part, by the member whose demand for copies of statements were found to be abusive. This was previously enacted in section 154(4) of the Companies Act 1963.

*Subsection (7)* sets out permission to send documents by electronic communication provided this is allowed by the company’s constitution and an electronic address has been notified to the company by the person requesting the document.

*Subsection (8)* states that if the company does not comply within 14 days after the date on which a demand is made under this section, then the company and any officer of it who is in default is guilty of a category 3 offence.

*Subsection (9)* states that where there is a default under this section, the court may direct that the copies demanded be sent to the member.

*Subsection (10)* clarifies that “officer” includes any shadow director and *de facto* director.

*Section 340* sets out certain requirements in relation to the publication of statutory financial statements, abridged financial statements and non-statutory financial statements of a company. It is an amended re-enactment of section 19 of the Companies (Amendment) Act 1986.

*Subsection (1)* states that if a company publishes its statutory financial statements it must also publish with those statutory financial statements, any directors’ report prepared in accordance with *section 325* and any statutory auditors’ report made under *section 391* in the form required by *section 336*. This is an amended re-enactment of the requirement set out in section 19(1) of the Companies (Amendment) Act 1986.

*Subsection (2)* states that where a company is required to prepare group financial statements for a financial year it shall not publish entity financial statements for that year unless they are combined with group financial statements and published together as the statutory financial statements of the company. This is a new requirement.

*Subsection (3)* states that where a company publishes its abridged financial statements prepared in accordance with *sections 353* or *354*, it shall also publish with those abridged financial statements, any report in relation to those abridged financial statements specified in *section 350* and, if the statutory auditors of the company have refused to provide the directors of the company with a report under *section 356*, an indication of the refusal. This is a slightly amended re-enactment of the requirement of section 19(1A) of the Companies (Amendment) Act 1986.

*Subsection (4)* states that if a company publishes non-statutory financial statements it must include a statement indicating:

- (a) the reason for the preparation of the non-statutory financial statements;
- (b) that the non-statutory financial statements are not the statutory financial statements of the company;
- (c) whether statutory financial statements dealing with any financial year with which the non-statutory financial statements deal have been annexed to the annual return and delivered to the Registrar and, if not, an indication of when they are likely to be so delivered;
- (d) whether the statutory auditors of the company have made a report under *section 391* in the form required by *section 336* in respect of the statutory financial statements of the company;
- (e) whether any matters referred to in the statutory auditors’ report were qualified or unqualified or whether the statutory auditors’ report included a reference to any matters to which the statutory auditors drew attention by way of emphasis without qualifying the report.

This is an amended re-enactment of the requirement of section 19(2) of the Companies (Amendment) Act 1986 except that the requirement to give the reason for the preparation of the non-statutory financial statements is new.

*Subsection (5)* states that where a company publishes non-statutory financial statements, it shall not publish the statutory auditors’ report under *section 391* with those non-statutory financial statements. This is a slightly amended re-enactment of section 19(3) of the Companies (Amendment) Act 1986.

*Subsection (6)* states that where a holding company publishes non-statutory entity financial statements dealing with the company alone, it must indicate in a note to those financial statements whether or not group financial statements have been prepared for that period and, if so, where they can be obtained from.



*Subsection (7)* states that if a company fails to comply with any of the requirements of this *section*, the company and any officer of it who is in default shall be guilty of a category 3 offence.

*Subsection (8)* clarifies that the term “officer” includes any shadow director and *de facto* director.

*Section 341* requires that the directors of a company shall lay the statutory financial statements of the company for each financial year together with the directors’ report and statutory auditors’ report before the company in general meeting, not later than nine months after the financial year end date. This is an amended re-enactment of the requirement set out in section 148(7) of the Companies Act 1963.

*Subsection (1)* states that the directors must, in respect of each financial year, lay before the company in general meeting, copies of (a) the statutory financial statements of the company for the financial year, (b) the directors’ report including any group directors’ report for the financial year and (c) the statutory auditors’ report on those financial statements and that directors’ report.

*Subsection (2)* states that those financial statements and those reports must be laid before the members not later than nine months after the financial year end date.

*Subsection (3)* states that the statutory auditors’ report shall be open to inspection by any member at a general meeting.

*Subsection (4)* states that where under *section 175(3)* the holding of an annual general meeting is dispensed with, then *subsections (1)* and *(3)* shall be disregarded and the time period of nine months in *subsection (2)* shall refer to the time by which those statements must be provided to the members for the purpose of their signing the written resolution referred to in *section 175(3)*.

## **Chapter 13**

### **Annual return and documents annexed to it**

*Section 342* introduces the term “annual return”. This is a return that has to be made by a company to the Registrar in respect of successive periods as set out in the following sections of this Act. The concept of an annual return was previously contained in sections 125 and 127 of the Companies Act 1963.

*Section 343* requires a company to make an annual return not later than 28 days after the annual return date of the company. The section introduces provisions for this period to be extended by a court. Prior to the commencement of CA 2014, section 125 of the Companies Act 1963 required every company to make an annual return at least once in every year and section 127 required that the annual return of a company should be made up to a date that was not later than its annual return date. Those provisions have been merged so that there is now one basic requirement to file an annual return within 28 days of the company’s annual return date.

*Subsection (1)* states that the “annual return date” is the date provided under *section 345* and “first annual return date” is to be read accordingly.

*Subsection (2)* states that subject to the following provisions of this section, the company shall deliver to the Registrar, an annual return not later than 28 days after the annual return date of the company.

*Subsection (3)* states that if the annual return is made up to an earlier date than the company’s annual return date, it shall be delivered to the Registrar not later than 28 days after that earlier date.

*Subsection (4)* states that an annual return of a company shall be in the prescribed form and contain the prescribed information and be made up to a date that is not later than its annual return date except that the first annual return due after a company is incorporated shall be made up to its first annual return date.

*Subsection (5)* states that on application by a company having given notice to the Registrar, the court may, if it is satisfied that it would be appropriate, extend the time for delivering the annual return to the Registrar but only one such order may be made in relation to a particular period.

*Subsection (6)* states that if an order is made under *subsection (5)* by a court, then the company must, within 28 days, or such longer period as the court may allow deliver a certified copy to the Registrar. If the copy of the order is not received by the Registrar then it is not valid for the purpose of *subsection (5)*.

*Subsection (7)* states that the court, for the purposes of *subsection (5)*, shall be the District Court for the district court district where the registered office of the company is located or the High Court. It is clarified that the allocation to District courts of jurisdiction in the extension of filing period applications in respect of annual returns is limited to returns that are delivered to the CRO on or after the commencement of this section. This would preclude companies which have already filed annual returns from seeking extensions of time and other misuses of the section such as seeking refunds of late filing penalties. An application to the District Court can only be made by companies with outstanding returns, at the time of the sections commencement.

*Subsection (8)* states that *subsection (2)* (requirement to deliver an annual return to the Registrar within 28 days of the annual return date of the company) does not apply in respect of any annual return date that falls in a period when the company is in the course of being wound up.

*Subsection (9)* states that *subsection (2)* (requirement for a company to deliver an annual return to the Registrar not later than 28 days of the annual return date of the company) does not apply in respect of any annual return date that falls during a period when the company is being voluntarily struck off the register by the Registrar unless the company is restored to the register subsequent to its having been dissolved.

*Subsection (11)* states that if a company fails to comply with requirements of this section, the company and any officer of it who is in default, shall be guilty of a category 3 offence.

*Subsection (12)* states that the term “officer” includes any shadow director and *de facto* director.

*Section 344* provides that where a company makes its annual return by electronic means to the Registrar within the required period referred to in section 343(2) or (3), as the case may be, or, where that period stands extended in accordance with section 343(5) and (6), notwithstanding that none of the required documents have been annexed to the annual return shall be deemed to have been delivered to the Registrar within the required period with the foregoing documents annexed to it if those documents are delivered to the Registrar within 28 days after the date on which the annual return has been delivered to the Registrar by electronic means.

*Section 345* deals with determining the annual return date for companies that were incorporated both before and after the commencement of this section. Similar requirements were previously contained in section 127(5) and (6) of the Companies Act 1963.

*Subsection (1)* states that unless it is altered by the company or the Registrar in accordance with *section 346*, the annual return date of a company, in any year, is to be determined by this section.

*Subsection (2)* states that in the case of a company incorporated before the commencement of this section, the company's existing annual return date is taken to be its next annual return date falling after that commencement. The subsection also provides that the annual return date of the company in each subsequent year is the anniversary of the date set at the annual return date.

*Subsection (3)* states that in the case of a company incorporated on or after the commencement of this section, the first annual return date of the company is a date six months after the date of its incorporation and the annual return date in each subsequent year is the anniversary of its first annual return date.

*Section 346* sets out various ways in which a company can alter its annual return date. Requirements regarding altering an annual return date were previously set out in sections 127(8) to (11) of the Companies Act 1963.

*Subsection (1)* states that where the annual return of the company is made up to a date earlier than its annual return date, the company's new annual return date will be the anniversary of the date to which that annual return is made up, unless the company:

- (a) elects in the annual return, to retain its existing annual return date; or
- (b) establishes a new annual return date in accordance with *subsection (2)*. The subsection also states, for the avoidance of doubt, that an election to retain its existing annual return date will not operate to make the next annual return date of the company fall in any year other than the year in which it would have fallen had the election not been made.

*Subsection (2)* states that, subject to subsections (3) and (4), a company may establish a new annual return date by delivering an annual return to the Registrar, in accordance with *section 343(2)*, being an annual return that is delivered not later than 28 days after its existing annual return date and to which there is annexed notification in the prescribed form nominating the new annual return date, but, notwithstanding anything to the contrary in this Act, the company shall not be required to annex statutory financial statements. The concession provided here is that no accounts are required to be annexed to it so that these can be deferred to the next annual return made up to the extended Annual Return Date. This concession is not available for a company in its first year of operation.

*Subsection (3)* the new annual return date established under *subsection (2)* must be a date falling within the period of six months after the existing annual return date.

*Subsection (4)* states that where a company has established a new annual return date in accordance with *subsection (2)*, it may not establish another new annual return date in accordance with that subsection until at least five years have passed since the establishment of the first new annual return date.

*Subsection (5)* states that if it appears desirable to the Registrar for a holding company or a holding company's subsidiary undertaking to extend its annual return date so that the subsidiary undertakings annual return date may be the same as that of the holding company, the Registrar may, on the application or with the consent of the directors of the company or undertaking whose annual return date is to be extended, direct that an extension is to be permitted in the case of that company or undertaking.

*Subsection (6)* states that where an annual return date of a company or subsidiary undertaking is altered in accordance with *subsections (2)* or *(5)*, its annual return date after that shall be each anniversary of the altered date unless it is again changed in accordance with the provisions of this section.

*Section 347* sets out the documents which must be always attached to the annual return of the company. Similar provisions were previously included in section 128 of the Companies Act 1963.

Subsection (1) states that, subject to the provisions of this part, a copy of the following documents have been laid, or are to be laid, before the relevant general meeting of the company

- (a) the statutory financial statements of the company;
- (b) the director's report including any group director's report; and
- (c) the statutory auditor's reports on those financial statements and that director's report.

The subsection clarifies that if in the period to which the annual return relates the most up-to-date statutory financial statements have not yet been laid before the members, then the section refers to the next general meeting after the return's filing.

*Subsection (2)* elaborates on the meaning of the reference to 'a copy of a document'. It consolidates sections 3 and 4 of the Companies (Miscellaneous Provisions) Act, 2013 into this Act.

A "copy" can now include a document which is signed using typeset signatures, that is, typed names of the directors. This means that the entire document can be created electronically. The law prior to the commencement of CA 2014 provided that a certificate could be signed either manually or using an electronic signature. The aim is to facilitate greater uptake of electronic filing.

Electronic filing of annual returns has, in a sense, unintentionally, been hampered by the need to file a copy of the accounts related documents which has been certified as a true copy or a true written copy and which contains copies of the signatures of the two directors who signed those accounts. Prior to the introduction of the 2013 Act, if a company wished to file those documents electronically, it had to manually scan in every page of the hard copy of those documents so that there will be a copy of the signature of the two directors. In the experience of the Companies Registration Office, this discouraged electronic take up of company filing.

*Subsection (3)* states that where any document referred to in *subsection (1)* above that has been annexed to the annual return is in a language other than the English language or the Irish language, a translation of it in the English language or the Irish language shall be annexed to each such document. The translation shall be certified in the prescribed manner to be a correct translation.

*Subsection (4)* states that every document annexed to the annual return in accordance with *subsection (1)* should cover the period:

- (a) since the incorporation of a company in the case of the first annual return to which documents are annexed; and
- (b) since the end of the period covered by the statutory financial statements annexed to the preceding annual return in all other cases.

It also requires that these documents are to be made up to a date not earlier by more than nine months to the date to which the annual return is made up.

*Subsection (5)* states that if a company fails to comply with *subsections (1), (3) or (4)*, the company and any officer of it who is in default shall be guilty of a category 3 offence.

*Subsection (6)* states that "officer" includes any shadow director and *de facto* director.

*Section 348* deals with documents to be annexed to the annual return in certain situations. These various requirements were included in a number of pieces of legislation in existence prior to CA 2014, as indicated below.

*Subsection (1)* deals with the situation where a holding company that prepares Companies Act financial statements has availed itself of the exemption in *section 299* (subsidiary undertaking of higher EEA holding undertaking) and does not prepare group financial statements because it has relied on the consolidated accounts and annual report prepared by a higher holding undertaking in which it and all of its subsidiary undertakings are consolidated. The subsection requires the holding company to annex to its annual return:

- (a) the consolidated accounts of that higher holding undertaking;
- (b) the consolidated annual report of that higher holding undertaking; and
- (c) the report of the person responsible for auditing the consolidated accounts of the higher holding undertaking.

*Subsection (2)* deals with the situation where a holding company that prepares Companies Act financial statements has availed of the exemption in *section 300* (subsidiary undertaking of higher non-EEA holding undertaking), does not prepare group accounts because it has relied on the consolidated accounts and annual report prepared by a higher holding undertaking in which it and all of its subsidiary undertakings are consolidated. The subsection requires that the holding company shall annex to its annual return, those consolidated accounts, annual report and the report of the person responsible for auditing the accounts on which they have relied.

*Subsection (3)* deals with a situation where a company that prepares IFRS financial statements has availed itself of the exemption in IFRS and does not prepare group financial statements because it has relied on consolidated accounts and an annual report prepared by a higher holding undertaking in which it and all of its subsidiary undertakings are consolidated. This subsection requires that the holding company shall annex to its annual return, the consolidated accounts, the consolidated annual report and the report of the person auditing those accounts and that report on which it has relied.

*Subsection (4)* states that where a company has relied on the exemption in *section 316(1)* regarding information on related undertakings, the company shall annex to the annual return to which the statutory financial statements referred to in that provision are annexed, the full information concerned, that is the information referred to in *section 316(1)* and the information referred to in *section 314(1)* and (2) that it would have had to disclose in the notes to the financial statements but for its reliance on that exemption.

*Subsection (5)* states that where any document required to be annexed to the annual return by this *Section* is in a language other than the English or Irish language, there shall be annexed to the copy of that document delivered with the annual return, a translation of it into the English or Irish language certified in the prescribed manner to be a correct translation.

*Subsection (6)* states that if a company fails to comply with any of the provisions of this section, the company and any officer of it who is in default, shall be guilty of a category 3 offence.

*Subsection (7)* provides that the reference to a copy of a document is a reference to a copy that satisfies the following conditions-

- (a) it is a true copy of the original save for the difference that the signature or signatures on the original, and any dates or dates thereon shall appear in typeset form on the copy; and
- (b) it is accompanied by a certificate of a director and the secretary of the company, that bears the signature of the director and the secretary in electronic or written form, stating that the copy is a true copy of the original.

*Subsection (8)* clarifies that the term “officer” includes any shadow director and *de facto* director.

*Section 349* provides that a company shall not be required to annex statutory financial statements to the first annual return falling to be made by the company after it is incorporated.

## Chapter 14

### Exclusions, exemptions and special arrangements with regard to public disclosure of financial information

*Section 350* sets out the conditions under which a company may qualify to be treated as a small or medium company. This section is an amended re-enactment of section 8 of the Companies (Amendment) Act 1986 except that the specific qualifying conditions have been increased in this Act.

*Subsection (1)* specifies that “qualifying conditions” mean the conditions referred to in *subsections (5)* or *(6)*.

*Subsection (2)* states that unless a company is specifically excluded by *subsection (11)*, then a company qualifies as a small or medium company in relation to its first financial year if it meets the qualifying conditions in respect of that year.

*Subsection (3)* sets out how a company, which is not excluded by *subsection (11)*, qualifies as a small company in relation to a subsequent financial year. These conditions are that:

- (a) the qualifying conditions are satisfied in respect of the current year and the preceding financial year;
- (b) the company qualified as a small company in relation to the preceding financial year and the qualifying conditions are satisfied in respect of the current year;
- (c) the company qualified as a small company in relation to the preceding financial year and the qualifying conditions were satisfied in the preceding financial year.

What this means is that if a company is a small company, then it must fail the conditions for two consecutive years before it ceases to be a small company. Similarly, if a company is not a small company, it must meet the conditions for two consecutive years before it qualifies to become a small company.

*Subsection (4)* sets out how a company, which is not excluded by *subsection (11)* qualifies as a medium company in relation to a subsequent financial year. These conditions are that:

- (a) the qualifying conditions are satisfied in respect of the current year and the preceding financial year;
- (b) the company qualified as a medium company in relation to the preceding financial year and the qualifying conditions are satisfied in respect of the current year;
- (c) the company qualified as a medium company in relation to the preceding financial year and the qualified conditions were satisfied in the preceding financial year.

As for a small company, what this means is that if a company is a medium company, it must fail the qualifying conditions for two years before ceasing to be a medium company. Similarly, if the company was not a medium company it must meet the qualifying conditions for two consecutive years to become a medium company.

*Subsection (5)* sets out the qualifying conditions for a small company. These are that the company, in relation to a financial year, meets two or more of the following conditions:

- (a) the amount of the turnover of the company must not exceed €8.8 million;
- (b) the balance sheet total of the company does not exceed €4.4 million;
- (c) the average number of employees of the company does not exceed 50.

*Subsection (6)* sets out the qualifying conditions for a medium company. These are that the company, in relation to a financial year, meets two or more of the following conditions:

- (a) the amount of the turnover of the company does not exceed €20 million;
- (b) the balance sheet of the company does not exceed €10 million;
- (c) the average number of employees of the company does not exceed 250.

*Subsection (7)* specifies that “amount of the turnover” means the amount of turnover shown in the company’s profit and loss account.

*Subsection (8)* states that when applying limits in *subsections (5)(a)* and *(6)(a)* to a financial year which is not 12 months, the amounts specified in those subsections shall be proportionately adjusted. In other words, if the financial year is a period of 9 months, then the amount of turnover limit for a small company is 75% of €5 million and for a medium company, 75% of €20 million.

*Subsection (9)* specifies that “balance sheet total” means the aggregate amount shown as assets in the company’s balance sheet. That is the gross assets before deduction of any liabilities.

*Subsection (10)* states that the average number of employees of a company shall be determined by applying the method of calculation set out in *section 313* that is, by adding together the monthly number of employees for each month of the financial period and dividing by the number of months in the financial period.

*Subsection (11)* specifies that a holding company that prepares group financial statements or a company falling within any provision of *Schedule 5* may not qualify as a small or medium company.

*Section 351* provides that small and medium companies need not include certain information in their directors’ report. The information that they are excluded from providing is details regarding the use of financial instruments during the period and an analysis of key performance indicators for the period. This is an amended re-enactment of the exemption contained in *section 13(2)* of the Companies (Amendment) Act 1986.

*Section 352* sets out certain exemptions available to small and medium companies in relation to annexing certain information to the company’s annual return. In the case of a small company, instead of annexing statutory financial statements of the company, it may annex abridged financial statements; instead of annexing the directors’ report, it may annex certain information extracted from that report; and instead of annexing the statutory auditors’ report on the statutory financial statements, it may annex a special statutory auditors’ report. In the case of a medium company, that company may instead of its statutory financial statements, annex abridged financial statements; and instead of the statutory auditors’ report on the statutory financial statements, it may annex a special statutory auditors’ report.

*Subsection (1)* states that the exemption set out in *subsection (2)* are available to small or medium companies as defined in *section 350*.

*Subsection (2)* exempts small and medium companies from the requirement to annex the following documents to its company’s annual return:

- (a) the statutory financial statements of the company;
- (b) in the case of a small company, the directors' report;
- (c) the statutory auditors' report on those financial statements and that directors' report.

*Subsection (3)* sets out the documents that must instead be annexed to the annual return of a small company that has availed of the exemption provided in *subsection (2)*. These documents are as follows:

- (a) abridged financial statements prepared in accordance with *section 353* and which have been approved and signed in accordance with *section 355*;
- (b) an extract of the information required by *section 329* in relation to directors' interests in shares and debentures that is required to be stated in a directors' report;
- (c) a special statutory auditors' report prepared in accordance with *section 356*.

*Subsection (4)* sets out the information that must be annexed to the annual return of a medium company that avails of the exemption provided by *subsection (2)*. These documents are as follows:

- (a) abridged financial statements prepared in accordance with *section 354* which have been approved and signed in accordance with *section 355*;
- (b) the directors' report prepared in accordance with *section 325*;
- (c) a special statutory auditors' report prepared in accordance with *section 356*.

*Subsection (5)* provides that the reference to a copy of a document is a reference to a copy that satisfies the following conditions-

- (a) it is a true copy of the original save for the difference that the signature or signatures on the original, and any dates or dates thereon shall appear in typeset form on the copy; and
- (b) it is accompanied by a certificate of a director and the secretary of the company, that bears the signature of the director and the secretary in electronic or written form, stating that the copy is a true copy of the original.

*Section 353* sets out how the abridged financial statements of a company that qualifies as a small company shall be extracted from the statutory financial statements of the company. Preparation of abridged financial statements for a small company was previously set out in sections 10 and 12(1) of the Companies (Amendment) Act 1986.

*Subsection (1)* states that the abridged financial statements of a small company shall be extracted from the statutory financial statements of the company prepared under *section 290* in the manner set out in the following Subsections.

*Subsection (2)* states that where the statutory financial statements of the company are IFRS financial statements, the abridged financial statements shall comprise:

- (a) the balance sheet of the company;
- (b) the notes to the financial statements that provide the information required by *sections 305 to 321*; and
- (c) the notes to the financial statements that provide information in relation to the maturity of non-current liabilities and details of any security given in respect of those liabilities.

*Subsection (3)* provides that where the statutory financial statements of the company are Companies Act financial statements, the abridged financial statements shall comprise:

- (a) the balance sheet of the company;
- (b) the notes to the financial statements that provide the information required by *sections 305 to 321*;



- (c) the notes to the financial statements that provide the information required by *paragraphs 52, 53, 57, 58 and 68 of Schedule 3*; and
- (d) if not shown separately on the face of the balance sheet, the total amounts falling due within one year and after one year for debtors and creditors.

*Subsection (4)* states that *section 274(3)* which requires a reference to a balance sheet to include certain notes does not apply to the balance sheet referred to in this section.

*Section 354* sets out how the abridged financial statements are to be prepared for a medium company. Sections 11 and 12(2) of the Companies (Amendment) Act 1986 previously set out how abridged financial statements of a medium company should be prepared.

*Subsection (1)* states that the abridged financial statements of a medium company shall be the same as the statutory financial statements prepared under *section 290* except that the profit and loss account and notes may be abridged as set out in the following subsections.

*Subsection (2)* states that where the statutory financial statements of the company are IFRS financial statements, the abridged income statement may combine as one item under the heading “gross profit or loss”, the company’s revenue and certain expenses extracted from the income statement.

*Subsection (3)* states that in relation to *subsection (2)*, the following are the expenses that may be combined as one item with the revenue of the company:

- (a) where the expenses are classified by function, those expenses classified as cost of sales may be combined with the revenue of the company into a single item; and
- (b) where the expenses are classified by nature, only changes in finished goods and work in progress and raw materials and consumables used, may be so combined.

*Subsection (4)* states that for the purposes of *subsection (2)*, the notes to the statutory financial statements may be abridged such that items that are combined on the face of the income statement are not separately identified in the notes.

*Subsection (5)* states that where the statutory financial statements of the company are Companies Act financial statements, then the abridged profit and loss account may combine as one item under the heading “gross profit or loss”, the company’s turnover and certain expenses for the period as extracted from the profit and loss account prepared in accordance with *section 287*.

*Subsection (6)* sets out the line items of the formats set out in *Schedule 3* that may be combined for the purposes of *subsection (5)*.

*Subsection (7)* states that, for the purposes of *subsection (5)*, the notes to the statutory financial statements may be abridged such that items that are combined on the face of the income statement are not separately identified in the notes and, in particular, the information required by *paragraph 65 of Schedule 3* need not be given.

*Subsection (8)* states that *section 274(4)* requiring a reference to a profit and loss account to include certain notes does not apply to a profit and loss account referred to in this section.

*Section 355* deals with the approval and signing of abridged financial statements and sets out certain matters that must be included on the face of the abridged balance sheet. These requirements were previously contained in sections 18(1) and (2) of the Companies (Amendment) Act 1986.

*Subsection (1)* states that where the directors are satisfied that the abridged financial statements have been prepared as required by *section 353* and *354*, those abridged financial statements shall be approved by the directors and signed on their behalf by two directors where there are more than two directors.

*Subsection (2)* states that where a company has a single director, then that director may approve and sign the abridged financial statements if he or she is satisfied that they have been properly prepared.

*Subsection (3)* states that the face of an abridged balance sheet must contain a statement by the directors that:

- (a) they have relied on the exemption contained in *section 352*;
- (b) they have done so on the ground that the company is entitled to the benefit of that exemption as a small or medium company; and
- (c) the abridged financial statements have been properly prepared in accordance with *sections 353* or *354*, as appropriate.

*Subsection (4)* states that the signatures indicating approval by the directors shall be inserted on the face of the abridged balance sheet immediately after the statement referred to in *subsection (3)*.

*Subsection (5)* requires that every copy of an abridged balance sheet which is approved by the board of directors or which is circulated, published or issued, shall state the names of the persons who signed the balance sheet on behalf of the board of directors.

*Subsection (6)* states that the following applies to documents annexed to the annual return and delivered to the Registrar:

- (a) the copy of the abridged financial statements shall state the names of the directors that signed the abridged balance sheet on behalf of the board of directors;
- (b) the information extracted from the directors' report in accordance with *section 352(3)(b)* shall be signed by the secretary of the company as being a true copy of the information laid before the members in general meeting;
- (c) the directors' report required by *section 352(4)(b)* shall state the names of the directors who signed the report on behalf of the board of directors;
- (d) the special statutory auditors' report on the abridged financial statements shall state the name of the statutory auditors who signed the report and, if different, the name of the statutory auditors who signed the report under *section 391*.

*Subsection (7)* states that if abridged financial statements are approved which have not been prepared in accordance with the requirements of *section 353* or *354*, every director of the company who is a party to their approval or is reckless as to whether they have been so prepared, shall be guilty of a category 2 offence.

*Subsection (8)* states that every director of the company at the time the abridged financial statements are approved shall be taken to be a party to their approval unless he or she shows that he or she took all reasonable steps to prevent their being approved.

*Subsection (9)* states that if any of the other requirements of *subsection (6)* regarding documents annexed to the annual return are not complied with, the company and any officer of it who is in default shall be guilty of a category 2 offence.

*Subsection (10)* states that in this section the term "officer" includes any shadow director and *de facto* director.

*Section 356* deals with the special report of the statutory auditors on abridged financial statements. The special report of the auditors was previously dealt with by *section 18(3) and (4)* of the Companies (Amendment) Act 1986.

*Subsection (1)* states that abridged financial statements annexed to the annual return and delivered to the Registrar must have a copy of the special report of the statutory auditors containing a statement of the statutory auditors with respect to the matters set out in *subsection (2)* below and a copy of the statutory auditors' report under *section 391*.

*Subsection (2)* states that where the directors of a company propose to annex abridged financial statements to the annual return, and the statutory auditors of the company are of the opinion that the directors of the company are entitled to rely on the exemption for small or medium companies and the abridged financial statements have been properly prepared, it shall be the duty of the statutory auditors to state in a special report that, in their opinion, the directors are entitled to annex those abridged financial statements to the annual return and those abridged financial statements are properly prepared.

*Subsection (3)* requires that the special report prepared by the statutory auditors shall be signed by them and bear the date of such signing; the requirements of *section 337(2)* with respect to the signing of the report there referred to shall also apply with respect to the signing of the special report.

*Subsection (4)* states that every copy of the special report of the statutory auditors that is delivered to the Registrar or otherwise circulated, published or issued shall state the name of the statutory auditors providing the report and, if different, the names of the statutory auditors who provided the report under *section 391*.

*Subsection (5)* states that if the company fails to comply with the requirements of *subsections (1) or (4)*, the company and any officer of it who is in default shall be guilty of a category 2 offence.

*Subsection (6)* states that the term "officer" includes any shadow director and *de facto* director.

*Section 357* states that a subsidiary undertaking is exempted from the requirement to annex financial statements to their annual return that is filed with the Registrar if a holding undertaking that is established under the laws of an EEA state has provided a guarantee over the liabilities in the financial statements of the subsidiary for the whole of that financial year. The section also sets out certain other conditions that must be complied with. This is a slightly amended re-enactment of the requirements of *section 17* of the Companies (Amendment) Act 1986.

*Subsection (1)* states that where a company is a subsidiary undertaking of a holding undertaking that is established under the laws of an EEA state, the company, in any particular financial year, shall be exempted from the provisions of *section 347 and 348* if certain conditions are satisfied. The conditions that must be satisfied are as follows:

- (a) the shareholders of the company at the date of the next annual general meeting of the company or the next annual return date, whichever is the earlier, shall give their consent to the exemption;
- (b) there must be in force, in respect of the whole of the financial year an irrevocable guarantee by the holding undertaking of all amounts shown as liabilities in the statutory financial statements of the company for that financial year;
- (c) the company must have notified all the shareholders referred to in *paragraph (a)* of the guarantee;
- (d) the statutory financial statements of the company are consolidated in the consolidated accounts prepared by the holding undertaking;

- (e) the fact that the company has availed of the exemption is disclosed in a note to those consolidated accounts;
- (f) a notice stating that the company has availed of the exemption together with a copy of the guarantee and notification referred to in *paragraphs (b) and (c)* and a declaration by the company in writing that *paragraph (a)* has been complied with, is annexed to the annual return of the company for the financial year;
- (g) the consolidated accounts of the holding undertaking are drawn up in accordance with the requirements of the 7<sup>th</sup> Council Directive 83/349/EEC of 13 June 1983 or in accordance with International Financial Reporting Standards and are audited in accordance with Article 37 of that 7<sup>th</sup> Council Directive; and
- (h) a copy the consolidated accounts of the holding undertaking together with the report of the auditors on them are annexed to the annual return of the company referred to in *paragraph (f)*.

## Chapter 15

### Audit exemption

The audit exemption regime as set out in *sections 358, 359, 360, 361, 362, 363 and 364* has been streamlined to ensure the audit exemption criteria are in line with article 52 of Directive 2013/34/EU which must be transposed into national law by July 2015. The aim of the Directive is to simplify the accounting requirements for small companies and improves the clarity and comparability of companies' financial statements within the European Union. The new Directive takes the small company or group as the starting point and imposes additional requirements on medium-sized companies and groups and even more requirements on large companies and groups as well as on “public interest entities” (essentially listed companies as well as banks and insurance undertakings whether listed or not, regardless of size). This is described as a “think small first” approach.

*Section 358* sets out the main conditions that must be complied with in order for a company to be able to avail itself of an exemption from having its statutory financial statements audited in a non-group situation.

*Subsection (1)* states that subject to *Subsection (3)* and the other provisions of this chapter, *section 360* (audit exemption) applies to a company in respect of its statutory financial statements for a particular financial year if the company qualifies as a small company in relation to that financial year.

*Subsection (2)* states that for the purposes of this section, whether a company qualifies as a small company shall be determined in accordance with *section 350 (2), (3), (5), (7), (8), (9) and (10)*.

*Subsection (3)* states that *section 360* does not apply to a company in respect of its statutory financial statements for a particular financial year during any part of which the company was a group company (within the meaning of *section 359*) unless the group qualifies, under *section 359*, as a small group in relation to that financial year (and the other relevant provisions of this Chapter are complied with).

*Subsection (4)* states that in *subsection (3)* “group”, in relation to a group company, shall be read in accordance with *section 359 (1) (b)*.

*Subsection (5)* states that nothing in this section shall prejudice the operation of Chapter 16 (special audit exemption of dormant companies)

*Section 359* sets out the main conditions that must be complied with in order for a company to be able to avail itself of an exemption from having its statutory financial statements audited in a group situation.

*Section 360* states that for as long as a company meets the conditions set out in *sections 358 or 359*, the requirement to have statutory financial statements audited does not apply to the company in respect of the financial year and also identifies those other requirements of this Act which do not apply to the company unless and until circumstances arise which mean that the company fails to be entitled to the audit exemption in respect of that financial year. Similar provisions were previously set out in section 32 of the Companies (Amendment) (No. 2) Act, 1999.

*Subsection (1)* states that where a company, in accordance with *sections 358 or 359*, applies to the statutory financial statements of a company or group, for a particular year:

- (a) the obligation in *section 333* (obligation to have statutory financial statements audited) does not apply to the company or group in respect of that financial year; and
- (b) the provisions specified in *subsection (2)* don't apply to the company or group unless and until circumstances arise which mean that the company is not entitled to avail of the audit exemption in respect of that financial year.

*Subsection (2)* sets out the provisions of the Act that do not apply when the audit exemption has been availed of. These are all provisions of this Act that confer any power on statutory auditors or require anything to be done by or to statutory auditors or make provision on the basis of a report of the statutory auditors having been prepared. The subsection includes a Table setting out particular references in the Act which refer to statutory auditors.

*Section 361* clarifies that the audit exemption is not available to a company if members, having the power to do so under *section 334* have served notice that they do not wish the audit exemption to be availed of. This section is an amended re-enactment of the requirements of sections 33(1) and (2) of the Companies (Amendment) (No. 2) Act 1999.

*Section 362* states that the audit exemption is not available where a company or subsidiary undertaking falls within a certain category.

*Section 363* deals with a non-group situation and states that the audit exemption may not be availed of by that company unless its annual return is filed on time with the Registrar of Companies. This requirement was previously contained in section 32A of the Companies (Amendment) (No. 2) Act 1999.

*Subsection (1)* states that regardless of what conditions the company satisfies, a company is not entitled to the audit exemption unless:

- (a) the company's annual return to which statutory financial statements or abridged financial statements are annexed has been delivered to the Registrar in compliance with *section 343*; and
- (b) if it is not the company's first annual return, the annual return for the preceding financial year was delivered to the Registrar in compliance with *section 343*.

*Subsection (2)* states that where an annual return is the first annual return of a company, the requirement to have all the statutory financial statements or abridged financial statements annexed to the return, does not apply.

*Section 364* deals with a group situation and states that the audit exemption may not be availed by these entities unless their annual returns have been filed correctly with the Registrar. This

is a new requirement as previously a holding company was not entitled to avail itself of the audit exemption.

## **Chapter 16**

### Special audit exemption for dormant companies

*Section 365* is new and deals with the audit exemption for dormant companies. This comes from the Company Law Review Group recommendation in 2009 that companies classified as dormant that are members of a group should be entitled to avail of an audit exemption. *Subsection (2)* provides that in order to be regarded as dormant a company (a) must have no significant accounting transactions in respect of the financial year concerned; and (b) its assets and liabilities must comprise only permitted assets and liabilities.

## **Chapter 17**

### Revision of defective statutory financial statements

*Section 366* deals with a situation where the directors have approved statutory financial statements and they subsequently realise that there is an error or deficiency in those statutory financial statements or directors' report. It provides that they may prepare revised financial statements or a revised directors' report in respect of that year. This Chapter is a new chapter as voluntary revision of defective financial statements and directors' reports were not provided for in the previous Companies Acts. It has been closely based on similar legislation in the UK Companies Act 2006.

*Subsection (1)* states that if the directors become aware that any statutory financial statements (referred to as the "original statutory financial statements") or any directors' report (referred to as the "original directors' report") for a financial year did not comply with the requirements of this Act or, where applicable, Article 4 of the IAS regulation, they may prepare revised financial statements or a revised directors' report in respect of that year.

*Subsection (2)* states that where copies of the original statutory financial statements or original directors' report have been laid before the company in general meeting or delivered to the Registrar, the revisions shall be confined to correcting the incidence of non-compliance and the making of any necessary consequential alternations.

*Subsection (3)* states that where the reason for the revision of statutory financial statements is that information that should have been included by way of note was not so included or information provided in a note was incorrect or incomplete, then:

- (i) where the amounts presented in the profit and loss account, balance sheet or other statements are not affected, the revision may be effected by supplementary note; and
- (ii) in all other cases, revised financial statements shall be prepared.

*Subsection (4)* states that where the reason for the revision of the directors' report is that information that should have been included was not so included or information provided was incorrect or incomplete, then:

- (i) in the case where additional information is to be provided by way of revision and it does not affect other information included in the report, the revision may be effected by supplementary note; and
- (ii) in all other cases, a revised directors' report shall be prepared.

*Subsection (5)* states that where statutory financial statements for any financial year are revised, the next statutory financial statements prepared by the company shall refer to the fact that the previous set of financial statements was revised and provide particulars of the revision, its effect and the reason for the revision in a note to those statutory financial statements.

*Section 367* establishes the general principle that the provisions of this Act, as to the matters to be included in the financial statements and directors' report, apply to the revised financial statements and revised directors' report as if they had been prepared and approved by the directors as at the date of the original financial statements or original directors' report.

*Subsection (1)* states that provisions of this Act as to the matters to be included in statutory financial statements apply to revised financial statements as if those revised financial statements had been prepared and approved by the directors as at the date of the original statutory financial statements.

*Subsection (2)* states, in particular, that the requirement to give a true and fair view as set out in *section 289* shall be applied to the revised financial statements as at the date of the original statutory financial statements.

*Subsection (3)* requires that the accounting principles set out in *paragraph 14(b)* of *Schedule 3* apply to revised financial statements as if the reference in that provision to the date on which the financial statements were signed was to the date on which the original statutory financial statements were signed.

*Subsection (4)* states that the provisions of this Act as to matters to be included in a directors' report apply to a revised directors' report as if that revised report were prepared and approved by the directors as at the date of the original directors' report.

*Section 368* deals with the approval and signing of revised financial statements. It requires that in certain circumstances, information must be included in a prominent position in the revised financial statements, clearly identifying that the original financial statements have been revised either by issuing revised financial statements or by issuing a supplementary note.

*Subsection (1)* states that *section 324* dealing with the approval and signing of statutory financial statements applies to revised financial statements except that where the revision is affected by supplementary note, it applies so as to require a signature or signatures on the supplementary note instead of on the balance sheet.

*Subsection (2)* states that where the original statutory financial statements have been sent to members, laid before the members at a general meeting or delivered to the Registrar, the directors must include a statement in the prominent position in the revised financial statements or supplementary note giving certain information. If revised financial statements are issued, there must be a statement clearly identifying those financial statements as being revised financial statements and also a statement as to the following matters:

- (i) the revised financial statements replace the original financial statements for the particular financial year;
- (ii) that the revised financial statements are now the statutory financial statements of the company for that financial year;
- (iii) that they have been prepared as at the date of the original financial statements and not as at the date of revision and, accordingly, do not deal with events and transactions between those dates;
- (iv) details of how the original statutory financial statements did not comply with the requirements of this Act; and

- (v) particulars of the significant amendments made in remedying the defects.

If the revision is being effected by way of supplementary note, statements specifying that:

- (i) that the supplementary note revises, in certain respects, the original statutory financial statements of the company and is to be treated as forming part of those original statutory financial statements; and
- (ii) that the statutory financial statements have been revised as at the date of the original statutory financial statements and not as at the date of the revised supplementary note and, accordingly, do not deal with events and transactions between those dates.

It also requires that the date of approval of the revised financial statements or supplementary note be given in the revised financial statements or supplementary note.

*Subsection (3)* applies *subsections (8) to (10) of section 324* to the signing of the revised financial statements or supplementary note. This has the effect of making it a category 2 offence not to sign the revised financial statements or supplementary note as required by this section.

*Section 369* deals with the approval and signing of the revised directors' report or supplementary note and requires that certain information be included in the revised directors' report or supplementary note.

*Subsection (1)* states that *section 332* regarding the approval and signing of directors' reports shall apply to a revised directors' report and, in the case of a revision by supplementary note, it applies as if it required the signature or signatures to be included on the supplementary note instead of in the report.

*Subsection (2)* states that where copies of the original directors' report have been sent to members, laid before the members in general meeting or delivered to the Registrar, the directors shall include certain information in a prominent position in the revised directors' report before approving that directors' report. In the case of a revised directors' report, the following statements must be made:

- (i) that the revised directors' report replaces the original directors' report for the financial year, specifying the year;
- (ii) that it has been prepared as at the date of the original directors' report and not at the date of the revision and, accordingly, does not deal with events and transactions between those two dates;
- (iii) the respects in which the original directors' report did not comply with the requirements of the Act; and
- (iv) any significant amendments made consequential upon remedying the defects.

In the case of a revision by supplementary note, statements should be included in the supplementary note stating:

- (i) that the note revises, in certain respects, the original directors' report of the company and is to be treated as forming part of that original directors' report; and
- (ii) that the directors' report has been revised as at the date of the original directors' report and not as at the date of the revision and, accordingly, does not deal with events and transactions between those dates.

It also requires that the date of approval of the revised directors' report or supplementary note should be recorded in the revised directors' report or supplementary note as applicable.



*Subsection (3)* states that the requirements of *section 332* with regard to the signing of the directors' report and the inclusion of the signatories name apply equally to the revised directors' report, approved in accordance with this section or the supplementary note approved in accordance with this section.

*Section 370* requires that the statutory auditors of a company must issue a report on the revised financial statements and revised directors' report.

*Subsection (1)* states that a company's current statutory auditors shall make a report in the form required by *section 336* to the company's members in accordance with this section on revised financial statements prepared by the directors.

*Subsection (2)* states that the auditor's duty to assess the adequacy of accounting records and to report offences that they have become aware of also apply in relation to the statutory auditors' report on the revised financial statements.

*Subsection (3)* states that where the statutory auditors' report on the original statutory financial statements was not made by the company's current statutory auditors, the directors may require that the report is made by the previous statutory auditors provided that they agreed to do so and are still qualified to be appointed as statutory auditors of the company.

*Subsection (4)* states that where the previous statutory auditors agree to make that report then they are responsible for the assessment of accounting records and reporting of offences and by all other obligations imposed on statutory auditors in this Chapter.

*Subsection (5)* requires the statutory auditors' report on revised financial statements to state whether in the auditor's opinion, the revised financial statements have been properly prepared in accordance with the relevant financial reporting framework and with the provisions of this Act or, where applicable, of Article 4 of the IAS Regulation and, in particular, whether a true and fair view, as at the date the original statutory financial statements were approved by the directors, is given by these revised financial statements.

*Subsection (6)* states that the auditors' report shall also state whether in the auditor's opinion, the original statutory financial statements failed to comply with the requirements of this Act or, where applicable, of Article 4 of the IAS Regulation, in the respects identified by the directors in the statement made in the revised financial statements or supplementary note, as the case may be.

*Subsection (7)* requires the statutory auditors consider whether the information contained in the directors' report for the financial year for which the revised financial statements are prepared (or where that report has been revised, the revised directors' report) is consistent with the revised financial statements and shall give their opinion as to whether it is or is not.

*Subsection (8)* states that the requirements of *section 337* on signature of statutory auditors' report applies to a statutory auditors' report prepared under this section as it applies to a statutory auditors' report referred to in *section 336* with the necessary modifications.

*Subsection (9)* states that once the statutory auditors' report prepared under this section is signed, it will then become the statutory auditors' report on the statutory financial statements of the company in place of their report on the original statutory financial statements.

*Section 371* deals with situations where the company has availed itself of the audit exemption.

*Subsection (1)* states that *section 370* does not apply to a company that is entitled to and has availed of the audit exemption.

*Subsection (2)* states that where, as a result of the revisions to the statutory financial statements, a company is no longer entitled to avail itself of the audit exemption, the company shall cause a report by statutory auditors of the company on the revised financial statements to be prepared.

*Subsection (3)* states that the statutory auditors' report on the revised financial statements must be delivered to the Registrar within two months of the date of the revision of those financial statements.

*Section 372* deals with the statutory auditors' report to be prepared by statutory auditors where the directors have issued a revised directors' report but have not issued revised financial statements.

*Subsection (1)* states that a company's current statutory auditors shall make a report in the form required by *section 336* to the company's members on any revised directors' report prepared under *section 366* if the relevant statutory financial statements have not been revised at the same time.

*Subsection (2)* states that where the company's statutory auditors have changed between the date of approval of the original directors' report and the date of approval of the revised directors' report, the directors may ask the previous statutory auditors to prepare the report under this section, provided that they agreed to do so and are still qualified to be appointed as statutory auditors to a company.

*Subsection (3)* states that where the previous statutory auditors agree to make that report, all references in this Chapter to statutory auditors in relation to a report under this section shall be read as being references to those previous statutory auditors.

*Subsection (4)* the report from the statutory auditors shall state that they have considered whether the information given in the revised directors' report is consistent with the original statutory financial statements and shall state in their report whether they are of the opinion that it is or that it is not.

*Subsection (5)* states that the requirements of *section 337* in relation to the signature of statutory auditors' reports apply to a statutory auditors' report to be prepared under this section as it applies to a statutory auditors' report prepared under *section 336* with the necessary modifications.

*Section 373* provides that when revised financial statements or a revised directors' report are issued by the directors, those revised statements and report become the statutory financial statement and directors' report for all purposes under this Act from the date they are approved.

*Subsection (1)* states that for all provisions of this Act, the revised financial statements are considered to be the statutory financial statements of the company in place of the original statutory financial statements from the date that they are approved by the directors.

*Subsection (2)* sets out a list of key provisions of the Act under which the revised financial statements are to be treated as the company's statutory financial statements. These are as follows:

- (a) *Section 339* (right to demand copies of financial statements and reports);
- (b) *Section 340* (requirements in relation to publication of financial statements).

The subsection also requires the revised financial statements to be treated as the statutory financial statements for the following purposes only if those sections have not already been complied with using the original statutory financial statements. These sections are:

- (i) *Section 338* (circulation of statutory financial statements);
- (ii) *Section 341* (financial statements and reports to be laid before the members in general meeting); and
- (iii) *Section 347* (documents to be annexed to annual return: all cases).

*Subsection (3)* states that where the directors have approved a revised directors' report, that revised report shall become the directors' report in place of the original directors' report for all purposes under this Act from its date of approval.

*Subsection (4)* states that the revised report shall be the directors' report for the purposes of *section 339* (right of members to demand copies of the financial statements and reports). It also states that to the extent the section has not already been complied with, the revised directors' report shall become the directors' report for the purposes of the following sections:

- (i) *Section 338* (circulation of statutory financial statements);
- (ii) *Section 341* (financial statements and reports to be laid before the members in general meeting); and
- (iii) *Section 347* (documents to be annexed to annual return: all cases).

*Section 374* sets out the requirements that apply where the original statutory financial statements or original directors' report have been sent to any person under *section 338*.

*Subsection (1)* sets out the scope of this section. It states that the section applies where revised financial statements or a revised directors' report have been prepared by the directors and copies of the original statutory financial statements or original directors' report have been sent to any person under *section 338*.

*Subsection (2)* states that where revised financial statements or a revised directors' report have been prepared, the directors are required to send a copy of those revised financial statements or revised directors' report, together with a copy of the statutory auditors' report on them, to such persons, within 28 days of the date of revision. If the revision is affected by supplementary note, the directors are required to send a copy of that note, together with a copy of the statutory auditors' report on the revised financial statements or revised directors' report to those persons within 28 days of the date of revision.

*Subsection (3)* states that the directors are also required to send a copy of the revised financial statements and revised directors' report to all persons who, at the date of revision, are members of the company, holders of any debentures of the company, or a person entitled to receive notice of general meetings, even if they were not entitled to the original financial statements and reports.

*Subsection (4)* states that if this section is not complied with, each of the directors who approved the revised financial statements or the revised directors' report shall be guilty of a category 3 offence.

*Subsection (5)* clarifies the meaning of "the day on which financial statements are sent under *section 338*". It states that if the directors have completed sending copies of the original statutory financial statements under *section 338*, the day referred to shall be the day on which the original statutory financial statements were sent, despite the fact that they have been subsequently revised. If the directors have not completed sending copies of those financial statements under *section 338*, the day shall be the last day on which the revised financial statements are sent out under this section.

*Section 375* states the directors' responsibilities with regard to laying revised financial statements or revised directors' reports before members when the original statutory financial statements or directors' report have already been laid before a general meeting of the company.

*Subsection (1)* states that this Section applies where the directors have prepared revised financial statements or a revised directors' report and copies of the original statutory financial statements or original directors' report have been laid before a general meeting of the company.

*Subsection (2)* requires that a copy of the revised financial statements or the revised directors' report shall be laid before the next general meeting of the company, held after the date of revision.

*Section 376* sets out the responsibility of directors in relation to revised financial statements or a revised directors' report where a copy of the original statutory financial statements or directors' report have been annexed to the annual return of the company and delivered to the Registrar.

*Subsection (1)* sets out the scope of the Section and states that it applies in relation to revised financial statements or revised directors' reports where a copy of the original statutory financial statements or directors' report has been annexed to the company's annual return and delivered to the Registrar under *section 343*.

*Subsection (2)* requires that where revised financial statements or revised directors' report have been prepared then these must be delivered to the Registrar within 28 days after the date of revision, together with a copy of the statutory auditors' report on them. Where the revision is affected by supplementary note, a copy of that note, together with a copy of the statutory auditors' report on the revised financial statements or revised directors' report, must be delivered to the Registrar within 28 days of the date of revision.

*Subsection (3)* states that if a director fails to comply with *subsection (2)* he or she shall be guilty of a category 3 offence.

*Subsection (4)* states that a shadow director or *de facto* director of a company has a duty to ensure that the requirements of *subsection (2)* are complied with.

*Subsection (5)* states that any person who fails to comply with *subsection (4)* is guilty of a category 3 offence.

*Subsection (7)* clarifies that in this section "date of revision" means the date of revision of the original statutory financial statements.

*Section 377* sets out the duties of directors in relation to revised financial statements or a revised directors' report where the company, as it qualifies as a small or medium company, has annexed abridged financial statements to the annual return and delivered them to the Registrar.

*Subsection (1)* states that this Section applies where the directors have prepared revised financial statements and the company has delivered abridged financial statements to the Registrar because it has taken advantage of the exemption available for a small or medium company.

*Subsection (2)* states that where the abridged financial statements would not comply with this Act if they had been prepared in relation to the revised financial statements either because the company would no longer meet the qualifying conditions as a small or medium company or the revision impacts on the content of the abridged financial statements, the directors have the duty set out in the following Subsection.

*Subsection (3)* states that it shall be the duty of the directors, either:

- (a) to deliver to the Registrar within 28 days of the date of revision, a copy of the revised financial statements or revised directors' report, together with the statutory auditors' report on the revised financial statements; or
- (b) if, based on the revised financial statements, the company is still entitled to prepare revised abridged financial statements, then those revised abridged financial statements should be delivered to the Registrar.

*Subsection (4)* deals with a situation where the abridged financial statements are not impacted by the revision made to the statutory financial statements. It requires the directors to comply with the duty set out in the following subsection.

*Subsection (5)* requires that in this situation, the directors of the company shall deliver a note to the Registrar stating that the statutory financial statements of the company were revised in a manner which did not impact on the abridged financial statements and they shall also include a copy of the statutory auditors' report on the revised financial statements.

*Subsection (6)* requires that any revised abridged financial statements or the note under *subsection (5)* must be delivered to the Registrar within 28 days of the date of revision.

*Subsection (7)* states that any director that fails to comply with this section shall be guilty of a category 3 offence.

*Subsection (8)* states that it is the duty of a person who is a shadow director or a *de facto* director to ensure that the requirements of this section are complied with in relation to the company.

*Subsection (9)* states that any person that fails to comply with the requirements under *subsection (8)* shall be guilty of a category 3 offence.

*Subsection (10)* states that "date of revision" in this section means the date of revision of the original statutory financial statements.

*Section 378* states that where, based on the revised financial statements, a company is entitled to and avails of the audit exemption in respect of a financial year or would have been so entitled except for the time that it takes to complete the preparation of these revised financial statements, this Chapter shall be applied as if no mention was made in it of a statutory auditors' report.

*Section 379* sets out what happens when there are modifications made to the Act between the date of approval of the original financial statements, directors' report and abridged financial statements and the date of approval of revised financial statements, revised directors' report or revised abridged financial statements.

*Subsection (1)* states that where the provisions of the Act as to matters to be included in the statutory financial statements of a company or in a directors' report, are amended after the date of approval of the original statutory financial statements or directors' report but prior to the date of revision, the provisions of the Act that are to be complied with in the revised financial statements and revised directors' report are those in force at the date of approval of the original statutory financial statements or original directors' report.

*Subsection (2)* provides that where matters to be included in abridged financial statements are amended after the date of the original abridged financial statements but before the date of revision of the revised abridged financial statements, the revisions that are to be complied with are those in force at the date of delivery of the original abridged financial statements.

## **Chapter 18**

### Appointment of statutory auditors

*Section 380* sets out general provisions regarding the appointment of statutory auditors and an interpretation of provisions providing for the auditors term of office. Section 160(1) of the Companies Act 1963 required companies to appoint auditors. Section 160(2) required that the appointment of an auditor continued until he retired or somebody else was appointed auditor in his stead.

*Subsection (1)* requires one or more statutory auditors to be appointed in accordance with this Chapter for each financial year of a company.

*Subsection (2)* explains that the plural form “statutory auditors” is used throughout this Part, irrespective of the fact that a single statutory auditor may be appointed.

*Subsection (3)* clarifies that references to statutory auditors elsewhere in the Act shall be read accordingly.

*Subsection (4)* states that the appointment of a firm (not being a body corporate) by its firm name to be the statutory auditors, is deemed to be the appointment of those persons who are partners in the firm from time to time and are qualified to be statutory auditors of that company.

*Subsection (5)* clarifies that any reference or provision in this Chapter stating that a person appointed statutory auditor shall hold office until the conclusion of a general meeting means that the person holds such office until the conclusion of such a general meeting except when one of the following happens sooner:

- (i) the person’s resignation, in accordance with this Part, or death;
- (ii) the termination of the person’s office in accordance with this Part; or
- (iii) the person becoming disqualified from holding office in accordance with the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010.

*Section 381* sets out how the remuneration of statutory auditors is to be determined. This is an amended re-enactment of the requirement set out in section 160(8) of the Companies Act 1963.

*Subsection (1)* states that the remuneration of the statutory auditors:

- (a) shall be agreed with the directors where they are appointed by the directors;
- (b) where the auditors are appointed by the members or deemed automatically re-appointed under *section 377(2)*, their remuneration may be fixed by the members at the annual general meeting or extraordinary general meeting appointing them and thereafter, at each general meeting during the auditors’ term of office or in such other manner as the members may, from time to time, resolve; or
- (c) where they are appointed by the Director of Corporate Enforcement, may be fixed by the Director of Corporate Enforcement or by the directors or members if the Director of Corporate Enforcement authorises that to be done.

*Subsection (2)* clarifies that for the purpose of this section, amounts paid in respect of expenses are included in the expression “remuneration”.

*Section 382* deals with the appointment of the first statutory auditors of a company and the power of members to appoint someone else in their stead. This is an amended re-enactment of the requirement set out in section 160(6) of the Companies Act 1963.

*Subsection (1)* states that the first statutory auditors of the company may be appointed by the directors at any time before the first annual general meeting of the company.

*Subsection (2)* states that those statutory auditors will hold office until the conclusion of the first annual general meeting except that the company may, at a prior general meeting, remove those auditors and appoint another person who has been nominated for such appointment by any member of the company as the statutory auditors.

*Subsection (3)* a notice of the nomination of those persons or such appointment must be given to members of the company not less than 14 days before the date of that general meeting.

*Subsection (4)* states that if the directors fail to exercise their power under *subsection (1)*, the company in general meeting may appoint the first statutory auditors of the company and, in this event, the powers of the directors shall cease.

*Subsection (5)* states that if statutory auditors are appointed by the company in general meeting, they shall hold office up to the conclusion of the first annual general meeting of the company.

*Section 383* deals with the subsequent appointments of statutory auditors and includes provision for automatic re-appointment of auditors at annual general meetings. These issues were previously dealt with in section 160(2) and (3) of the Companies Act 1963.

*Subsection (1)* states that a company shall appoint statutory auditors to hold office from the conclusion of an annual general meeting to the conclusion of the next annual general meeting.

*Subsection (2)* states that unless notice is given of a resolution to appoint some other person in place of retiring statutory auditors, retiring statutory auditors at any general meeting are deemed to be re-appointed without any resolution being passed unless:

- (a) he or she is not qualified for re-appointment;
- (b) a resolution has been passed at that meeting appointing somebody instead of him or her or providing expressly that he or she shall not be re-appointed; or
- (c) he or she has given the company notice in writing of his or her unwillingness to be re-appointed.

*Subsection (3)* states that where notice is given of an intended resolution to appoint some other person or persons in place of a retiring statutory auditor and for any reason, including the death, incapacity or disqualification of that person or persons, the resolution cannot be proceeded with, the retiring statutory auditor shall not automatically be re-appointed under *subsection (2)*.

*Subsection (4)* states that where the members of a company, by signing a resolution, have relieved the company of an obligation to hold an annual general meeting, a retiring statutory auditor is deemed to be reappointed as of the date on which the last member signed the resolution.

*Section 384* deals with the power of directors to appoint statutory auditors in certain circumstances. These powers were previously set out in section 160(7) of the Companies Act 1963 and section 35 of the Companies (Amendment) (No. 2) Act 1999.

*Subsection (1)* states that where any casual vacancy in the office of statutory auditors arises, it is the duty of the directors to appoint statutory auditors as soon as possible after that vacancy has arisen.

*Subsection (2)* states that where, as a result of any circumstances arising, the company is not entitled to the audit exemption, it shall be the duty of the directors of the company to appoint statutory auditors as soon as possible after those circumstances arise.

*Subsection (3)* states that statutory auditors so appointed hold office until the conclusion of the next annual general meeting of the company held after their appointment.

*Section 385* deals with a situation where the members fail to appoint a statutory auditor at an annual general meeting and provide that the Director of Corporate Enforcement may then appoint one or more persons to fill the position of statutory auditors of the company. The power at present rests with the Minister in accordance with section 160(4) and (5A) of the Companies Act 1963.

*Subsection (1)* states that if no statutory auditors are appointed by the members at an annual general meeting and the company is not entitled to avail itself of the audit exemption, the Director of Corporate Enforcement may appoint one or more persons to fill the position of statutory auditors of the company.

*Subsection (2)* states that where the situation referred to in *subsection (1)* arises (i.e. no statutory auditors are appointed by the members), the company shall, within one week of that date, give the Director of Corporate Enforcement, notice in writing of that fact. The subsection also requires that where a resolution removing the statutory auditors is passed at an annual general meeting, the company must give notice of that fact to the Registrar within 14 days of the date of the meeting.

*Subsection (3)* states that if a company fails to give notices as required by *subsection (2)*, the company and any officer of it who is in default, shall be guilty of a category 3 offence.

*Subsection (4)* states that statutory auditors appointed by the Director of Corporate Enforcement in accordance with *subsection (1)*, shall hold office until the conclusion of the next annual general meeting of the company held after their appointment.

## **Chapter 19**

### **Rights, obligations and duties of statutory auditors**

*Section 386* states that the statutory auditors of a company have a right of access at all reasonable times to the accounting records of the company. This right of access was previously legislated for in section 193(3) of the Companies Act 1990.

*Section 387* gives statutory auditors of a company, the right to get any information and explanations they consider necessary for the performance of their duties from officers of the company. The section also sets out time limits which officers should comply with in relation to requests from statutory auditors for information or explanations. The right to demand information and explanations was previously contained in section 193(3) of the Companies Act 1990 and the time periods for compliance with those requests were set out in section 197(3), (4) and (5) of the Companies Act 1990.

*Subsection (1)* states that where the auditors believe that information and explanations are known to officers of the company or can be procured by them, then they have a right to receive that information if they consider it is necessary for the performance of their duties.

*Subsection (2)* states that if an officer of the company fails to comply with such a request for information within two days of the date on which it is made by the statutory auditors of the company or the statutory auditors of the holding company, such an officer shall be guilty of a category 2 offence.



*Subsection (3)* states that in any proceedings against a person in respect of an offence under *subsection (2)*, it is a defence to prove that it was not reasonably possible for the person to comply within the time specified but that he or she provided the information or explanation as soon as was reasonably possible after the expiration of two days.

*Subsection (4)* states that, in this section, the term “officer” includes any employee of the company and any shadow director and *de facto* director.

*Section 388* deals with the right of statutory auditors of a holding company to obtain information and explanations concerning subsidiary undertakings. This section is an amended re-enactment of section 196 of the Companies Act 1990.

*Subsection (1)* states that where a company (referred to as “the holding company”) has a subsidiary, then:

- (a) where the subsidiary undertaking is either an existing company, a company registered under this Act, a body established in the State, a partnership or unincorporated body of persons having its principle place of business in the State, then it shall be the duty of the subsidiary undertaking and the statutory auditors of the subsidiary undertaking, to give the statutory auditors of the holding company, such information and explanations as they require for the purposes of their duties as statutory auditors of the holding company;
- (b) in any other case, it shall be the duty of the holding company, if required by its statutory auditors, to take all steps as are reasonably open to it to obtain the information and explanations from the subsidiary undertaking.

*Subsection (2)* states that if an undertaking, body or other person fails to comply within five days with a requirement to provide such information to the statutory auditors of the holding company, then the undertaking, body or other person and any officer of the undertaking or body shall be guilty of a category 2 offence.

*Subsection (3)* states that in any proceedings against a person for an offence under *subsection (2)* it shall be a defence to prove that it was not reasonably possible for the person to comply within the time specified but that he or she complied with it as soon as was reasonably possible, after the expiration of the five days.

*Subsection (4)* states that the term “officer” in relation to an undertaking or body includes any employee of the undertaking or body and, if it is a company, any shadow director or *de facto* director.

*Section 389* states that if an officer of a company knowingly makes a statement which is misleading or false or is reckless as to whether it is misleading or false to the statutory auditors of a company, they shall be guilty of a category 2 offence. This was previously provided for in section 197(1) and (2) of the Companies Act 1990.

*Subsection (1)* states that an officer of a company who knowingly makes a statement to which this section applies, which is misleading or false or makes such a statement being reckless as to whether it is misleading or false, shall be guilty of a category 2 offence.

*Subsection (2)* states that this section applies to any statement made to the statutory auditors of a company (whether orally or in writing) which conveys any information or explanation which they require or are entitled to require as statutory auditors of the company.

*Subsection (3)* clarifies that the term “officer” in relation to a company, includes any employee of the company and any shadow director and *de facto* director.

*Section 390* requires that any persons who are appointed as statutory auditors of a company shall be under a general duty to carry out the audit services with professional integrity. This is a slightly amended re-enactment of the obligation set out in section 193(6) of the Companies Act 1990.

*Section 391* sets out the general obligation on statutory auditors to issue a report to the members on all statutory financial statements laid before the members during their term in office. This general duty was previously set out in section 193(1) of the Companies Act 1990.

*Section 392* sets out the requirements on statutory auditors to report to the Registrar and to the Director where they have formed the view that adequate accounting records, in accordance with *sections 281* to *285*, have not been kept by a company. The section also provides that statutory auditors are required, if requested, to furnish certain information to the Director. The section clarifies that compliance with these reporting requirements are not an infringement of any professional or legal duty. The section is an amend re-enactment of the requirements set out in sections 194(1) to (4) and sections 194(5B) and (6) of the Companies Act 1990.

*Subsection (1)* states that if at any time the statutory auditors of a company form the opinion that the company is contravening or it has contravened any of *sections 281* to *285* in relation to keeping adequate accounting records, the statutory auditors are required:

- (a) as soon as possible to serve a notice in writing on the company stating their opinion; and
- (b) not later than 7 days after the date of that notice to notify the Registrar in the prescribed form and the Registrar is then required to forward a copy of that notice to the Director.

*Subsection (2)* states that where the statutory auditors form the opinion that the company has contravened any of *sections 281* to *285* but that following such a contravention, the directors have taken the necessary steps to ensure that those provisions are complied with, then the auditor need not make the notification referred to in *subsection (1)(b)* above.

*Subsection (3)* states that statutory auditors are not required to make the notifications referred to in *subsection (1)* if they are of the opinion the contraventions are minor or immaterial in nature.

*Subsection (4)* states that where the statutory auditors of a company have made a notification in accordance with *subsection (1)(b)*, they must, on the request of the Director, give the Director such information and access to such documents that are in their position or control as well as facilities for taking copies of such documents as the Director may request.

*Subsection (5)* states that any written information given in response to a request of the Director will, in all legal proceedings (other than proceedings for an offence), be admissible without further proof, until the contrary is shown, as evidence of the facts stated in it.

*Subsection (6)* states that compliance with any obligation under this section imposed on auditors will not breach any professional or legal duty of the statutory auditors or make them in any way liable to the company, its shareholders, creditors or other interested parties.

*Subsection (7)* states that nothing in this section compels the disclosure, by any person, of any information that they would be entitled to refuse to produce on the grounds of legal professional privilege or authorises the inspection or copying of any document containing such information that is in the person’s possession.

*Subsection (8)* states that any person who fails to make the notifications required by *subsection (1)(a)* or *(b)* or to comply with a request under *subsection (4)* shall be guilty of a category 3 offence.

*Section 393* sets out an obligation on statutory auditors to report category 1 or 2 offences that they become aware of to the Director. It also provides that the statutory auditors have an obligation to provide the Director with any relevant information in their possession or control relating to the offence and give the Director access to and facilities for copying such books and documents in their possession or control that are relevant to the matter concerned. *Section 194(5)* and *(5A)* of the Companies Act 1990 required statutory auditors to report indictable offences to the Director and provide the Director with relevant information and books and documents.

*Subsection (1)* states that where, in the course of carrying out an audit of the financial statements of the company, statutory auditors come into possession of information that leads them to form the opinion that there are reasonable grounds for believing that the company or an officer or agent of it has committed a category 1 or 2 offence, the statutory auditors shall notify that opinion to the Director and provide the Director with particulars of the grounds on which they have formed that opinion.

*Subsection (2)* states that where the statutory auditors notify the Director of any matter under *subsection (1)* they shall, if requested by the Director:

- (a) provide the Director with such further information in their possession or control as the Director may require, including further information relating to the grounds on which they formed the opinion;
- (b) give the Director such access to books and documents in their possession or control as the Director may require; and
- (c) give the Director such access to facilities for taking copies of or extracts from those books and documents as the Director may require.

*Subsection (3)* states that any written information given to the Director under *subsection (2)* shall, in all legal proceedings (other than proceedings for an offence) be admissible without further proof, until the contrary is shown, as evidence of the facts stated in it.

*Subsection (4)* states that compliance with any obligation imposed on statutory auditors under this Section shall not contravene any professional or legal duty of those statutory auditors and shall not give rise to any liability on them to the company, its shareholders, creditors or other interested parties.

*Subsection (5)* states that nothing in this section compels the disclosure by any person, of any information that the person would be entitled to refuse to produce on the grounds of legal professional privilege or authorises the inspection or copying of any document containing such information that is in the person's possession.

*Subsection (6)* states that any person who contravenes *subsection (1)* or fails to comply with the request under *subsection (2)*, is guilty of a category 3 offence.

## **Chapter 20**

### **Removal and resignation of statutory auditors**

*Section 394* states that a company may, by ordinary resolution at a general meeting, remove a statutory auditor and appoint in his or her place, any other person or persons provided:

- (a) that person or persons have been nominated for appointment by any member of the company and they are qualified under the European Communities (Statutory Audits) (Directive 2006/43/EC) 2010 (S.I. No. 220 of 2010) to be statutory auditors of the company; and

- (b) notice of the nomination has been given to members of the company. The section is subject to *section 395* and is without prejudice to any rights of the statutory auditor in relation to his or her removal under this section.

This is an amended re-enactment of section 160(5) of the Companies Act 1963.

*Section 395* deals with resolutions removing the statutory auditor from office, resolutions at an annual general meeting appointing somebody other than the retiring statutory auditor as statutory auditor and resolutions providing expressly that the retiring statutory auditor shall not be re-appointed. The section states that in order for such resolutions to be effective, in the case of a resolution providing for the auditors removal from office, there must be good and substantial grounds for the removal related to the conduct of the auditor with regard to the performance of his or her duties as auditor of the company or, in the case of any other resolution, it is, in the company's opinion, in the best interests of the company. The section also clarifies that diverging opinions on accounting treatments or audit procedures cannot constitute the basis for the passing of any such resolution and "best interests of the company" may not include any illegal or improper motive with regard to avoiding disclosures or detection of any failure to comply with this Act. These requirements were previously contained in section 161C of the Companies Act 1963.

*Subsection (1)* states that resolutions referred to in *subsection (2)* shall not be effective unless:

- (a) where the resolution provides for the auditors removal from office, there are good and substantial grounds for the removal related to the conduct of the auditor with regard to the performance of his or her duties as auditor of the company or otherwise; or
- (b) in the case of any other resolution to which this section applies, the passing of the resolution is, in the company's opinion, in the best interests of the company.

This subsection also states that for these purposes, diverging opinions on accounting treatments or audit procedures cannot constitute the basis for the passing of any such resolution and the phrase "best interests of the company" does not include any illegal or improper motive with regard to avoiding disclosures or detection of any failure by the company to comply with the Act.

*Subsection (2)* states that this section applies to:

- (a) a resolution removing the statutory auditor from office;
- (b) a resolution at an annual general meeting appointing somebody other than the retiring statutory auditor as statutory auditor;
- (c) a resolution providing expressly that the retiring statutory auditor shall not be re-appointed.

*Section 396* explains the meaning of extended notice and states that extended notice is required for:

- (a) a resolution at an annual general meeting of a company appointing, as statutory auditors, any persons other than the incumbent statutory auditors or providing expressly that the incumbent statutory auditors shall not be re-appointed;
- (b) a resolution at a general meeting of a company removing the statutory auditors from office; and
- (c) a resolution at a general meeting of a company filling a casual vacancy in the office of statutory auditor.

Section 161(1) of the Companies Act 1963 required extended notice to be given for similar resolutions.

*Subsection (1)* states that extended notice is required for:

- (a) a resolution at an annual general meeting of the company, appointing as statutory auditors, any persons other than the incumbent statutory auditors or providing expressly that the incumbent statutory auditors shall not be re-appointed;
- (b) a resolution at a general meeting of a company removing statutory auditors from office; and
- (c) a resolution at a general meeting of a company filling a casual vacancy in the office of statutory auditor.

*Subsection (2)* states that for the purposes of this Section, extended notice comprises the following requirements:

- (a) the person proposing the resolution must give the company 28 days notice of the intention to move such resolution;
- (b) on receipt of notice of such an intended resolution, the company:
  - (i) shall immediately send a copy of it to the incumbent statutory auditors or the person who ceased to hold office that caused a casual vacancy; and
  - (ii) shall give its members notice of such resolution at the same time and in the same manner as it gives notice of the meeting or, if that is not practicable, shall give them notice of it either by advertisement in a daily newspaper circulating in the district in which the registered office of the company is situated, or at any other mode allowed by this Act, not less than 21 days before the date of the meeting.

*Subsection (3)* states that if after notice of the intention to propose such a resolution has been given to the company, a meeting is called for a date, 28 days or less after the date on which the notice has been given, the notice, though not given within the time required by *subsection (2)*, is deemed to have been properly given for the purposes of that subsection.

*Section 397* deals with the right of statutory auditors to make representations where their removal or non-reappointment is proposed at a general meeting of the company. These rights are were previously set out in section 161(3) and (4) of the Companies Act 1963.

*Subsection (1)* states that in this section “relevant meeting” means the meeting at which a resolution of the type mentioned in *section 396(1)(a)* or *(b)* is to be considered.

*Subsection (2)* states that, subject to *subsection (4)*, if notice is given of an intended resolution mentioned in *section 396(1)(a)* or *(b)* and the statutory auditors referred to make representations to the company and request their representations to be sent to the members of the company, the company shall, unless the representations are received by it too late for it to do so:

- (a) state the fact that representations have been made in any notice of the resolution given to members of the company; and
- (b) send a copy of the representations to every member of the company to whom notice of the relevant meeting is sent.

*Subsection (3)* states that if a copy of the representations is not sent out as mentioned in *subsection (2)* (because either they were received too late or because of the company’s default), the statutory auditors concerned may, without giving up their right to be heard orally, require that the representations be read out at the relevant meeting.

*Subsection (4)* states that copies of the representations need not be sent out or read at the relevant meeting as mentioned in *subsection (2)* or *(3)* if, on the application either of the company or any other person who claims to be aggrieved, the court is satisfied that the rights conferred by this section are

being abused to secure needless publicity for defamatory matter and orders that those things need not be done.

*Subsection (5)* states that, in such a case, the court may order the company's costs to be paid, in whole or in part, by the statutory auditors concerned.

*Section 398* deals with the situation where auditors have been removed from office and clarifies their rights to get notice of, attend and be heard at a general meeting of the company considering any such intended resolution. Similar requirements were previously contained in section 161(2A) to (4) of the Companies Act 1963.

*Subsection (1)* states that statutory auditors of a company who have been removed are entitled to attend the next annual general meeting of the company after their removal and the general meeting of the company at which it is proposed to consider a resolution of the filling of the vacancy caused by their removal. They have rights to receive all notices of and other communications relating to any such meetings which a member of the company is entitled to receive and they are also entitled to be heard at any general meeting on any part of the business of the meeting which concerns them as former statutory auditors of the company.

*Subsection (2)* states that where, subject to *subsection (4)* notice is given of such an intended resolution as is mentioned in *subsection (1)* and the statutory auditors make representations in writing to the company and request their representations be sent to members of the company, the company shall, unless the representations are received by it too late for it to do so:

- (a) state the fact that representations have been made in any notice of the resolution given to members of the company; and
- (b) send a copy of the representations to every member of the company to whom notice of the meeting is sent.

*Subsection (3)* states that if the copy of the representations is not sent as is mentioned in *subsection (2)* (either because they were received too late or because of the company's default), the statutory auditors concerned may, without prejudice to their right to be heard orally, require that the representations be read out at the meeting.

*Subsection (4)* states that copies of the representations need not be sent out or read out at the meeting as mentioned in *subsections (2)* or *(3)* if, on the application either of the company or of any other person who claims to be aggrieved, the court is satisfied that the rights conferred by this section are being abused to secure needless publicity for defamatory matters and orders that those things need not be done.

*Subsection (5)* states that the court may order that the company's costs on such application should be paid, in whole or in part, by the statutory auditors concerned.

*Section 399* deals with the statement that must be received from statutory auditors who have been removed because the company is availing itself of the audit exemption. This Section is an amended re-enactment of section 34 of the Companies (Amendment) (No. 2) Act 1999.

*Subsection (1)* states that if a company which is availing of the audit exemption decides to terminate the appointment of the statutory auditors, then the statutory auditors shall within a period of 21 days after their being notified by the company of that decision, serve a notice on the company containing the statement referred to in *subsection (2)* and, unless and until, the statutory auditors serve such a notice any termination of their appointment shall not have effect.

*Subsection (2)* requires that the statement in the notice from the statutory auditors under *subsection (1)* shall be whichever of the following is appropriate:

- (a) a statement to the effect that there are no circumstances connected with the decision of the company referred to in *subsection (1)* that the statutory auditors concerned consider should be brought to the notice of the members or creditors of the company; or
- (b) a statement of any such circumstances as mentioned in *paragraph (a)* above.

*Subsection (3)* states that where a notice from the statutory auditors as referred to in *subsection (1)* is served on a company:

- (a) the statutory auditors shall send a copy of the notice to the Registrar within 14 days of serving it on the company; and
- (b) subject to *subsection (4)*, the company shall, if the notice contains a statement of circumstances as mentioned in *subsection (2)(b)* above, send a copy of that notice within 14 days of the date on which it is served on a company to every person who is entitled under *section 338* to receive copies of the documents specified in that section.

*Subsection (4)* states that copies of a notice served on a company under *subsection (1)* need not be sent to the person specified in *subsection (3)(b)* if, on the application of the company concerned or any other person who claims to be aggrieved, the court is satisfied that the notice contains material which has been included to secure needless publicity for defamatory matter and orders that the thing need not be done.

*Subsection (5)* states that the court may order the company's costs to be paid, in whole or in part, by the statutory auditors concerned.

*Subsection (6)* states that *section 398* does not apply to statutory auditors who are removed from office in the circumstances referred to in *subsection (1)*.

*Section 400* sets out the general conditions that apply when a statutory auditor resigns from the office of statutory auditors to a company. It specifies the content of a statement which must be served on the company and also sets out the conditions which must be complied with when an auditor indicates their unwillingness to be re-appointed as statutory auditors of the company. This is a slightly amended re-enactment of the requirements set out in *section 185* of the Companies Act 1990.

*Subsection (1)* states that the statutory auditors of a company may resign from the office of statutory auditors to the company if they serve a notice in writing on the company which complies with *subsection (3)* and states their intention to resign.

*Subsection (2)* states that the resignation shall take effect on the date on which the notice is served or on such later date as is specified in the notice.

*Subsection (3)* states that the notice referred to under *subsection (1)* shall contain either:

- (a) a statement to the effect that there are no circumstances connected with the resignation of the statutory auditors that they consider should be brought to the notice of the members or creditors of the company; or
- (b) a statement of any such circumstances.

*Subsection (4)* states that where a notice under *subsection (1)* is served on a company:

- (a) the statutory auditors shall send a copy of the notice to the Registrar within 14 days of the date they served such notice on the company; and

- (b) subject to *subsection (5)*, if the notice contains a statement of relevant circumstances as referred to in *subsection (3)(b)*, the company shall, not later than 14 days after receiving the notice, send a copy of the notice to every person who is entitled under *Section 338* to be sent copies of the documents referred to in that section.

*Subsection (5)* states that copies of a notice served on a company under *subsection (1)* need not be sent to the persons specified in *subsection (4)(b)* if, on the application of the company concerned or any other person who claims to be aggrieved, the court is satisfied that the notice contains material which has been included to secure needless publicity for defamatory matter and orders that that thing need not be done.

*Subsection (6)* states that the court may order the company's costs to be paid, in whole or in part, by the statutory auditors.

*Subsection (7)* specifies that similar requirements apply when statutory auditors have expressed their unwillingness to be re-appointed as statutory auditors to the company.

*Subsection (8)* states that a person who fails to comply with *subsections (3)* or *(4)(a)* in relation to their resignation or expressed unwillingness to be re-appointed as statutory auditors shall be guilty of a category 3 offence.

*Subsection (9)* requires that if *subsection (4)(b)* is not complied with in relation to the resignation or expressed unwillingness of an auditor to be re-appointed as statutory auditors to the company, the company concerned and any officer of it who is in default is guilty of a category 3 offence.

*Subsection (10)* states that the term "officer" includes any shadow director and *de facto* director.

*Section 401* deals with the right of a statutory auditor that has served a notice of resignation under *section 400* which contains a statement in accordance with *subsection (3)(b)* of that section to require the directors of the company to convene a general meeting of the company to receive and consider such information or explanation of the circumstances connected with the statutory auditors resignation from office as they may wish to give the meeting. It also makes provision that where the auditors request the company to circulate a further statement in writing, they shall send it to the Registrar and to every person who is entitled under *section 338* to be sent copies of the documents referred to in that section. This is an amended re-enactment of the requirements of *section 186(1)* to *(4)* and *(6)* of the Companies Act 1990.

*Subsection (1)* states that where a notice served by statutory auditors on a company regarding their resignation under *section 400* contains a statement in accordance with *subsection (3)(b)* of that section, it may also require the directors of the company to convene a general meeting of the company for the following purpose.

*Subsection (2)* states that the purpose is to receive and consider such information and explanation of the circumstances connected with the statutory auditors resignation from office as they may wish to give to the meeting.

*Subsection (3)* states that where the statutory auditors have required the directors to convene a general meeting, they shall do so within 14 days after being served with a notice from the statutory auditors for a day not more than 28 days after they were served with a notice from the statutory auditors.

*Subsection (4)* states that, subject to *subsection (5)* where a notice served on a company regarding the resignation of the statutory auditors under *section 400* contains a statement in accordance with *subsection (3)(b)* of that section and the statutory auditors request the company to circulate to its members before the next general meeting after their resignation, a further statement in writing



prepared by the statutory auditors of circumstances connected with their resignation that they consider should be brought to the notice of the members, the company shall:

- (i) state the fact that the statement was made in any notice of the meeting given to members of the company; and
- (ii) send a copy of the statement to the Registrar and to every person who is entitled under *section 338* to be sent copies of the documents referred to in that section.

*Subsection (5)* states that *subsection (4)* need not be complied with by the company concerned if, on the application either of the company or any other person who claims to be aggrieved, the court is satisfied that the rights conferred by this section are being abused to secure needless publicity for defamatory matter and orders that that sub-section need not be complied with.

*Subsection (6)* states that the court may order the company's costs to be paid, in whole or in part, by the statutory auditors concerned.

*Subsection (7)* states that if *subsections (3) or (4)* are not complied with, the company and any officer of it who is in default, shall be guilty of a category 3 offence.

*Subsection (8)* clarifies that the term "officer" includes any shadow director and *de facto* director.

*Section 402* states that the statutory auditors who have resigned from the office of statutory auditors have a right to get notice of, attend, and be heard at the next annual general meeting of the company after their resignation and any general meeting of the company at which it is proposed to fill the vacancy caused by their resignation. This is an amended re-enactment of the requirements of *section 186(5)* of the Companies Act 1990.

*Subsection (1)* states that statutory auditors of a company that have resigned from the office of statutory auditors are permitted to attend the next annual general meeting of the company after their resignation and any general meeting of the company at which it is proposed to fulfil the vacancy caused by their resignation or which is convened pursuant to a request of theirs as referred to in *section 401(1)*. For that purpose, the company is required to send them all notices of and other communications relating to any such meeting that a member of the company is entitled to receive and permit them to be heard at any such meeting which they attend on any part of the business of the meeting which concerns them as former statutory auditors of the company.

*Subsection (2)* states that if *subsection (1)* is not complied with, the company and any officer of it who is in default is guilty of a category 3 offence.

*Subsection (3)* states that the term "officer" includes any shadow director and *de facto* director.

## **Chapter 21**

### Notification to Supervisory Authority of certain matters and auditors acting while subject to disqualification order

*Section 403* deals with a duty of a statutory auditor to notify the Supervisory Authority regarding a cessation of office and also specifies the information that shall accompany that notification. This section is a slightly amended re-enactment of the requirements of *section 161A* of the 1963 Act.

*Subsection (1)* states that where, for any reason during the period between conclusion of the last annual general meeting and the conclusion of the next annual general meeting of the company, a statutory auditor ceases to hold office by virtue of *section 394* or *400*, the auditor shall, within 30 days

after the date of the date of cessation, notify the Supervisory Authority, in the form and manner specified by the Supervisory Authority, that the auditor has ceased to hold office.

*Subsection (2)* states that the notification shall be accompanied by:

- (a) in the case of resignation of the auditor, the notice served by the auditor under *section 400(1)*;  
or
- (b) in the case of removal of the auditor at a general meeting in accordance with *section 394*, a copy of any representations in writing made to the company by the outgoing auditor in relation to the intended resolution except where such representations were not sent out to the members of a company because of an application to the court.

*Subsection (3)* states that where, in the case of resignation, the notice served under *section 400(1)* is to the effect that there are no circumstances connected with the resignation that the auditor considers should be brought to the notice of members or creditors of the company, the notification of *subsection (1)* shall be accompanied by a statement of the reasons for the auditor's resignation.

*Subsection (4)* clarifies that in this section the term "resignation" includes an indication of unwillingness to be re-appointed at an annual general meeting and a reference to a notice served under *section 400(1)* includes a reference to a notice given by the auditor under *section 383(2)(c)*.

*Section 404* sets out the duty of a company to notify the Supervisory Authority when a statutory auditor ceases to hold office. It also specifies the information that must accompany that notification. This section is a re-enactment of the requirements of section 161B of the Companies Act 1963.

*Subsection (1)* states that where, for any reason during the period between the conclusion of the last annual general meeting and the conclusion of the next annual general meeting of a company, a statutory auditor ceases to hold office by virtue of *section 394* or *400*, the company shall, within 30 days after the date of cessation, notify the supervisory authority that the auditor has ceased to hold office in such form and manner as the supervisory authority specifies.

*Subsection (2)* specifies that the notification shall be accompanied by:

- (a) in the case of resignation of the auditor, the notice served by the auditor under *section 400(1)*;  
or
- (b) in the case of removal of the auditor at a general meeting pursuant to *section 394*, a copy of the resolution removing the auditor and a copy of any representations in writing made to the company in accordance with *section 397(2)* by the outgoing auditor, unless such representations were not sent out to members because of an application to the court.

*Subsection (3)* clarifies that in this section, the term "resignation" includes an indication of unwillingness to be re-appointed at an annual general meeting and a reference to a notice served under *section 400(1)* includes a reference to a notice given by the auditor under *section 383(2)(c)*.

*Section 405* sets out the consequences for a person of acting in relation to an audit while they are subject or deemed to be subject to a disqualification order (within the meaning of *Chapter 4 of Part 14*). This section is a slightly amended re-enactment of the requirements of section 195 of the Companies Act 1990.

*Subsection (1)* states that if a person who is subject or deemed to be subject to a disqualification order:

- (a) becomes, or remains more than 28 days after the date of the disqualification order, a partner in the firm of statutory auditors;
- (b) gives directions or instructions in relation to the conduct of any part of the audit of the financial statements of the company; or
- (c) works in any capacity in the conduct of an audit of the financial statements of a company, he or she shall be guilty of a category 2 offence.

*Subsection (2)* states that where a person is convicted of an offence under *subsection (1)*, the period for which he or she was dis-qualified shall be extended for a further period of ten years beginning after the date of conviction or such other (shorter or longer) period as the court may order.

*Subsection (3)* states that *section 847* (court may grant relief to a person subject to a disqualification order) shall not apply to a person convicted of an offence under *subsection (1)*.

## **Chapter 22**

### False statements - offence

*Section 406* states that if a person in any return, statement, financial statement or other document required by or for the purposes of any provision of this Part, intentionally makes a statement, false in any material respect, knowing it to be false the person shall be guilty of a category 2 offence. This is a slightly amended re-enactment of the requirements of section 37 of the Companies (Amendment) (No. 2) Act 1999.

## **Chapter 23**

### Transitional

*Section 407* contains a transitional provision to provide that existing companies may opt to prepare financial statements in accordance with the provisions of the Sixth Schedule to the Companies Act 1963, for the financial year which begins before, but ends after, the commencement of this section.

## **Part 7 – Charges and Debentures**

### *Preliminary Note*

*Part 7* contains provisions regarding debentures and charges and introduces a number of changes to the law. The thrust of the changes is to simplify the registration and de-registration of charges while clarifying the priority rules.

*Chapter 1* is new and is intended to give effect to recommendations of the Company Law Review Group in its Second Report. The expression “charge” (which includes a mortgage under the existing law) is now expressly stated not to include a mortgage or charge over an interest in cash, accounts in financial institutions or any other deposits, shares or other financial instruments. This is in accordance with the exception to the registration requirement envisaged under Directive 2002/47/EC on Financial Collateral Arrangements.

*Chapter 2* deals with the registration and priority of charges and introduces some major changes in this regard. Two separate procedures for the registration of charges are now envisaged – the one-stage procedure and the two-stage procedure. The one-stage procedure is similar to the procedure as it has been under the CA 1963, namely that particulars of all charges created must be delivered to the Registrar of Companies within 21 days of their creation. The proposed two-stage procedure provides that an initial notice can be sent to the Registrar stating the intention of the company to create a charge followed up by a further more detailed notification within 21 days of the creation of the charge, stating that fact. In this way, it is envisaged that lenders may be more willing to advance funds if they can achieve an enhanced security priority to a company’s assets.

The rules governing the priority of charges have also been significantly changed in that where the priority of charges is not governed by some other regime (e.g. Property Registration Authority rules etc.) such priority will be determined by reference to the date of receipt by the Registrar of the prescribed particulars. This is in contrast to the previous position where, although not stipulated in the legislation in force, priority is deemed to be governed by date of creation of the charge. The Company Law Review Group was of the view that this practice was unfair as it resulted in a situation where a charge created earlier but filed later would take priority over a charge created later but filed earlier. It was recommended that priority be given to the creditor who files first in time in order to minimise the potential for fraudulent abuse and thereby protecting providers of finance.

The chapter specifically provides that the Registrar shall not be under a duty to enter on the Chargor’s file in the Companies Registration Office what the section describes as “extraneous material” and receipt by the Registrar of particulars of such extraneous material shall have no effect. Extraneous material includes details of a negative pledge.

*Chapter 3* contains provisions as to debentures and substantially re-enacts sections 94 to 97 of the Companies Act 1963. The liability of trustees for debenture holders is described, the concept of perpetual debentures is dealt with and the power of the company to re-issue redeemed debentures is laid down.

*Chapter 4* is newly inserted and provides that the Registrar has no jurisdiction to accept or register an order of any authority (whether judicial or otherwise) affecting a shareholder or debenture holder of the company or any notice of the making thereof.

### *Explanatory Memorandum*

#### **Chapter 1**

## Interpretation

*Section 408* is new and deals with the definition of “charge”. For the purposes of this Part, a charge is said to include a mortgage, which is also the position under section 99(10)(a) of the Companies Act 1963. The provision has been amended in accordance with the view of the Company Law Review Group in its Second Report to expand on the definition of “charge”. It is now specified that a charge means a mortgage or charge in a written or oral agreement created over an interest in any property of a company (including a judgment mortgage). Furthermore, the definition is now expressly stated not to include a mortgage or charge over an interest in cash, accounts in financial institutions or any other deposits, shares, bonds or debt instruments. This is in accordance with the exception to the registration requirement envisaged under the Directive on Financial Collateral Arrangements (2002/47/EC). This Directive was implemented in Ireland by the EC (Financial Collateral Arrangements) Regulations 2004 (S.I. No.1 of 2004) and European Communities (Financial Collateral Arrangements) (Amendment) Regulations 2004 (S.I. No. 89 of 2004). “Property” is defined as including any assets or undertaking of the company. The definition of “charge” can be altered by statutory instrument in the future to ensure the continued alignment with a financial collateral arrangement under the European Communities (Financial Collateral Arrangements) Regulations.

## Chapter 2

### Registration of charges and priority

*Section 409* provides for the registration of charges created by companies. The section is drawn from section 99 of the Companies Act 1963, as amended by section 122 of the Companies Act 1990. *Subsection (1)* provides that all charges created by a company must be registered in accordance with this section. This is drawn from section 99(1) CA 1963 and it has been amended insofar as the charge is now said to be void unless the procedures set out in *subsections (3) and (4)* are complied with.

Under *subsection (2)*, where the particulars of the charge received by the Registrar omit the particulars of one or more properties covered by the charge, the charge shall be rendered void but only insofar as it relates to the particular property or properties the particulars of which have been omitted. The charge will still stand in respect of any property for which proper particulars have been included.

*Subsection (3)* sets out that the manner in which registration of the charge is to be effected is by the filing of a statement of the particulars of the charge in the prescribed form within 21 days of the creation of the charge.

*Subsections (4) and (5)* are new and provide for a system of preliminary filing of notice of charges in accordance with the recommendations of the CLRG. The CLRG identified anomalies within the old system of registration of charges owing to the fact that charges acquire their priority from the date of their creation as opposed to the date of their registration, provided that they are filed within the 21 day period. Essentially, a charge created earlier but filed later (but within 21 days of its creation) would take priority over a charge created later but filed earlier, despite the fact that the creditor filing earlier would have no knowledge of the first-ranked charge when carrying out a search with the Companies Registration Office. Accordingly, the CLRG recommended that priority be given to the creditor who files first in time. To ensure that another charge is not filed in the period between a clear search and the filing of the charge for registration, the CLRG recommended that a filing could be submitted prior to the completion of the transaction, provided a further filing evidencing the actual creation of a charge was filed with the Registrar within 21 days of the first filing of the intention to create a charge. In such circumstances, a charge would take effect as to priority from the date of the first preliminary filing. In the absence of a second filing within 21 days of the preliminary filing, the preliminary filing

of an intention to create a charge would lapse. Such a notice filing system has been applied in the U.S., Canada and New Zealand and has been recommended in the UK.

*Subsection (6)* provides that the requirement to register a charge is without prejudice to any obligation (including a contractual one) to repay the money secured by the charge in question. Where a charge becomes void because it has not been registered, the money secured by it immediately becomes payable. This provision is taken from section 99(1) CA 1963.

*Subsection (7)* provides that where a charge comprises property situate outside the State, particulars may be sent for registration notwithstanding that further proceedings may be necessary to make the charge valid in the state where the property is located.

*Subsection (8)* is newly inserted and provides for a situation in which there has been a change among the person(s) entitled to a charge registered under this Part. If there has been such a change, the fact of the change and the particular of the person(s) now entitled to the charge may be forwarded to the Registrar who will then register those details.

*Subsection (9)* is also new and makes it clear that the Registrar will not accept deeds or supplemental documents when registering a charge under this Part.

Seven subsections of section 99 CA 1963 have not been carried forward in this Act. Section 99(2) CA 1963 sets out the categories of charges requiring registration. The CLRG recommended that the division of charges into categories is both a historical anachronism and cumbersome. In order to bring greater consistency, transparency and certainty to the law, the CLRG recommended that every charge, subject to EU requirements, should be subject to the requirement to register particulars with the Companies Registration Office. The rationale for such a recommendation is that creditors should not be misled by a company appearing to have full title to an asset which it possesses, where such an asset is already encumbered in favour of another creditor. Accordingly, the CLRG recommended that the provision should not be brought forward into the Act. An exception to the registration requirement is any charge falling within the ambit of Directive 2002/47/EC on Financial Collateral Arrangements, as implemented by S.I. No.1 of 2004 and S.I. No. 89 of 2004. This exception is provided for in *section 409* of this Part.

Section 99(3) CA 1963 provides for an extension of the 21 day filing period where a charge is created outside of the State, comprising of property situate outside of the State, to allow for posting. The CLRG was of the opinion that such a provision was outdated given the accessibility of effective courier services. Accordingly, it was recommended that this provision be repealed.

Section 99(5) CA 1963 provides that where a charge comprises property outside of the State and registration in the country where the property is situate is necessary to make the charge valid, a further certificate, in the prescribed form, stating that the charge was presented for registration in that country, is to be delivered to the CRO. The CLRG was of the opinion that it was of no concern to the Registrar or the public whether the charge needs to be perfected in a foreign jurisdiction. This is a concern of the chargee only. Accordingly, the CLRG recommended that the provision should not be brought forward.

Section 99(6) CA 1963 provides that where a negotiable instrument is given for the securing of book debts of the company, the instrument shall not be treated as a charge on those book debts. The CLRG recommended the repeal of this section because the encumbered asset is not in the purported ownership of the company.

Sections 99(7) to 99(9) CA 1963 deal with debentures. Section 91 CA 1963 imposes a requirement on companies to keep a register of debentures. The CLRG noted that this provision has been disregarded for many years without any apparent impairment to creditors' rights. Accordingly, the CLRG

recommended the repeal of sections 91 and 92 CA 1963. The CLRG was further of the opinion that sections 99(7) to (9) CA 1963 had become redundant and should be repealed.

*Section 410* derives from section 100 of the Companies Act 1963 and provides for the duty of the company to register charges under the previous *section 409* and the right of other parties to effect registration. Section 100(3) and 100(4) CA 1963 has been deleted in accordance with the recommendation of the Company Law Review Group in its Second Report. The CLRG noted that, although under section 100 CA 1963 it is the duty of the company creating a charge to register particulars of the charge, in practice most particulars are filed by the chargee or its solicitor. The reason for the practice is that as the failure to file within 21 days of the charges creation will render the charge void against creditors and the liquidator of the company, the beneficiary of the charge wishes to ensure filing is done in a timely manner. Invariably, the company willingly permits the chargee the burden of preparing and filing the form, although the cost of so doing is usually borne by the company. *Subsection (1)* sets out that it is the duty of the company that creates the charge to comply with either *section 409(3)* or *409(4)*, however *subsection (2)* clarifies that anyone interested in the charge may also register it. *Subsection (3)* states that where a person uses the procedure as noted above, they may recover from the company the amount of fees properly paid by that person to the Registrar. The reference to the registration of the particulars of any debentures issued by the company has also been removed from *subsection (1)* given that sections 91 and 92 CA 1963 (which required the company to keep a register of debenture holders and make it available to the public for inspection) have now been repealed.

*Section 411* is taken from section 101 of the Companies Act 1963 and deals with situations where a company purchases property which is subject to a charge. Since *section 409* only requires charges created by a company to be registered, this *section 411* is necessary to ensure that charges that were created by an individual, but for which the liability for the repayment of is assumed by a company, are registered by that company. This ensures that the records of the charges on company property will be more complete.

The extension of the filing deadline in cases where the property concerned is situated outside the State has been removed in line with *section 409*. *Section 411(3)* provides for an offence for failure to comply with this section, thus carrying over section 101(2) CA 1963.

*Section 412* is new and governs the priority of charges. Company legislation had been silent on the issue of priority of charges. The precise date has never been expressly specified for the priority of charges, although it was accepted to be the date of creation of the charge.

*Subsection (1)* defines relevant rule of law as meaning a rule of law that governs the priority of charges created by a company. *Subsections (2)* and *(3)* contain various transitional provisions relating to priorities. It ensures that priority, as between charges created just before commencement (but not registered until after) and charges created just after commencement, will be determined according to the rules in *sections 412* and *413*, and not according to existing law.

*Subsection (4)* clarifies the meaning of the “date or time of receipt” of the prescribed particulars in the context of the 2 different procedures for registering charges under *section 409* of this Act.

*Subsection (5)* is new. It gives effect to the recommendations of the CLRG in its Second Report that priority as to charges would also be subject to any contrary agreement between the creditors such as an inter-lender or priority agreement, often entered into by financial institutions where more than one such institution lends to a particular company.

*Subsection (6)* is also new. It restricts the particulars of a charge which are capable of being received by the Registrar. The Act specifically provides that the Registrar shall not be under a duty to enter on the Chargor's file in the Companies Registration Office what the section describes as "extraneous material" and receipt by the Registrar of particulars of such extraneous material shall have no effect. Extraneous material includes details of a negative pledge or other covenants applicable to the charged assets or any events that crystallise a floating charge. The CLRG noted that it had been customary to insert additional details in the prescribed particulars being delivered for registration, the most common of which were details of negative pledge clauses which would in any event be a contractual restriction in the deed of charge. Prior to the Act, any such information on the form submitted to the Registrar is ignored when transcribing details onto the register of charges, applicable to the charger company. The CLRG noted that it should be regarded as quite exceptional by the public, that relevant charges would not contain negative pledges. Accordingly, the CLRG recommended that the practice of delivering this additional information for registration should be discontinued and this should be reflected in legislation.

*Subsection (7)* states that *subsection (6)* does not apply to negative pledges included in particulars of a floating charge granted by a company to the Central Bank for the purposes of either providing or securing collateral. *Subsection (8)* defines a negative pledge for the purposes of the section.

*Section 413* deals with the registration and priority of judgment mortgages and substantially amends section 102 of the Companies Act 1963. Section 102(2) CA 1963 has been deleted as it was no longer relevant in light of the proposed amendments. The priority of judgment mortgages are governed by the Land and Conveyancing Law Reform Act, 2009.

*Subsection (1)* is new and provides that a judgment converted into a judgment mortgage shall be void against the liquidator and any creditor of the company unless the procedure for registration of a judgment mortgage in *subsection (2)* is followed.

*Subsections (2) to (4)* set out the procedure involved in the registration of a judgment mortgage. The particulars of the judgment mortgage in the prescribed form must be lodged with the Registrar together with the relevant mortgage document not later than 21 days after the judgment creditor has been notified by the Property Registration Authority of the creation of the judgment mortgage. Under *subsection (5)*, a judgment creditor will be presumed (unless the contrary is proven) to have received the notification from the Property Registration Authority on the third day after the date on which the notification has been sent.

*Subsection (7)* is drawn from section 102(3) CA 1963 and provides that judgment mortgages shall not be governed by this *section 413* where they have been created prior to the commencement of it.

*Section 414* contains provisions in respect of the register of charges and is derived from section 103 of the Companies Act 1963. The amendments have been made in accordance with the views of the Company Law Review Group in its Second Report.

*Subsection (1)* is drawn from section 103(1) CA 1963. The CLRG recommended the retention of the requirement for the register of charges to be kept by CRO and for it to be open to public inspection as it serves a useful purpose for the provision of relevant information on companies registered in the State. Section 103(1)(a) CA 1963 in relation to charges which holders of debentures are entitled to benefit from has not been reproduced here. Neither has section 103(1)(b)(iv) CA 1963, which referred to the amount secured by the charge. The CLRG noted that this provision had become redundant and was of little relevance today to a person making a search. The reason for this is that most charges now secure all sums due or to become due by the company to the creditor-chargee. A subsequent potential creditor is likely to require the first charge be released or to have sight of the first charge, which can be provided by the chargor-company, to ascertain exactly the nature of the security which will have



priority. Thus, the information relating to the amount of the charge, as filed, has little practical significance. Accordingly the CLRG recommended its repeal.

*Subsection (2)* comes from section 103(2) CA 1963, with the only change being the insertion of the words “if any” before “as may be prescribed”.

*Section 415* provides that a certificate of registration shall be given in respect of any charge registered under this Part. This is drawn from section 104 of the Companies Act 1963. Such certificate of registration of charge shall be conclusive evidence that the requirements of this Part regarding the registration of charges have been complied with, but only insofar as they relate to charges for which particulars have been filed.

The words “..under his hand...” in section 104 CA 1963 have been deleted. This was done in accordance with the view of the Company Law Review Group that such wording was archaic. The reference to the charge stating the amount thereby secured has also been deleted. This was done in accordance with the repeal of section 103(1)(b)(iv) CA 1963 in *section 414* of this Part.

*Section 416* deals with entries of satisfaction and release of property from charge. It derives from section 105 of the Companies Act 1963 which has been amended in accordance with the views of the Company Law Review Group in its Second Report.

*Subsections (1), (2) and (3)* derive in part from section 105 CA 1963. The requirement for the Registrar to give notice to the chargee is now expressed to apply in a situation where the satisfaction or release has not been signed by or on behalf of the charge after giving notice to the person who, for the time being, stands registered as the person entitled to such charge or to the judgment creditor. This *subsection (1)* allows notice of satisfaction of a charge to be served upon the person then registered as entitled to the charge where the Companies Registration Office has been statutorily notified that there has been a change of lender. It is appropriate for the notice of satisfaction of charge to be served on the person then registered as entitled to the charge as if there has been a change the original holder will no longer have an interest.

*Subsection (4)* is new. It gives effect to the recommendations of the CLRG in relation to the signing of the release in the prescribed form.

*Subsection (5)* creates a new category 2 offence where someone knowingly signs a false release statement.

*Subsections (6) and (7)* are also new and they impose personal liability on the signor. Personal liability may be imposed for all the debts of the company, or such portion thereof as the court deems just and equitable, where the signor did not honestly believe on reasonable grounds that the statement was true. In addition, such action must have contributed to the insolvency of the company, prevented or impeded the orderly winding-up of the company or facilitated the defrauding of the creditors of the company.

*Section 417* provides an extension of time for registration of charges and rectification of the register. This is taken from section 106 of the Companies Act 1963, which permits an application to be made to court for late registration where there has been a failure to file the prescribed particulars of a charge within the 21 days. The court, when permitting late registration, is required to be satisfied that the late registration will not prejudice the position of the creditors or shareholders. The CLRG, in its Second Report, cited the fact that, in 2002, over 7,000 charges were registered with the CRO but only 14 of these (0.2%) were registered pursuant to a court order. Accordingly, the CLRG

recommended the retention of this section. Section 106(2) CA 1963 has been deleted in light of the fact that section 100(3) and 100(4) CA 1963 has been repealed.

*Section 418* provides that copies of all instruments creating charges must be kept by the company at the same place. There is a cross-reference to *sections 215 to 217* of the Act which will operate to apply the Acts harmonised provisions in relation to the keeping and inspection of registers and documents in this context. *Section 418* is drawn from section 109 of the Companies Act 1963. The last line, referring to debentures, has been removed in light of the repeal of sections 91 and 92 CA 1963.

*Section 419* deals with the registration of charges created prior to the commencement of this Part of the Act. The transitional provisions in this section make it clear that the relevant provisions of the Companies Act 1963 continue to apply to charges created before the commencement of this Part. *Subsection (2)* provides that those provisions of the CA 1963 also apply in situations where the time allowed under those provisions for registration of that charge has not expired on the commencement of this Part. It also covers a situation where the time for registration of a charge has been extended by an order under section 106 of CA 1963. Section 106 provides that an extension of time may be given by the Court if the delay in registering the charge was “accidental or due to inadvertence” and the extension is not prejudicial to any party.

*Section 420*, like the preceding section, provides for transitional provisions, but this time in relation to priorities of charges. *Subsection (1)* provides for the meaning of the phrase used in this section “charge to which the special transitional case applies”. *Subsection (2)* provides that the modification rule in *section 412* shall not apply in relation to the issue of the priority of any charge, created before the commencement of this Part, as against a charge falling within this Part created on or after that commencement. *Subsection (3)* provides that the modification rule in *section 412* shall apply in relation to the issue of the priority of a charge to which the special transitional case applies if the first mentioned charge has not been registered under Part IV of the Act of 1963 before that commencement. *Subsection (4)* clarifies the meaning of the phrase “the date, or time of receipt of the prescribed particulars” in the context of the application of *section 412* to the issue of priority falling within *subsection (3)* of this section. *Subsection (5)* states that non-compliance with section 102(1) CA 1963 shall be disregarded for the purposes of *subsection (4)*.

*Section 421* is new and it was introduced in accordance with the recommendations of the Company Law Review Group in its Second Report. The Netting of Financial Contracts Act 1995 (“the Netting Act”) facilitates the use of swap instruments and provides, *inter alia*, that a mortgage or charge to secure a liability under a “financial contract” shall be legally enforceable against the chargor, notwithstanding any “rule of law relating to bankruptcy, insolvency or receivership, or in the Companies Acts.”

The Netting Act was implemented to facilitate international bodies wishing to do business in Ireland. Such bodies were concerned particularly as to the effect of the appointment of an examiner to an Irish incorporated counterparty. The prohibition of set-off or other creditor remedies on the appointment of an examiner discouraged contractual relations for swaps and similar arrangements with Irish incorporated companies. The effect of the Netting Act has been to enable persons to enter into financial contracts with Irish incorporated counterparties without the risk that an examiner appointed to the counterparty would put a stay on the enforcement of the financial contracts. The terms of the Netting Act are so broad that particulars of security created over a company’s assets to secure its obligations under a “financial contract” may not require to be filed under section 99 of the Companies Act 1963. This goes beyond “the examinership difficulty” which the Netting Act successfully addressed. The absence of a requirement to register can give a distorted picture to a person inspecting

a company's file at the CRO. Accordingly, the CLRG recommends the Netting Act be amended by specifying that particulars of a charge, within the meaning of *section 408* of this Part, be filed in accordance with *section 409* of this Part. A charge to secure obligations under a "financial contract" over cash, a bank account, shares, bonds and debt instruments would not require registration as it would not fall within the category of a registrable charge (under the definition *section 408* of this Part). Particulars of charges over other assets such as land or equipment, to secure obligations under a "financial contract" are generally filed with the CRO in practice. Accordingly, the CLRG believes that the foregoing recommendation in the previous paragraph will have no adverse effect on companies registered in the State which conclude financial contracts.

### **Chapter 3**

#### **Provisions as to debentures**

*Section 422* concerns the liability of trustees for debenture holders and is drawn from section 93 of the Companies Act 1963. Many deeds under which trustees for debenture holders are appointed contain clauses which absolve the trustees from liability in circumstances other than wilful neglect or default. It is considered desirable that some check should be placed upon the power of trustees to escape liability for failure to carry out functions for which they receive payment. A prohibition of such provisions, subject to certain exceptions, is therefore included in this provision, carrying through the existing law.

*Section 423* on perpetual debentures derives from section 94 of the Companies Act 1963. That provision was first introduced to overcome certain doubts about the legality of perpetual debentures. A provision making a debenture irredeemable or postponing the redemption to some distant date would amount to a "clog on the equity of redemption" thereby rendering the instrument void. The words "whether issued or executed before or after the operative date" have been omitted as compared with section 94 CA 1963 as they are no longer necessary in this Act.

*Section 424* gives the company the power to re-issue redeemed debentures and is adapted from section 95 of the Companies Act 1963. Under *subsection (2)*, the person entitled to the debentures shall have the same priorities as if the debentures had never been redeemed. *Subsection (3)* deals with situations where debentures are deposited to secure advances from time to time on current account, or otherwise. Subsections (4) and (5) of section 95 CA 1963 in relation to stamp duty have been omitted here.

*Section 425* deals with circumstances where debentures have been redeemed before 1<sup>st</sup> April 1964 and are re-issued on or subsequent to that date. The provision is drawn from section 96 of the Companies Act 1963. Reference to the "operative date" has been replaced by the insertion of the actual operative date of the CA 1963 (namely 1<sup>st</sup> April 1964). Given that this provision may possibly cover re-issues occurring after the commencement of *section 417* of the Act, reference to *section 416* has been inserted.

*Section 426* is a verbatim re-enactment of section 97 of the Companies Act 1963 and provides that specific performance may be a remedy for a breach of a contract to take up and pay for any debentures.

### **Chapter 4**

#### **Prohibition on registration of certain matters affecting shareholders or debentureholders**

*Section 427* is newly inserted and provides that the Registrar has no jurisdiction to accept or register an order of any authority (whether judicial or otherwise) affecting a shareholder or debentureholder of the company or any notice of the making thereof.

DELETED

## **Part 8 - Receivers**

### *Preliminary Note*

*Part 8* of the Act deals with receivers. It substantially re-enacts the law on receivership as contained in the Companies Act 1963, as amended.

*Chapter 1* provides interpretation for the Part as a whole.

*Chapter 2* details the notifications and information that must be provided once a receiver is appointed. The contents of the statement as to the affairs of the company are described and the disqualification, resignation and removal of receivers are provided for.

*Chapter 3* contains new provisions and sets out the powers and duties of receivers. Receivers are now given certain specific powers under *section 437* in addition to those conferred on them by court order or the instrument under which they were appointed. Conferring statutory powers on receivers is intended to alleviate many of the problems which may arise from poorly drafted debentures. *Chapter 3* also deals with the receiver's liability on contracts, the duty of the receiver to get the best price reasonably obtainable when selling property and the treatment of preferential payments when a receiver is appointed under a floating charge.

*Chapter 4* provides for the regulation of receivers and the enforcement of their duties. The court is granted the power to make orders in relation to the return of assets improperly transferred and is entitled to set the remuneration of the receiver. A receiver can be compelled to make outstanding returns and the court can end or limit a receivership on application from the liquidator.

### *Explanatory Memorandum*

#### **Chapter 1** Interpretation

*Section 428* provides that where this Part refers to "the appointment of a receiver under powers contained in any instrument" such phrase will also capture the appointment of a receiver pursuant to powers which are implied by virtue of any enactment. This is drawn from paragraph (b) of *section 323* of the Companies Act 1963. Paragraph (a) of that section has been replicated in *section 2* of the Act which provides a definition for "receiver" for the purposes of the Act.

#### **Chapter 2** Appointment of receivers

*Section 429* sets out what must be done to notify those dealing with the company that a receiver has been appointed. These provisions are drawn from *section 317* of the Companies Act 1963 and some new elements have been added. A statement that a receiver has been appointed must appear on every invoice, order for goods or business letter issued by or on behalf of the company or the receiver and such a statement must also appear on the website of the company and any email sent on behalf of the company. Where a receiver of the company has been appointed and a winding up of the company is taking place, a statement to that effect must also appear on all the above document types and the company website. Default in complying with the requirements as to notification is now said to be an offence as opposed to merely resulting in a fine.

*Section 430* describes the information to be given when a receiver is appointed. It is drawn from section 319 of the Companies Act 1963 as amended by section 52 of the Company Law Enforcement Act 2001. It is the duty of the Registrar, where it becomes aware of the appointment of a receiver, to inform the Director of Corporate Enforcement of that appointment. After notifying the company of his or her appointment, the receiver must be sent, within 14 days, a statement in the prescribed form setting out the affairs of the company. The details of what must be included in this statement are laid down in *section 431* below. Within 2 months of receiving that statement, the receiver must send it on to the CRO, the court, the company, any trustees for the debenture holders and the debenture holders themselves (where possible). Under *subsection (3)*, the receiver is obliged to periodically send to the Registrar an “abstract in the prescribed form” which contains information regarding the assets over which he or she has control and also details of his or her receipts and payments when acting as receiver for that company. If the receiver has ceased to act, the abstract referred to above must include a statement from the receiver giving his or her opinion as to whether or not the company is solvent. It is the duty of the Registrar to forward this opinion to the Director of Corporate Enforcement. The obligations placed on the receiver under *subsection (1)* of this section are limited in cases where a receiver is being appointed to act with an existing receiver or in place of a receiver who is ceasing to act. Breach of the requirements of this section on the part of a receiver shall result in a category 4 offence.

*Section 431* details what must be included in the statement to be submitted to the receiver. It derives from section 320 of the Companies Act 1963, as amended by section 173 of the Companies Act 1990. The particulars to be included are listed at *subsection (1)* and *subsection (2)* provides that the statement must be verified by affidavit of any of the persons listed in that subsection. The statement must show details of assets, debts, liabilities etc. As the maintenance of accounting records is specifically excluded from the necessary skills of a secretary (in *Part 5* of the Act) it is not justifiable for the secretary to be a mandatory signatory on the statements. If any of those persons fails to comply with the requirements of this section in giving an affidavit, they shall be guilty of a category 3 offence unless that person can prove that it was not possible to comply with the requirements.

*Section 432* provides that where a statement of affairs is not submitted to the receiver in accordance with the preceding sections, the court may make any order it sees fit, including an order compelling compliance with *sections 430* and *431*. This provision is taken from section 320A of the Companies Act 1963, as inserted by section 174 of the Companies Act 1990.

*Section 433* lists the persons that shall not be qualified to act as receiver of the property of a company. This has been taken from section 315 of the Companies Act 1963, as amended by section 170 of the Companies Act 1990. Those who are not qualified to act include undischarged bankrupts; persons who have been an officer or employee of the company in the previous 12 months; persons related to or who are a partner of officers of the company; those who are not qualified to be a receiver of any subsidiary or holding company of the company in question; and bodies corporate. Receivers becoming disqualified under this section must vacate his or her office and give notice of such vacation within 14 days to the company, the Registrar and the debenture holder or court, where applicable. Receivers appointed prior to 1<sup>st</sup> August 1991 shall not be governed by the provisions of this section. Those persons acting as receiver when disqualified and those receivers that do not provide notification that they have been so disqualified shall be guilty of a category 2 offence.

*Section 434* states that a receiver may resign provided he or she has given 30 days’ notice to the company itself or its liquidator (where applicable). Notice must also be given to the holders of charges (whether fixed or floating) over property of the company. If the receiver has been appointed by the court, it is necessary for the court to grant permission for the receiver to resign and the court

may impose terms and conditions on such resignation. It is a category 4 offence if the receiver fails to comply with the provisions of this section. This section is drawn from section 322C of the Companies Act 1963, as inserted by section 177 of the Companies Act 1990. In relation to the entitlement of holders of charges to receive notice, the Company Law Review Group noted that there was no reason to distinguish between holders of fixed and floating charges and this provision was amended accordingly.

*Section 435* details how a receiver may be removed and re-enacts section 322A of the Companies Act 1963, as inserted by section 175 of the Companies Act 1990. If cause is shown, the court may remove a receiver and appoint another in his or her place. 7 days' notice of the proceedings in which the removal is sought must be served on the receiver and on the party that appointed him or her. The receiver and the party that appointed him/her are entitled to appear and be heard at these proceedings.

*Section 436* provides that the Registrar must be notified of appointments of receivers and must also be notified when a receiver ceases to act. Where a person obtains an order for the appointment of a receiver, he or she shall, within 7 days of the date of the order, cause to be published in the *Iris Oifigiúil* and delivered to the Registrar, a notice in the prescribed form. A category 4 offence is imposed for contravention of this section. This section is drawn from section 107 of the Companies Act 1963. It has been amended so that the requirement to publish a notice "...in at least one daily newspaper in the district in which the registered office is located" has been replaced by a requirement to simply publish a notice in the *Iris Oifigiúil*. The reasons for this are the cost of publication and the inefficiency of the notice reaching the intended recipients.

### **Chapter 3** Powers and Duties of Receivers

*Section 437* sets out the powers of the receiver and is a new section, introduced in accordance with the views of the Company Law Review Group. It is modelled on section 420 of the Australian Corporations Law and gives certain specific powers to receivers in addition to those conferred on them by court order or instrument under which they were appointed. The section contains three principal elements, first, a general power to do all things necessary for or convenient to the attainment of the receiver's objectives; second, a list of specific powers, which comprise the most common contexts in which the general power is engaged; and third, the capacity of the court to adjust the powers of a particular receiver, either expanding or limiting their powers. Conferring statutory powers on receivers is intended to alleviate many of the problems which may arise from poorly drafted debentures.

*Section 438* provides that receivers and other persons may apply to the court for directions concerning the performance by the receiver of his or her functions. This is taken from section 316 of the Companies Act 1963, as amended by section 171 of the Companies Act 1990. If a person other than the receiver is applying for directions, such application must be supported by evidence that the applicant is being unfairly prejudiced by actions or omissions of the receiver. This section stipulates that receivers shall be personally liable on any contract they enter into in the performance of their functions unless the contract provides otherwise. In respect of that personal liability, the receiver shall be entitled to an indemnity out of the assets of the company and it is made clear that this provision does not affect any right to indemnity which the receiver would have apart from the provisions of this section. Likewise, this section shall not be taken to limit the receiver's liability on contracts entered into without authority and a receiver shall not have any right to indemnity in respect of such liability.

*Subsection (7)* deals with situations where the charge or purported charge in respect of which a receiver has been appointed or purported to be appointed was deemed not to be effective as a charge on the property or part thereof. A receiver appointed in such a way may apply for a court order that he or she may be relieved from personal liability in respect of anything done by him or her in relation to property which is subject to an ineffective charge. If the court makes such an order, *subsection (8)* applies to make the person who appointed (or purported to appoint) the receiver personally liable for everything for which, but for the order, the receiver would have been liable.

*Section 439* imposes a duty on a receiver selling property to get the best price reasonably obtainable and in this regard re-enacts section 316A of the Companies Act 1963, as inserted by section 172 of the Companies Act 1990. If a receiver breaches his or her duty under this section, it will not be a defence to say he or she was acting as agent of the company or under a power of attorney. In addition, a receiver will not be entitled to be indemnified or compensated by the company for any liability which arises as a result of a breach of his or her duty under this section. *Subsection (3)* stipulates that a receiver may not sell by private contract a non-cash asset (of the value described under *section 238*) to any person who has been an officer of the company in the 3 years preceding the date of appointment of the receiver, unless notice of this sale has been given to all the creditors of the company who are known to the receiver. The notice period required under this provision is 14 days.

*Section 440* addresses the issue of preferential payments when the receiver is appointed under a floating charge and re-enacts section 98 of the Companies Act 1963. It is provided that, where the company is not in the course of being wound up, debts relating to preferential payments (i.e. debts to be paid in priority to all other debts) are to be paid out of any assets over which the receiver (or other person taking possession) has control in priority to any claim for principal or interest in respect of the debentures. *Subsection (2)* cross-references *section 621(2)(c)* concerning preferential payments in a winding-up and applies the provisions on payment of accrued holiday remuneration to situations where a receiver has been appointed. *Subsection (4)* stipulates that payments made under this section shall, so far as possible, be recouped out of the assets of the company available for payment of general creditors.

*Section 441* concerns the delivery to the Registrar of the accounts of receivers and it re-enacts section 321 of the Companies Act 1963. A receiver is obliged to send to the Registrar every 6 months, and within 30 days of ceasing to act as receiver, an abstract showing the assets of the company of which he or she has taken possession, their estimated value and the proceeds of sale of any such assets. The receiver must also provide details of his or her receipts and payments for the period of his or her appointment. Failure for a receiver to comply with this section will result in a category 4 offence.

## **Chapter 4**

### **Regulation of receivers and enforcement of their duties**

*Section 442* provides for the enforcement of the receiver's duty to make returns and re-enacts, in substance, section 322 of the Companies Act 1963. This section applies in situations where a receiver has failed to deliver any document(s) or notice(s) which he or she is required to deliver by law and where he or she has not made good this failure in the requisite time period. In such circumstances, the court may direct the receiver to make good the default within a specified time. Members or creditors of the company, the Registrar, or the liquidator of the company may apply to the court for an order under this section. Such an order may provide that the receiver bear all the costs of and incidental to the application.



*Section 443* confers a power on the court to order the return of assets which have been improperly transferred, thus re-enacting section 139 of the Companies Act 1990, as applied with modification by section 178 CA 1990 to receivers. The court may make the order where it is “just and equitable” to do so, and, in making this evaluation, the court is to have regard to the rights of persons who have acquired an interest in the property in good faith and for value. This section shall not apply to transfers described in *section 604* of the Act – namely transfers which result in an unfair preference of creditors.

*Section 444* grants the court a power to fix the remuneration of the receiver. This re-enacts section 318 of the Companies Act 1963. The order setting the remuneration may be varied or amended by the court on application from the liquidator, the receiver or any member or creditor of the company. It is made clear that these provisions on the receivers remuneration do not affect the right of the receiver to an indemnity out of the assets of the company as provided for in *section 438* of the Act.

*Section 445* provides that the court may end or limit a receivership on the appointment of a liquidator. This re-enacts section 322B of the Companies Act 1963, as inserted by section 176 of the Companies Act 1990. The order may provide that the receiver must cease to act altogether or that the receiver should only continue to act in respect of certain assets specified by the court. The court may discharge or amend the order on the application of the liquidator or the receiver. Applications made by the liquidator under this section must be served both on the receiver and on the party who appointed that receiver not less than 7 days before the court hearing and the receiver and the party who appointed him or her are entitled to be heard by the court at the application hearing.

*Section 446* empowers the Director of Corporate Enforcement to request the production of the receiver’s books, re-enacting section 53 of the Company Law Enforcement Act 2001. Books relating to a receivership that has concluded 6 years prior to the date of the request need not be produced. Failure of a receiver to supply books as requested will result in a category 3 offence.

*Section 447* concerns the prosecution of criminal offences committed by officers and members of the company. It is a new section which draws on various existing provisions of the Companies Act 1963, the Companies Act 1990 and the Company Law Enforcement Act 2001. If it appears to the receiver that any past or present officer or member of the company has been guilty of an offence in relation to the company, the receiver is obliged to report the matter to the Director of Public Prosecutions and to the Director of Corporate Enforcement. Following on from this, the receiver must give the DPP and the Director of Corporate Enforcement access to any information or facilities as may be required and if the DPP or the Director of Corporate Enforcement seeks to prosecute the case, the receiver and all officers and agents of the company (past or present) must give all assistance in connection with the prosecution as he/she is reasonably able to give. This obligation shall not apply where such officer or agent is a defendant in the proceedings. Persons failing to give the assistance described above to the DPP or the Director of Corporate Enforcement can be directed to comply with the requirements of this section in that regard. Finally, where any application under this section is made in relation to a receiver, the court may direct that the costs of the application be borne by the receiver personally unless the failure or neglect to comply was due to the fact that the receiver did not have access to sufficient assets of the company to enable him or her to so comply.

*Section 448* derives from section 58 of the Company Law Enforcement Act 2001 and deals with situations where misconduct by receivers must be reported to the Director of Corporate Enforcement. It applies where the disciplinary committee or tribunal of a prescribed professional body finds that one of its members acting as a receiver has not maintained appropriate records in relation to

a receivership or where that prescribed professional body has reasonable grounds for believing that one of its members has committed a category 1 or category 2 offence during the course of a receivership. In such cases, the professional body must report the matter to the Director of Corporate Enforcement. If the body fails to do so, that body and any officer of it to whom the failure is attributable shall be guilty of a category 3 offence.

DELETED

## **Part 9 – Reorganisations, Acquisitions, Mergers & Divisions**

### *Preliminary Note*

*Part 9* contains provisions relating to the reorganisation, acquisition, merger and division of companies. For the first time in Irish law, it will be possible to effect a merger between two private Irish companies. The division facility provided for is also entirely new.

*Chapter 1* deals with schemes of arrangement. The Company Law Review Group (CLRG) examined the procedures for effecting a scheme of arrangement and noted that there were two principal shortcomings in the procedure, namely the initiation of two separate legal proceedings to convene the scheme meetings and to approve the scheme and, secondly, the fact that the matter had to be brought before the court three times in all in convening the scheme meeting, seeking direction as to advertising the petition and obtaining approval of the scheme. Therefore, the law has been amended in accordance with the recommendations of the CLRG in its First Report that the procedure for effecting a scheme of arrangement be streamlined.

Under *section 450*, changes have been introduced so that court approval is no longer required to convene scheme meetings of members or creditors, where the proposed meetings are convened by the directors of the company. Such an amendment removes one of the two sets of legal proceedings as well as one of the court hearings. However, the court involvement is retained where the directors have not convened the scheme meeting and the court is given a discretion, on application and at any time order a scheme of meetings to be summoned in such a manner as it directs.

*Section 452* details the information which must be sent to members and creditors of the company where a scheme meeting has been convened and amendments have been made in accordance with the recommendations of the CLRG in its First Report.

*Section 453* explains the circumstances in which the compromise or arrangement becomes binding on the creditors or members concerned. It removes the necessity for a second court hearing (to advertise the passing of the scheme resolution and presentation of the scheme petition to the participants in the scheme) in most cases. This requirement to advertise is now satisfied by advertising in two daily newspapers circulated in the district where the registered office or principal place of business is located.

Under *section 454*, the requirement for the company to deliver a copy of the scheme order to the Registrar must now be effected within 21 days after the making of the order.

*Chapter 2* deals with acquisitions, the word “acquisitions” now being used as opposed to “takeovers”. This Chapter allows for the compulsory purchase of minority interests and lays down certain conditions for this right to buy out to apply. The Company Law Review Group in its First Report noted the complexity of descriptions applying to the entities involved in acquisitions and takeovers and recommended that “offeree” and “offeror” replace “transferor” and “transferee” respectively. Furthermore, it was recommended that an offeror (previously a transferee), which prior to the Act must be a company to obtain rights under section 204 of the Companies Act 1963, should be capable of being an individual. Hence, all references to an offeror include persons and companies, whereas references to an offeree apply to companies only. For this reason references are to “offerors” and “offeree companies”.

*Section 457* is the core section of this Chapter and enables the acquisition by an offeror of all the shares of an offeree (i.e. target) company, where the offeror has obtained acceptances of its offer in respect of 80% or more of the shares of the offeree company (or where the offeror and/or its subsidiaries already own shares in the target company, 80% of the shares in the target company not owned by the offeror).

*Section 458* contains additional requirements for the right to buy out to apply and derives from section 204 CA 1963. The section applies where shares in the offeree company are already in the beneficial ownership of the offeror. The value of the beneficial ownership of the shares must be greater than 20 per cent of the aggregate value of those shares and the shares affected. Where this is the case, the assenting shareholders must hold not less than 80 per cent in value of the shares affected and must be not less than 50 per cent in number of the holders of those shares. Prior to the Act, the requirement was that the assenting shareholder must be not less than 75 per cent in number of the holders of those shares.

*Chapter 3* concerns mergers and is new. The Act provides, for the first time in Irish law, a statutory mechanism whereby two private Irish companies can merge so the assets and liabilities (and corporate identity) of one are transferred by operation of law to the other, before the former is dissolved. A further innovation is that a merger can be affected without the necessity for a High Court order. Where a merger meets the requirements of the legislation, it is proposed that the Summary Approval Procedure (as set out in *Chapter 7* of *Part 4* of the Act) can be utilised to effect the merger, which can be expected to result in a significant saving of time and money. The provisions have been based on Cross-Border Merger regime, as laid down in the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008), while re-modelling the cross-border element to apply in a domestic context.

*Chapter 4* on divisions is also entirely new and now makes it possible for a private Irish company to be “divided” so that its undertaking is split between two other Irish companies. It has been drafted to mirror the corresponding provisions in *Chapter 3* on mergers. As many of the merger provisions are replicated in *Chapter 4*, it is not intended to repeat the full explanations for these provisions in the Chapter on divisions. Accordingly, the explanatory note for *Chapter 4* should be read in conjunction with the explanatory note for *Chapter 3*.

## *Explanatory Memorandum*

### **Chapter 1** Schemes of Arrangement

*Section 449* is new and contains a comprehensive list of the defined terms for the purposes of this Part. Many of the defined terms in this section are concepts recognisable under company law prior to the introduction of the Act and others are newly created terms.

This section defines a number of terms for the purposes of this Part.

“Debenture trustees” is defined in place of “trustee for debenture holders” as meaning the trustees of a deed securing the issue of debentures by the company;

“Scheme circular” means the circular that shall be sent with every notice convening or summoning the meeting which is sent to a creditor or member of the company concerned. This is in place of the term “statement” under the pre-existing law.

“Scheme order” means an order of the court sanctioning a compromise or arrangement referred to in *section 450*.

“Special majority” means a majority in number representing at least 75 per cent in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the scheme meeting.

*Subsection (2)* clarifies that references in this Chapter to a compromise or arrangement between a company and its creditors (or any class of them) *or* members (or any class of them) will include a reference to a compromise or arrangement between a company and its creditors (or any class of them) *and* members (or any class of them).

*Section 450* deals with the convening of scheme meetings by directors and the power of the court to summon such meetings. It is drawn in part from section 201(1) of the Companies Act 1963 and changes have been introduced so that court approval is no longer required to convene scheme meetings of members or creditors, where the proposed meetings are convened by the directors of the company. Prior to the introduction of the Companies Act 2014, the court would not give pre-approval at this meeting – the court reserved its discretion for the third court hearing to disapprove a scheme. Therefore, it was not considered appropriate to retain the courts involvement at this stage. This amendment removed one of the two sets of legal proceedings as well as one of the court hearings. However, *subsection (3)* retains the court involvement where the directors have not convened the scheme meeting and the court is given discretion to order scheme meetings to be summoned. The subsection provides that the court may, on application and at any time, order a scheme of meetings of the creditors or members to be summoned in such a manner as the court directs.

*Section 451* provides that, in circumstances where one or more scheme meetings is convened or where an application is made for an order that a scheme meeting be convened, the court may order a stay on all proceedings or restrain further proceedings against the company as it sees fit. Such an order can be granted on application of the company, the directors, any creditor or member of the company or the liquidator of the company (if it is being wound up). This section re-enacts section 201(2) of the Companies Act 1963.

*Section 452* details the information which must be sent to members and creditors of the company where a scheme meeting has been convened. This section is drawn from section 202 of the Companies Act 1963. Amendments have been made in accordance with the recommendations of the Company Law Review Group in its First Report. References to “a meeting of creditors or any class of creditors or members or any class of members” has been replaced by a reference to “a scheme meeting”. The word “statement” is replaced by “scheme circular” where necessary and “debenture trustee” replaces “trustee for debenture holders of the company”. *Subsection (7)* is new and includes shadow directors and *de facto* directors as directors for the purpose of this section.

*Section 453* explains the circumstances in which the compromise or arrangement becomes binding on the creditors or members concerned. This derives from section 201 of the Companies Act 1963 and section 23(5) of the Companies (Amendment) Act 1990.

*Subsection 2(a)* is an amended expression of the requirement for the resolution to be passed by “...a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, vote in favour of a resolution agreeing to any compromise or arrangement...”. The new wording is simpler and no change is effected in substance.

*Subsection 2(b)* has been newly inserted in accordance with the views of the CLRG in its First Report. It was recommended that the second court hearing, namely to advertise the passing of the scheme

resolution and presentation of the scheme petition to the participants in the scheme, should be removed in most cases. This requirement to advertise is now satisfied by advertising in two daily newspapers circulated in the district where the registered office or principal place of business is located. The CLRG further noted that as the participants in the scheme will have been notified of the scheme meetings, there ought to be no requirement to re-notify them of the passing of the scheme resolutions.

*Section 454* expands on *section 453* above. *Subsections (1)* and *(2)* are taken from section 201(5) of the Companies Act 1963 which deals with the requirement to deliver a copy of the scheme order to the Registrar and the requirement to attach a copy of the scheme order to the constitution of the company. The requirement for the company to deliver a copy of the scheme order to the Registrar must now be effected within 21 days after the making of the order. *Subsection (3)* provides a category 3 offence for failure to comply with the preceding subsections.

*Section 455* aims to facilitate the reconstruction and amalgamation of companies. It allows the court to make provision for a number of matters, listed at *subsection (2)*, where an application has been made to the court for the sanctioning of a compromise or arrangement. It derives from section 203 of the Companies Act 1963 with the phrase “proposed between a company and any person mentioned in that section” (referring to a compromise or arrangement proposed under section 201 CA 1963) being deleted. In addition, references to the “transferor company” and “transferee company” have been replaced by references to the “old company” and “new company” respectively. Section 203(5) CA 1963 has been deleted as it is no longer relevant.

## Chapter 2 Acquisitions

*Section 456* contains definitions for the purposes of this Part. Many of the defined terms in this section are concepts recognisable under company law as it stood prior to the introduction of the Act. There are also some newly created terms.

*Section 457* gives a right to buy out shareholders who dissent from a scheme, contract or offer approved by the majority and also lays down the right of those shareholders to be bought out. It is taken from section 204 of the Companies Act 1963 and amendments have been introduced in line with the recommendations of the Company Law Review Group in its First Report. The CLRG noted the complexity of descriptions applying to the entities involved in acquisitions and takeovers. In section 204 CA 1963 they are referred to as “transferor” and “transferee”. In view of the use of these terms by the Takeover Bids Directive (2004/25/EC), the Irish Takeover Panel Act 1997 and the Rules under that Act, the CLRG recommended that “offeree” and “offeror” replace “transferor” and “transferee” respectively. Furthermore, the scope of these terms has also been amended in accordance with the recommendation of the CLRG. It was recommended that an offeror (previously a transferee), which must be a company under section 204 CA 1963 to obtain rights, should be capable of being an individual. Hence, all references to an offeror include persons and companies, whereas references to an offeree apply to companies only. For this reason references are to “offerors” and “offeree companies”.

This overall purpose of this section is to enable the acquisition by an offeror of all the shares of an offeree (i.e. target) company, where the offeror has obtained acceptances of its offer in respect of 80% or more of the shares of the offeree company (or where the offeror and/or its subsidiaries already own shares in the target company, 80% of the shares in the target company not owned by the offeror). Additional requirements are laid down in *section 458* of the Act which are discussed below.

*Subsection (2)* is derived from the first part of section 204(4) CA 1963. The structure of the section has been changed as this subsection sets out the conditions which must be met for the rest of the section to apply. The reference to “four fifths in value of the shares” has been replaced by “80% in value of the shares”. Accordingly, the section will apply where the scheme, contract or offer has been accepted in respect of 80 per cent or more in value of the relevant shares and where such acceptance has occurred within 4 months after the date of publication of the scheme, offer or contract to the holders of the shares affected.

*Subsections (3) and (4)* are taken from section 204(1) and (2) CA 1963. They set out the conditions necessary for the offeror company to acquire the beneficial ownership of the remaining shares on the same terms as those earlier acquired shares or, in cases where an application is made under *section 459(4)(a)*, on any different terms that the court specifies. An application under *section 459(4)(a)* is one where a dissenting shareholder may apply to the court for an order permitting him or her to retain his or her shares or varying the terms of the scheme, contract or offer as they apply to that shareholder.

In order to acquire the shares of a dissenting shareholder, the offeror must, within 6 months of the publication of the terms of the scheme, contract or offer, give notice in the prescribed form to the dissenting shareholder that the offeror wishes to acquire beneficial ownership of that shareholder’s shares. The notice referred to in this *subsection 4(a)* has been renamed the “call notice” for ease of reference throughout this Part. *Subsection 4(b)* makes no substantive change to the law. In the absence of the dissenting shareholders making an application to the court within the specified 30 day period or where the dissenting shareholders make such application and the court approves the acquisition, the offeror company acquires the shares.

*Subsection (5)* deals with a situation where the terms of the scheme, contract or offer, allow the shareholder to choose between 2 or more sets of terms for the acquisition by the offeror of the beneficial ownership of the shares. In such cases, the call notice must include or be accompanied by a statement of the alternative sets of terms and must specify which of those sets of terms will apply to the dissenting shareholder where he or she does not choose one of those sets of terms (by way of a written notice to the offeror) within 14 days of the giving of the notice. This section re-enacts section 204(10) CA 1963 with the term “notice” being replaced by “call notice”.

*Subsection (6)* requires an offeror, within 30 days of a scheme, contract or offer becoming binding, to give notice of that fact to each of the dissenting shareholders. In a situation where the offeror has already given a call notice to the particular dissenting shareholder, the offeror is absolved from this requirement. This derives from section 204(4) CA 1963. The style of the subsection has been changed and the term “information notice” has been introduced for ease of reference. Otherwise, no substantive changes have been made.

Under *subsection (7)*, the offeror is bound to acquire the beneficial ownership of the remaining shares where that offeror becomes entitled to acquire the shares under *subsection (3)* or where the dissenting shareholder, within 3 months of receiving the information notice, requires the offeror to acquire his or her shares. This also derives from section 204(4) CA 1963.

*Subsection (8)* is newly inserted and requires that payment of cash consideration by way of cheque must be by way of cheque drawn on an Irish clearing bank.

*Section 458*, which should be read in conjunction with *section 457*, lays down an additional requirement for the right to buy out to apply, but only in circumstances where an offeror wishes to serve a call notice or to acquire the shares of a dissenting shareholder. The additional requirement in this section does not have to be satisfied where a dissenting shareholder wishes to be bought out.

This section is taken from section 204(2) and (3) of the Companies Act 1963. It applies where shares in the offeree company are already in the beneficial ownership of the offeror. The value of the beneficial ownership of the shares must be greater than 20 per cent of the aggregate value of those shares and the shares affected. Where this is the case, the assenting shareholders must hold not less than 80 per cent in value of the shares affected and must be not less than 50 per cent in number of the holders of those shares. Prior to the Act, the requirement was that the assenting shareholder must be not less than 75 per cent in number of the holders of those shares.

*Section 459* contains provisions supplemental to *sections 457* and *458* including provision for applications to the court.

*Subsections (1) to (4)* are new. They import Article 7 of the Companies (Forms) Order, S.I. No. 45 of 1964, which stipulates how notices under these sections are to be served.

Provision is made for electronic communications. The actual form of the notices will continue to be prescribed by the Statutory Instrument. The notices necessitated by section 204 of the Companies Act 1963 are now referred to as “call notice” and “information notice” in accordance with this Part. The requirement for directors to sign the call notice is now expressly stated in *subsection (3)*. Any references to a “share warrant to bearer” have been omitted as share warrants no longer apply in the case of private companies.

*Subsection (4)(c)* recognises the situation where it is not lawful to post the call notice or information notice into jurisdictions outside the State whose laws regulate the communication of notices in their own jurisdiction (in practice meaning Australia and the U.S.). In such circumstances notice is effected through the Iris Oifigiúil.

*Subsection (5)* is also new. Where a call notice has been issued, the dissenting shareholder may apply to the court to retain his or her shares or to vary the terms of the scheme, contract or offer as they apply to that shareholder. The dissenting shareholder may also apply to court for an order varying the terms of the scheme, contract or offer in cases where the offeror is bound to acquire the shares by virtue of *section 457(7(a))*.

*Subsection (6)* is taken from section 204(5) CA 1963 and has been split up into separate paragraphs to enhance clarity. The original time limit of 30 days is maintained which brings the provision in line with the law prior to the Act. The requirement on the offeror to deliver to the offeree company a list of persons served with any call notice or information notice and the number of affected shares held by them has been added in accordance with the recommendations of the CLRG.

*Subsection (7)* is a new subsection but is drawn in part from section 204 CA 1963. *Subsection (7)(a)* imposes a requirement on the offeree company to effect registration of shares in the name of the offeror. *Subsection (7)(b)* comes from section 204(6) CA 1963 and the wording has been amended slightly in order to integrate it into this subsection. The time period for holding such money or other consideration on trust has been increased from 6 to 7 years.

*Subsection (7)(c)* is new and has been inserted in accordance with the recommendation of the CLRG that unclaimed consideration in respect of shares compulsorily acquired should be held for 7 years at the longest and then given to the Minister for Public Expenditure and Reform who should indemnify the company against any future claims.

*Subsection (7)(d)* derives from section 204(7) CA 1963 and deals with the situation where shares in the offeror are issued instead of money to the offeree company to hold in trust for the dissenting shareholders. This subsection prevents the offeree company from exercising the voting rights in relation to those shares except on the instructions of the shareholders who are entitled to the shares.



*Subsection (8)* re-enacts section 204(9) CA 1963. Where a scheme, contract or offer becomes binding on a shareholder in respect of only part of the shares held by him or her, he or she shall be treated as an assenting shareholder only as regards that part of the shares and will be a dissenting shareholder for the remainder of his or her shareholding.

*Section 460* is new and contains provisions to clarify the application of this Chapter. *Subsection (1)* is drawn from section 204(11) of the Companies Act 1963 and brings within the terms of the section offers for a certain class, or classes, of shares only. *Subsection (2)* is taken from section 204(3) CA 1963. It provides that shares in the offeree company that are in the beneficial ownership of a subsidiary of the offeror will be regarded as being in the beneficial ownership of the offeror. It also makes it clear that a subsidiary of the offeror may acquire shares in the offeree company and this shall be deemed to be the acquisition of the beneficial ownership of those shares by the offeror.

*Subsection (3)* is new. Inserted in accordance with the recommendation of the CLRG, it reverses the effect of the Supreme Court decision in *Tempany -v- Hynes* [1976] I.R. 101, which, in practice, has impeded the operation of section 204 CA 1963. The effect of this judgment is to suggest that where the entire purchase money for an asset agreed to be acquired has not been paid, the unpaid seller retains a beneficial interest in the asset, as opposed to a non-possessory lien, which had been the situation prior to that judgment. This subsection now provides that the person who agrees to acquire the shares is deemed to acquire the beneficial interest in those shares.

*Subsection (4)* further clarifies the position in respect of shares being treated as not being in the beneficial ownership of the offeror.

### Chapter 3 Mergers

*Section 461* gives definitions for a number of terms used throughout this Chapter. Some of these definitions derive from Regulation 1 of the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008). It was decided to base this Chapter on those Regulations to provide a mechanism under Irish law whereby two Irish companies can merge so that the assets and liabilities (and corporate identity) of one are transferred by operation of law to the other, before the former is dissolved.

*Section 462* specifies the circumstances in which the provisions of this Chapter apply – namely where none of the merging companies is a PLC and where at least one of the merging companies is a private company limited by shares (LTD).

*Section 463* describes the type of mergers to which this Chapter applies, which are “merger by acquisition”, “merger by absorption” and “merger by formation of a new company”. These descriptions are taken from Regulation 1 of the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008). It also provides that where a company is being wound up, it may become a party to a merger provided that the distribution of its assets to its shareholders has not begun at the date of the common draft terms of merger.

*Section 464* is a new provision and specifies how a merger is to be put into effect. It must be effected either in accordance with the Summary Approval Procedure or, in the absence of the Summary Approval Procedure being employed, the relevant provisions of this Chapter. This means that a merger may, in certain circumstances, be effected without the need for a High Court order. It is

also possible to proceed under *Chapter 1* of this Part (reorganisation by way of scheme of arrangement) as an alternative.

*Section 465* makes it clear however that *Chapter 1* and *Chapter 3* of this Part are mutually exclusive; that is to say that a merger can be effected by proceeding under either of those Chapters but not by proceeding partially under one of those Chapters and partially under the other.

*Section 466* lays down what must be included in the document to be known as the common draft terms of merger. This derives from Regulation 5 of the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008). The common draft terms of merger must be drawn up by the directors of the merging companies and those terms must be approved in writing. It is not permitted for the common draft terms of merger to provide for any shares in the successor company to be exchanged for shares in a transferor company held either by the successor company (or its nominee on its behalf) or by the transferor company (or its nominee on its behalf).

*Section 467* provides for the director's explanatory report and is drawn from Regulation 6 of the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008). Except in cases of merger by absorption, the directors must prepare a separate written report giving particulars of the common draft terms of merger and the legal and economic grounds for and implications of those draft terms. *Subsection (4)* has been inserted to provide that the provisions of this section will not apply where certain conditions are satisfied. Those conditions are that, where there is a requirement that a holder of securities of the company give their consent to a vote by holders of shares of any of the merging companies in order for that vote to take effect, such holders of securities together with all of the holders of shares conferring the right to vote at general meetings of each of the merging companies must have agreed that this section will not apply. Alternatively, where there is no requirement that a holder of securities of the company give their consent to a vote by holders of shares of any of the merging companies in order for that vote to take effect, it is sufficient that all of the holders of shares conferring the right to vote at general meetings of each of the merging companies have agreed that this section will not apply.

*Section 468* provides that one or more experts must be appointed to examine the common draft terms of merger and to make a report thereon to the shareholders of the merging companies. Such a report is not needed where the merger is one by absorption nor where it is a merger where the successor company holds 90 per cent or more (but not all) of the shares carrying the right to vote at a general meeting of the transferor company or at general meetings of each of the transferor companies. Alternatively, the need for an expert's report may be obviated by every member of every merging company involved agreeing that such a report is not necessary.

An expert must be a "qualified person", which term is described under *subsection (6)* as a statutory auditor who has not been an officer or employee of any of the merging companies in the previous 12 months or is not related (within the meaning of this section) to an officer of any of the merging companies.

*Subsection (7)* stipulates when the experts report must be delivered and what information it must include.

*Subsection (8)* gives powers to the expert to obtain information and explanations from the merging companies and their officers and to make enquiries necessary for the purposes of making his or her report. Any company and any officer of it who fails to give the required information and explanations shall be guilty of a category 2 offence under *subsection (9)*. Similarly, the provision of false or misleading information or explanations will result in a category 2 offence.

*Subsections (11) and (12)* deal with the situation where a person appointed as an expert ceases to be a qualified person.

This *section 468* is derived from Regulation 7 of the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008).

*Section 469* is new and provides that, in circumstances where the Summary Approval Procedure is not being used to effect the merger (and therefore where a general meeting is not being held) and where the latest statutory financial statements of any of the merging companies relate to a financial year ended more than 6 months before the date of the common draft terms of merger, the company must prepare a merger financial statement if it is availing itself of the exemption from the requirement to hold a general meeting under *section 473(6)*. *Subsections (2) to (5)* provide for the format and content of the merger financial statement. *Subsection (6)* has been inserted to provide that the provisions of this section will not apply where certain conditions are satisfied. Those conditions are that, where there is a requirement that a holder of securities of the company give their consent to a vote by holders of shares of any of the merging companies in order for that vote to take effect, such holders of securities together with all of the holders of shares conferring the right to vote at general meetings of each of the merging companies must have agreed that this section will not apply. Alternatively, where there is no requirement that a holder of securities of the company give their consent to a vote by holders of shares of any of the merging companies in order for that vote to take effect, it is sufficient that all of the holders of shares conferring the right to vote at general meetings of each of the merging companies have agreed that this section will not apply.

*Section 470* makes provision for the registration and publication of documents in the case of a merger. It is taken from Regulation 8 of the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008). The common draft terms of merger, together with a notice in the prescribed form must be delivered to the Registrar. Notice of the delivery of the common draft terms of merger must be published by the Registrar in the CRO Gazette and by each of the merging companies in one national newspaper. The delivery to the Registrar and the publishing of the notice must be carried out at least 30 days in advance of the passing of the resolution to effect the merger. Compliance with this section is not required in a case where the Summary Approval Procedure is employed to effect the merger. *Subsection (5)* disapplies the provisions of this section in circumstances where the merging company publishes, free of charge on its website a copy of the common draft terms of merger. Such publication must be for a continuous period of 2 months and must begin at least 30 days before the date of the general meeting to consider the common draft terms of merger. In addition, the company must publish notice of the publication on its website of the common draft terms of merger in the CRO Gazette and in one daily newspaper. *Subsection (6)* makes provision for circumstances where access to the company's website is disrupted and extends the required period of publication in such circumstances.

*Section 471* provides for the inspection of the documents relating to the merger. This section provides for the inspection of specified documents free of charge by any member of the merging company for a period of 30 days before either the date of the passing of the unanimous resolution where the Summary Approval Procedure is employed or, where it is not, the date of the passing of the resolution on the common draft terms of merger by each merging company in accordance with *section 473*. Provision is made in *subsection (5)* for exemption from the obligations under this section where the merger documents specified in *subsection (1)* are published on the company's website. There is no obligation to make documents available for physical inspection where documents are available on the website of the company free of charge as this could lead to some companies declining to use the internet as an option to publish documents as the documents would still have to be made available for physical inspection. This section is taken from regulation 9 of the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008).

*Section 472* is new and disapplies the subsequent provisions of this Chapter where the Summary Approval Procedure is employed to effect the merger. Provision is made in *subsection (3)* for *section 479* (preservation of rights of holders of securities), *section 483* (civil liability of directors and employees) and *section 484* (criminal liability for untrue statements in merger documents) to apply where the Summary Approval Procedure is employed.

*Section 473* describes the proceedings in relation to general meetings of the merging companies. The provisions derive from Regulations 10 and 11 of the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008). It provides that a general meeting of merging companies must be held to approve common draft terms within 30 days of publication of notice. Members of a successor company who hold not less than 5 per cent of the paid up capital of the company which carries the right to vote at general meetings of the company (excluding treasury shares) may require the convening of a general meeting to consider the common draft terms of merger.

*Section 474* is new and allows for the provision by email to the shareholders (where they have so consented) of the copies of the merger documents. The notice convening the general meeting to consider the draft terms of merger must contain a statement that the documents are being supplied in this manner. Shareholders will not be permitted to make a request for copies of the merger documents (under *section 473(3)*) where those documents were available to download and print, free of charge, from the company's website.

*Section 475* is new and clarifies the situation regarding meetings of classes of shareholders of the merging companies. It is stated that the provisions of *Chapter 4* of *Part 3* (excluding *sections 88(9)* and *89*) of the Act on the variation of rights attached to any class of shares in a company are to apply where the share capital of any of the merging companies is divided into shares of different classes.

*Section 476* provides that a minority shareholder in a transferor company may request the successor company to acquire his or her shares in the transferor company for cash. Such a request must be in writing and must not be later than 15 days after the "relevant date", such term being defined in *subsection (4)*. *Subsection (2)* provides that the price for the shares will be determined in accordance with the share exchange ratio set out in the draft common terms of merger and that any shares purchased by the successor company will be treated as treasury shares. This section is drawn from Regulation 12 of the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008).

*Section 477* derives in part from Regulation 14 of the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008) and states that all the merging companies must make a joint application to the court for an order confirming the merger. This application must be accompanied by a statement of the size of the shareholding of any shareholder who has requested the purchase of his or her shares and of the measures which the successor company proposes to take to comply with the shareholders request. The requirement under this section to make an application to the court obviously does not apply where the Summary Approval Procedure is being employed by the merging companies to effect the merger.

*Section 478* provides for the protection of creditors of any of the merging companies. Such creditors shall be entitled to be heard in relation to the confirmation by the court of the merger under

*section 480*. This is taken from Regulation 15 of the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008).

*Section 479* operates to preserve the rights of holders of securities, other than shares, in any of the companies being acquired to which special rights are attached. Such holders of securities must be given rights in the successor company at least equivalent to those they possessed in the company being acquired. *Subsection (2)* disapplies this requirement in certain circumstances.

*Section 480* deals with the confirmation order to be issued by the court pursuant to an application under *section 477* of the Act.

*Subsection (2)* is new but is drawn in part from Regulation 14 of the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008). It states that the court may make an order confirming the merger where it is satisfied that the relevant requirements of the Chapter have been complied with; that proper provision has been made for any objecting creditors and minority shareholders; that the rights of holders of securities other than shares are safeguarded; and that the provisions of *Chapter 4* of *Part 3* in relation to variation of rights attached to a class of shares have been complied with, where applicable.

*Subsection (3)* derives from Regulation 19 of the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008). It lays down the effects that will flow from the order of the court confirming the merger. *Subsection (5)* also derives from Regulation 19 and provides that the successor company must comply with registration requirements and other formalities required by law and as directed by the court for the transfer of the assets and liabilities of the transferor company to be effective in relation to other persons.

*Subsections (4), (6), (7) and (8)* are new. They cater for the consequences of a merger on leasehold property (legally classified as ‘chattels real’) or immovable property. The section contains clear language that should improve certainty with respect to the property transactions and thus reduce paperwork and costs to business associated with the merger.

If the merger is to take effect at a particular time on the date appointed under *subsection (2)*, and this time is not suitable to the parties (having regard to their need to co-ordinate various transactions), then the court, under *subsection (9)*, can specify a different time for the merger to take effect that would be more suitable to the parties. This *subsection (9)* has been newly inserted.

*Section 481* states that, in giving an order confirming a merger under this Chapter, the court may in that order permit the giving of financial assistance (*section 82*) and/or a reduction in company capital (*section 84*) where it sees fit for the purpose of enabling the merger to properly have effect.

*Section 482* provides that orders confirming a merger must be sent to the Registrar and the Registrar must subsequently register that order and have it published in the CRO Gazette. This derives from Regulation 17 of the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008).

*Section 483* allows for the civil liability of directors and experts in relation to the preparation or implementation of a merger. Any shareholder of a merging company who has suffered loss or damage by reason of misconduct of a director or expert or by reason of the inclusion of any untrue statement in the merger documentation shall have a cause of action and shall be entitled to have such loss or damage made good to him or her. *Subsection (3)* and *(4)* provide for circumstances where

directors and experts can be absolved from liability under this section. This provision derives from Regulation 22 of the EC (Mergers and Divisions) Regulations 1987 (S.I. No. 137 of 1987).

*Section 484* provides for criminal liability for untrue statements in merger documents – whether of the directors, the expert or any person who authorised the issue of a merger document containing untrue statements. A category 2 offence is applied and *subsection (3)* provides for a defence to any proceedings against a person under this section. This section is adapted from Regulation 23 of the EC (Mergers and Divisions) Regulations 1987 (S.I. No. 137 of 1987).

## **Chapter 4** Divisions

*Section 485* gives definitions for a number of terms used throughout this Chapter. This Chapter on divisions is entirely new and for the first time makes it possible for a private Irish company to be “divided” so that its undertaking is split between two other Irish companies. It has been based on the preceding Chapter in relation to mergers, which in turn is modelled on the EC (Cross-Border Mergers) Regulations 2008 (S.I. No. 157 of 2008). As many of the merger provisions are replicated in *Chapter 4*, it is not intended to repeat the full explanations for these provisions in this Chapter on divisions. Accordingly, the explanatory note for *Chapter 4* can be read in conjunction with the explanatory note for *Chapter 3*. The Summary Approval Procedure does not apply to divisions.

*Section 486* specifies the circumstances in which the provisions of this Chapter apply – namely where none of the companies involved in the division is a PLC and where at least one of the companies is a private company limited by shares (LTD).

*Section 487* explains the different types of divisions permitted under this Chapter which are “division by acquisition” and “division by formation of new companies”. A “division by acquisition” is one in which 2 or more companies (known as a “successor company” - of which one or more but not all may be a new company) acquire between them all the assets and liabilities of another company that is dissolved without going into liquidation (the “transferor company”). Such acquisition must be in exchange for the issue to the shareholders of the transferor company of shares in one or more of the successor companies, with or without any cash payment and must be with a view to the dissolution of the transferor company.

A “division by formation of new companies” is similar to a division by acquisition the only difference being that the successor companies have been formed for the purposes of the acquisition of the assets and liabilities of the transferor company.

In cases where a company is being wound up, it may become party to either type of division, provided that the distribution of its assets to its shareholders has not already begun at the date of the common draft terms of division.

*Section 488* states the general principle that a division cannot be effected unless the provisions of this Chapter have been complied with. However, it is possible to proceed under *Chapter 1* of this Part as an alternative to effecting a division under this *Chapter 4*. If an approval, authorisation or consent is required by any other enactment or a Community act for a division to take effect, then a division cannot be effected under this Chapter where such approval, authorisation or consent has not been obtained.

*Section 489* makes it clear that *Chapter 1* and *Chapter 4* of this Part are mutually exclusive; that is to say that a division can be effected by proceeding under either of those Chapters but not by proceeding partially under one of those Chapters and partially under the other.

*Section 490* makes provision for the common draft terms of division and mirrors *section 466* of *Chapter 3*, with the addition of *subsections (5)* and *(6)*. These subsections deal with the allocation of assets of the transferor company. Where an asset is not allocated by the common draft terms of division and it is not possible to determine the manner in which it is to be allocated, the asset (or consideration therefor) is to be allocated to the successor companies in proportion to the share of the net assets allocated to each of those companies under the common draft terms of division.

*Section 491* deals with the director's explanatory report and replicates as applicable to a division situation *section 467* of *Chapter 3*. *Subsection (5)* has been added to exclude from the application of this section circumstances where a company is involved in a division by formation of new companies where the shares in each of the acquiring companies are allocated to the shareholders of the transferor company in proportion to their rights in the capital of that company.

*Section 492* lays down provisions in relation to the expert's report and mirrors *section 468* of *Chapter 3* with the addition of *subsection (13)* which excludes from the application of this section circumstances where a company is involved in a division by formation of new companies where the shares in each of the acquiring companies are allocated to the shareholders of the transferor company in proportion to their rights in the capital of that company.

*Section 493* describes how the division financial statement must be drawn up and replicates *section 469* of *Chapter 3*, with references to the Summary Approval Procedure being removed.

*Section 494* makes provision for the registration and publication of division documents and replicates *section 470* of *Chapter 3*, with the reference to the Summary Approval Procedure in *subsection (4)* being removed.

*Section 495* deals with the inspection of division documents and replicates in the context of a division *section 471* of *Chapter 3*, with the reference to the Summary Approval Procedure in *subsection (3)* being removed. There is no obligation to make documents available for physical inspection where documents are available on the website of the company free of charge as this could lead to some companies declining to use the internet as an option to publish documents as the documents would still have to be made available for physical inspection.

*Section 496* provides for the general meetings of companies involved in a division and mirrors *section 473* of *Chapter 3*. *Subsection (1)(b)* has been inserted and clarifies that reference to a successor company in this section does not include a reference to a new company formed for the purposes of the division.

*Section 497* allows for the use of electronic means to make the division documents available to the shareholders and reproduces *section 474* of the Act in the context of a division.

*Section 498* contains the provisions relating to meetings of classes of shareholders and replicates with the necessary modifications *section 475* of *Chapter 3*.

*Section 499* lays down the rules regarding the purchase of minority shares and mirrors *section 476* of *Chapter 3*.

*Section 500* deals with the court application for confirmation of the division and replicates *section 477* of *Chapter 3*.

*Section 501* gives protection to creditors and deals with the allocation of liabilities. It replicates *section 478* of *Chapter 3* in the context of a division, with the insertion of *subsections (2)* and *(3)*. These subsections provide for situations where a liability of the transferor company has not been allocated by the common draft terms of division and where it is not possible to determine the manner in which that liability is to be allocated. In such a case, the liability will become, jointly and severally, the liability of the successor companies.

*Section 502* operates to preserve the rights of holders of securities and replicates *section 479* of *Chapter 3*.

*Section 503* deals with the order of the court confirming the division and reproduces *section 480* of *Chapter 3*, with the addition of *subsection (3)* which concerns references in this section to “the relevant successor company”. The effect of this subsection is to ensure that the common draft terms of division or order of the court specify which of the companies, subsequent to the division, will assume the various assets and liabilities of the dividing company. *Paragraph (b)* of *subsection (3)* facilitates the court in providing for the possibility of the joint liability of the companies.

*Subsections (5), (7) (8 and (9)* are new. They cater for the consequences of a division on leasehold property (legally classified as ‘chattels real’) or immovable property. The section contains clear language that should improve certainty with respect to the property transactions and thus reduce paperwork and costs to business associated with the merger.

*Section 504* allows the court to make an order permitting the giving of financial assistance or a reduction of company capital, both of which may be prohibited or restricted under *section 82* or *section 84* of the Act. This replicates *section 481* of *Chapter 3*.

*Section 505* provides for the registration and publication of confirmation of the division and reproduces *section 482* of *Chapter 3*.

*Section 506* provides for the civil liability of directors and experts and replicates *section 483* of *Chapter 3*.

*Section 507* lays down criminal liability for untrue statements included in division documents and reproduces *section 484* of *Chapter 3*.



## **Part 10 - Examinerships**

### *Preliminary Note*

*Part 10* of the Act contains the provisions in relation to examinership. It largely reproduces the law on examinerships as contained in the Companies (Amendment) Act 1990, as amended. Examinerships were introduced into Irish law under that Act as a mechanism for the rescue of ailing companies that still have a reasonable prospect of survival. The company comes under the protection of the court and an examiner is appointed to try to formulate a scheme of arrangement and typically may have to find new investors to inject capital into the company. The protection of the court is offered for a period of 70 days, which can be extended by application to the court to 100 days. Once a scheme of arrangement is confirmed by the court, it then becomes binding on all members and creditors of the company.

The new provisions on Circuit Court jurisdiction for examiners, introduced by the Companies (Miscellaneous Provisions) Act 2013 have been incorporated into *Part 10*. This allows companies to apply directly to the Circuit Court to have an examiner appointed.

*Chapter 1* contains provisions to aid in the interpretation of this Part. New definitions have been added in order to create a comprehensive list of the defined terms in accordance with the recommendation of the Company Law Review Group (CLRG) in its First Report.

*Chapter 2* details how an examiner is appointed. The circumstances in which the court may appoint an examiner on the application to it of a petitioner are set out and it is still the case that, in order to appoint an examiner, the court must be satisfied that the company has a reasonable prospect of survival. The persons who may present a petition to the court are specified and provision is made for the independent expert's report which must accompany the petition.

The provision in the law for the remission of an examinership hearing from the High Court to the Circuit Court for companies with liabilities of under €317,000 has been removed as it is envisaged that such companies will now apply directly to the Circuit Court as small private companies as outlined above.

This Chapter also describes the effect of the petition to appoint an examiner on the creditors of the company and other parties and provides for what may or may not happen in relation to a company during the period of court protection.

*Chapter 3* lays down the powers of an examiner and also prohibits the examiner from repudiating a contract that has been entered into by the company prior to the period of court protection (with an exception being provided for in relation to so called "negative pledges" in contracts). There are rules concerning the production of documents and evidence and the court is given a wide discretion to transfer some or all of the functions and powers of the directors of the company to the examiner. The examiner is permitted to incur liabilities so that the company is enabled to continue to trade and an application may be made to the court by the examiner for an order that he or she be permitted to dispose of company property.

*Section 541* governs the court's consideration of the examiner's proposals and details the circumstances in which the court cannot confirm these proposals. An amendment to the law has been introduced in that the proposals must now have the effect of impairing the interests of the creditors of the company in such a manner as to "unfairly" favour the interests of the creditors or members of any company to which the company is related.

*Section 542(6)(b)* allows a court to authorise a reduction of capital in a scheme of arrangement or compromise. This subsection was inserted to deal with the judgment in *Re McEnaney Construction Limited* [2008] IEHC 43 which held that a court could not so authorise a reduction in capital unless the legislation specifically allowed for it to do so. A proviso is included in *subsection (7)* of that section to the effect that a reduction cannot result in an amount of company capital which is “manifestly inadequate”.

*Chapter 4* deals with the liability of third parties for debts of a company in examination. The provisions in this Chapter all derive from section 25A of the Companies (Amendment) Act 1990, as inserted by section 25 of the Companies (Amendment) (No.2) Act 1999. The provisions have been split up into a number of sections for the sake of clarity. In brief, this Chapter ensures that proposals in a scheme of arrangement or compromise cannot affect the liability of a guarantor, notwithstanding the fact that the primary liability of the company itself is being compromised by the proposals.

*Chapter 5* is concerned with the conclusion of the examinership. It governs how the period of court protection ceases, how examiners recoup their costs and expenses and how the court can order the return of assets which have been improperly transferred. There are other provisions in relation to the publication of orders under this Part, the possibility of holding a hearing under this Part otherwise than in public and the obligation on professional bodies to report to the Director of Corporate Enforcement regarding members of those bodies acting as examiners in an improper manner.

## *Explanatory Memorandum*

### **Chapter 1** Interpretation

*Section 508* is new but it derives in part from section 1 of the Companies (Amendment) Act 1990. This section has been amended insofar as new definitions have been added in order to create a comprehensive list of the defined terms for the purposes of this Part in accordance with the recommendation of the First Report of the Company Law Review Group. The newly inserted are:

“Court” means the High Court, except in a small company context, in which case it means the Circuit Court;

“Director” includes a shadow director;

“Examiner” means an examiner appointed under *section 509*;

“Independent expert” means the person who undertakes the preparation of a report under *section 511*; and

“Insurer” is defined by the Insurance Act 1989.

### **Chapter 2** Appointment of Examiner

*Section 509* deals with the power of the court to appoint an examiner. It is drawn from section 2 of the Companies (Miscellaneous Provisions) Act 2013, but it incorporates provisions of the EC (Corporate Insolvency) Regulations 2002, in accordance with EU law, and also provides for petitions for the examinership of small companies to be made in the Circuit Court rather than the High Court. This change was made on foot of a recommendation of the CLRG, and enables small companies in distress to enter into examinership more quickly and cheaply than was previously possible prior to the introduction of the Act..

The circumstances in which the court may appoint an examiner on application to it by a petitioner are set out. The company must be, or likely to be, unable to pay its debts and no resolution or order for the winding up of the company can be in place. In order to appoint an examiner, the court must be satisfied that the company has a reasonable prospect of survival (*subsection (2)*).

*Subsection (3)* spells out what the phrase "unable to pay its debts" means and is designed to ensure that as many companies as possible to avail of opportunities for re-structuring. It is clarified that the circumstances set out in *section 570* are applicable to this section. Circumstances set out in *section 570* in which a company will be deemed unable to pay its debts. The minimum debt in respect of which a petition can be brought by a creditor is increased to €10,000 from €1,269.74. A new provision has been inserted which seeks to enable petitions for winding up by creditors where there are large numbers of creditors. Where there are two or more creditors a petition can now be brought where the debt is a minimum of €20,000.

*Subsections (5) and (6)* contain provisions that derive from section 234 of the National Asset Management Agency Act 2009. It is specified that the court cannot appoint an examiner where the company has obligations in relation to an asset that has been transferred to NAMA, unless a copy of the petition has been served on NAMA and the court has heard NAMA in relation to the making of the order of examinership.

*Subsections (7) to (9)* contain significant changes to the law and in substance are drawn from section 2 of the Companies (Miscellaneous Provisions) Act, 2013, however, it incorporates provisions of the EC (Corporate Insolvency) Regulations 2002, in accordance with EU law. Small companies are permitted to apply directly to the Circuit Court to enter examinership rather than first having to go to the High Court. Prior to the introduction of the Act, a petition for the appointment of an examiner may only be made in the High Court. Under the Act such petitions may be made to the Circuit Court where the company is a small company within the meaning of the Act (this will be the case where two of the following conditions are satisfied: (a) it has no more than 50 employees; (b) the balance sheet total does not exceed €4.4 million; and (c) the turnover does not exceed €8.8 million).

It is hoped that immediate impact of this change will be lower costs and greater accessibility for small private companies due to the fact that it eliminates the requirement for any High Court involvement with associated costs.

*Subsection (10)* provides that the jurisdiction of the Circuit Court shall be exercisable by the judge of the Circuit Court for the circuit in which the registered office of the company is situated at the time of the presentation of the petitioner in which it has, its principal place of business, or if, at that time, there is no registered office of the company and its principal place of business is outside the State, for the Dublin Circuit.

Under *subsection (11)*, where an order is made appointing an examiner to a company, that examiner may request a copy of the order or certificate appointing him or her and any other prescribed particulars from the Central Office or the county registrar, as relevant.

*Section 510* lists the persons who may present a petition to the court in respect of a company and derives from section 3 of the Companies (Amendment) Act 1990, as amended. Such persons include the company, the directors of the company, a creditor (including a contingent or prospective creditor) of the company and members of the company holding at least one-tenth of the paid-up share capital that carries voting rights. Creditors of the company may include employees as possible applicants, if they are owed money by the company.

The right to present a petition is limited where the company is the holding company of an insurer or the holding company of a body corporate that holds a licence under section 9 of the Central Bank Act 1971. In such cases, only the Central Bank may present the petition. Similarly, only the Central Bank may present the petition where the company is the holding company of a credit institution or where the company is one which one or more trustee savings banks have been reorganised into pursuant to the Trustee Savings Banks Act 1989.

*Subsection (4)* contains tailored provisions in relation to companies listed in *Schedule 5* to the Act (namely companies that are authorised, supervised or regulated by the Central Bank). These provisions state that the petition may be presented to the court by any of the persons listed at *subsection (1)*; or the Central Bank; or one or more of the persons listed at *subsection (1)* together with the Central Bank. If a petition is presented in relation to a *Schedule 5* company, the Central Bank is entitled to receive notice of such petition and appear at the hearing of it.

*Section 511* provides that the petition to the court for examinership must be accompanied by a report in relation to the company prepared by either the statutory auditor of the company or a person who is qualified to be appointed as an examiner of the company. This is known as the independent expert's report and the requirement to produce it derives from section 3(3A) and (3B) of the Companies (Amendment) Act 1990, as inserted by section 7 of the Companies (Amendment) (No.2) Act 1999.

*Subsection (3)* contains an extensive list of the matters and information which the report must include.

*Section 512* contains supplemental provisions in relation to *sections 510* and *511*, particularly in relation to matters to be mentioned in the petition and at the hearing of the petition. These provisions are drawn from section 3 of the Companies (Amendment) Act 1990, as amended. The petition presented to the court must nominate a person to be appointed as examiner and it must be accompanied by a consent signed by that person together with a copy of any proposals for a compromise or scheme of arrangement (if prepared). Under *subsection (3)*, contingent or prospective creditors presenting a petition must give a security for costs before the court agrees to a hearing.

*Subsection (4)* prohibits a court from giving a hearing for examinership where a receiver has been appointed in relation to the property or undertaking of the company for a continuous period of 3 days previous to the presentation of the petition.

Once it has heard a petition for examinership, the court may decide to dismiss it, adjourn the hearing (conditionally or unconditionally) or make an interim order or any other order as it sees fit. Such an interim order may restrict the exercise of the director's powers. The court may also appoint an examiner to the company on an interim basis under *subsection (7)*.

*Section 513* gives certain powers to the court in circumstances where the independent expert's report was not made available in time to accompany the petition and where such delay was due to exceptional circumstances outside the control of the petitioner. It is taken from section 3A of the Companies (Amendment) Act 1990 as inserted by section 9 of the Companies (Amendment) (No. 2) Act 1999. In such cases, it is open to the court to place the company under the protection of the court

for such period as the court sees appropriate in order to allow for the submission of the report. That period cannot be longer than 10 days after the making of the order. The exceptional circumstances referred to in *subsection (1)* do not cover the appointment of a receiver.

*Subsection (4)* obliges the directors to co-operate in the preparation of the independent expert's report and failure to do so can result in the court granting an order that they co-operate.

If the report is not submitted to the court within the required timeframe, the company shall cease to be under the protection of the court. This will not prejudice the presentation of a further petition for examinership.

*Section 514* states that any liabilities incurred by the company when it is under the protection of the court pursuant to *section 513(1)* above, may not be the subject of a certificate under *section 529(2)* (liabilities certified by the examiner). This involves circumstances where an interim examiner is appointed and derives from section 3A(8) of the Companies (Amendment) Act 1990, as inserted by section 9 of the Companies (Amendment) (No. 2) Act 1999.

*Section 515* provides that the court must give creditors of the company an opportunity to be heard before appointing an examiner to a company or before making an order dismissing a petition for examinership presented to it. This is drawn from section 3B of the Companies (Amendment) Act 1990 as inserted by section 10 of the Companies (Amendment) (No.2) Act 1999. *Section 515(2)*, reflecting section 3B(2) C(A)A 1990 has been amended insofar as the appointment of an interim examiner is now expressly provided for.

*Section 516* allows for the supply of the independent expert's report upon request of the company or any interested party. It derives from section 3C of the Companies (Amendment) Act 1990, as inserted by section 11 of the Companies (Amendment) (No.2) Act 1999. The court may direct that any part of the report be omitted from it and may, in particular, give a direction for the omission from the report of any information it considers would be likely to prejudice the survival of the company, or the whole or any part of its undertaking. Such information could involve details of profits, contracts and trading partners, which should not be indiscriminately disclosed to other parties.

*Section 517* makes provision for the appointment of examiners to related companies and it derives from section 4 of the Companies (Amendment) Act 1990, as amended. It addresses the situation where the company to be placed under court protection is a member of a group of companies. Where the court has already exercised its power to appoint an examiner to any company, *subsection (1)* gives it further powers to extend that examiner's remit to cover another related company. A definition of related company is to be found in *section 2(10)* of the Act.

*Subsection (2)* gives an overall (non-exclusive) guideline for the court, in deciding whether it should make an order extending an examiner's remit to cover companies related to the first. It should look at the likelihood that the order will facilitate the survival of the company or related company and, under *subsection (3)*, the court must be satisfied that there is a reasonable prospect of survival of the related company.

*Subsection (6)* repeats, in the context of the current Act, provisions inserted into company law by the National Asset Management Agency Act 2009. These provisions state that the court is not permitted to make an order under this section where the related company has obligations in relation to an asset that has been transferred to NAMA, unless a copy for the order extending the examiner's remit to a related company has been served on NAMA and the court has heard NAMA in relation to the making of that order.

*Subsections (8) and (9)* consolidate section 2 of the Companies (Miscellaneous Provisions) Act 2013 into this Act. Subsection (8) provides that the Circuit Court shall only have jurisdiction to make an order referred to in *subsection (1)(a) or (b)* if the related company is a company that, in respect of the latest financial year of it that has ended prior to the relevant time referred to in *subsection (1)*, fell to be treated as a small company by virtue of *section 350*.

*Section 518* obliges the petitioner or the independent expert to act in utmost good faith when presenting a petition to the court or when preparing the report of the independent expert. The court is entitled to decline the hearing of the petition if it believes that this requirement has not been complied with. This duty to act in utmost good faith comes from section 4A of the Companies (Amendment) Act 1990, as inserted by section 13 of the Companies (Amendment) (No.2) Act 1999.

*Section 519* provides that a person shall not be allowed to act as examiner of a company unless he or she would be qualified to act as its liquidator. This is drawn from section 28 of the Companies (Amendment) Act 1990. *Subsection (2)* now provides for a category 2 offence for breach of this rule.

*Section 520* describes the effect of the petition to appoint an examiner on the creditors of the company and other parties. It derives from section 5 of the Companies (Amendment) Act 1990, as amended. *Subsection (2)* specifies that the period for which the company is under the protection of the court shall run to 70 days after the presentation of the petition. The petition may be refused by the court or withdrawn by the applicant before the expiry of this period.

*Subsection (4)* provides for what may and may not happen in relation to the company during the period of court protection. In particular, no proceedings for winding-up may be commenced, no receiver may be appointed and no action may be taken to realise any property of the company that is subject to a mortgage, charge or lien (except with the consent of the examiner). In addition, no other proceedings may be commenced against the company except with the leave of the court.

*Section 521* stipulates that, while the company is under the protection of the court, no payment may be made in relation to liabilities incurred by the company before the petition was presented, unless such payment is recommended by the independent expert or sanctioned by the court. If the court is to sanction the discharge of the liability, it must be satisfied that a failure to do so would considerably reduce the prospects of the company or the whole or any part of its undertaking surviving as a going concern. This is drawn from section 5A of the Companies (Amendment) Act 1990 as inserted by section 15 of the Companies (Amendment) (No.2) Act 1999.

*Section 522* governs the effect on a pre-existing receiver or provisional liquidator of an order appointing an examiner. This section slightly amends section 6 of the Companies (Amendment) Act 1990, as amended.

*Subsection (1)* provides that, if a receiver stands appointed to a company in respect of which a petition for examinership is presented to the court, and that receiver has stood appointed for less than 3 working days, the court may make any order it sees fit, including requiring the receiver to cease to act or to act only in respect of certain assets. The receiver can also be directed to deliver books, papers and records relating to the company property to the examiner and to give the examiner full details of all his or her dealings with the property of the company.

*Subsection (2)* deals with provisional liquidators and provides that such a person may be appointed as examiner of the company or be required to cease to act. Similarly, such provisional liquidator can be directed to provide information, books, papers and records to the examiner along with full particulars of his or her dealings with the company.

To make an order under this section directing the receiver or provisional liquidator to cease to act, or directing the receiver to act only in respect of certain assets, the court must be satisfied that the company has a reasonable prospect of survival.

*Section 523* cross-references *section 440* which obliges a receiver, appointed to a company on foot of a floating charge, to pay preferential creditors. *Section 523* allows the court to waive this requirement. It is stated that the court may make an order providing that *section 440* should not apply in respect of payments made by the receiver out of the assets coming into his or her hands as receiver. Such an order can only be made if it would be likely to facilitate the survival of the company as a going concern. *Subsection (5)* allows those creditors whose debts are classified as preferential payments and who should be paid in priority to other debts, the opportunity to be heard before the court makes its decision. This *section 523* is drawn from section 6A of the Companies (Amendment) Act 1990, as inserted by section 17 of the Companies (Amendment) (No.2) Act 1999.

### **Chapter 3** Powers of examiner

*Section 524* sets out in detail the powers of the examiner and is based on section 7 of the Companies (Amendment) Act 1990, as amended. It states that any provision of the Act which applies to the rights and powers of a statutory auditor and the supplying of information to and co-operation with such auditor will apply to an examiner (with the necessary modifications). Examiners have the power to convene, set the agenda for and preside at meetings of the board of directors and general meetings of the company and may also propose motions or resolutions and give reports to such meetings. They are entitled to receive notice of and be heard at all meetings of the board of directors and general meetings of the company.

Under *subsections (5)* and *(6)*, the examiner may take whatever steps are necessary to halt, prevent or rectify the effects of any act, omission, course of conduct, decision or contract in relation to the income, assets or liabilities of the company which is or is likely to be to the detriment of the company, or any interested party. This power of the examiner is subject to the right of parties acquiring an interest in good faith and for value in such income, assets or liabilities of the company.

*Subsection (7)* provides that an application may be made at any stage to the court by the examiner for directions regarding any question arising in the examinership. The examiner may also apply to the court for the exercise in relation to the company of all or any of the powers which the court may exercise under this Act, namely those exercisable by it upon the application of any member, contributory, creditor or director of a company. *Subsection (8)* gives the examiner the power to ascertain and agree claims against the company, if so directed by the court.

*Subsection (9)* provides that no liability shall attach to an examiner, nor shall any professional or legal duty of an examiner be regarded as being contravened, by reason of compliance by the examiner with the provisions of this section. This subsection is new and corresponds with *section 385(6)* of *Part 6* of the Act which contains a similar provision in relation to auditors.

*Section 525* prohibits the examiner from repudiating a contract that has been entered into by the company prior to the period of court protection. However, an exception is provided for in relation to so called “negative pledges” in contracts. Subject to the service of notice, such contracts may be set

aside by an examiner for the period during which the company is under the protection of the court if, in the opinion of the examiner, their enforcement would prejudice the survival of the company. This section derives from section 7(5A), (5B) and (5C) of the Companies (Amendment) Act 1990, as inserted by section 18 of the Companies (Amendment) (No.2) Act 1999.

*Section 526* governs the production of documents and evidence and is taken from section 8 of the Companies (Amendment) Act 1990, as amended. The purpose of the section is to give broad powers to the examiner in relation to the evidence which may be required and the persons from whom he or she may obtain documentation and information.

Under *subsection (3)*, the examiner has powers in relation to the investigation of a director's bank accounts, into which money has been paid arising from any transaction, arrangement or agreement between the director and the company which is disclosable in the company's financial statements under the Act but which was not so disclosed, or any money which is connected with any act or omission on the director's part which would amount to "misconduct".

*Subsection (5)* provides that the examiner may examine, under oath, other persons in addition to the officers or agents of the company. The full definition of "officers" and "agents" is set out in *subsection (10)*. This includes bankers, solicitors and auditors.

*Subsections (6), (7) and (8)* provide that, if any person refuses to co-operate with the examiner under this section, the examiner may certify such refusal for the court. The court may in turn enquire into the matter and may make any order it sees fit.

*Subsection (9)* notes that *section 795* of the Act applies for the purposes of this section as it applies for the purposes of *Part 13* of the Act. *Section 795* gives a saving for privileged legal material.

*Section 527* states that no person shall be entitled as against the examiner to withhold possession of documents, deeds or records belonging to the company or to claim a lien over any such documents. This re-enacts section 244A of the Companies Act 1963, as applied to examinership by section 180(2) of the Companies Act 1990. The aim of the section is to ensure that advisors and other third parties cannot withhold possession of files or documents belonging to the company by exercising a lien over them as security for unpaid fees.

*Section 528* confers a wide discretion on the court to transfer some or all of the functions and powers of the directors of the company to the examiner. It derives from section 9 of the Companies (Amendment) Act 1990. *Subsection (2)* lists the matters to which the court will have regard when deciding if it is just and equitable to make an order under this section. Such matters include: the likelihood that the interests of the company, its employees or its creditors will be prejudiced; the necessity of preserving the assets of the company; whether the company itself or its directors have sought the order; or any other matter which the court thinks relevant.

*Subsection (3)* is straightforward and gives the court the latitude and leeway to do everything in its power to ensure that an order vesting powers and duties of the directors in the examiner is carried out.

Under *subsections (4) and (5)*, the court is given the same powers it would have in a winding-up/liquidation and the court is also allowed to give the examiner the same powers that a liquidator would have (if appointed by the court).

*Section 529* sets out the general rule that any liabilities incurred by the company during the protection period shall be treated as expenses of the examiner. This allows the company to continue to



trade during the period of court protection and has its origins in section 10 of the Companies (Amendment) Act 1990, as amended. *Subsection (2)* has been amended insofar as the examiner is now required to certify his or her expenses “in writing”.

*Section 530* allows the court to authorise the examiner to dispose of property and is drawn from section 11 of the Companies (Amendment) Act 1990, as amended. *Subsections (1)* and *(2)* enable the examiner to dispose of assets which are subject to fixed or floating charges or hire-purchase agreements where such a disposal is likely to facilitate the survival of the whole or any part of the company as a going concern.

If the assets are disposed of under *subsection (1)*, i.e. if they are subject to a floating charge, the holder of the charge will be deemed to have a corresponding security over any property of the company directly or indirectly representing the property disposed of. However, the proceeds received from the sale of property secured by a fixed charge, or of retained-title goods under *subsection (2)* shall be used to pay off whatever loans or debts they secure. This is an essential safeguard to ensure that the just entitlements of those who hold the charge or title in question are not compromised. If the proceeds of a disposal of property under *subsection (2)* are being used to pay off 2 or more loans or debts secured, this shall be done in order of the priority of the securities concerned.

Under *subsection (6)*, the examiner is required to notify the Registrar of the making of a court order authorising him or her to dispose of charged company property. Failure to comply with this requirement will be a category 4 offence under *subsection (7)*.

*Section 531* contains provisions concerning the notification of the appointment of the examiner and derives from section 12 of the Companies (Amendment) Act 1990, as amended. A petitioner is required to provide the Registrar with notice of the petition within 3 days of its presentation to the court. Subsequently, if appointed, the examiner must publish a notice of his or her appointment in the CRO Gazette and in 2 daily newspapers and must also supply to the Registrar a copy of the order appointing him or her. The time limits within which these requirements must be carried out are laid down in *subsection (3)*.

*Subsection (5)* provides that the company invoices, orders and business letters must mention after the company name that the company is “in examination”. Similarly, the company website and any company emails must contain a statement that the company is in examination under this Part, as specified under *subsection (6)*.

Breach of any of the requirements under this section constitutes a category 4 offence.

*Section 532* contains general provisions of a procedural and technical nature relating to the actions of the examiner. It derives from section 13 of the Companies (Amendment) Act 1990. Provision is made for the resignation, removal, replacement, title and validation of actions of examiners. *Subsections (6)*, *(7)* and *(8)* address the liability of examiners. Finally, *subsection (9)* provides that either the company or an interested party (i.e. a shareholder or creditor) may apply to the court for the determination of any question in relation to the performance by the examiner of his functions.

*Section 533* provides that where it appears to the court, from the report of the independent expert or otherwise, that there is evidence of irregularities (e.g. disappearance of stock) the court shall hold a hearing as soon as possible to consider and examine the evidence. This section is taken from section 13A of the Companies (Amendment) Act 1990, as inserted by section 21 of the Companies (Amendment) Act 1999.

*Subsection (2)* provides that the court can direct the examiner to prepare a report to assist the court in its hearing into the irregularities. *Subsections (3) to (7)* concern the supply of a copy of that report to various parties and allow certain information from the report to be redacted where the court so directs. *Subsection (8)* lists the persons entitled to appear and be heard at a hearing under this section and has been amended in that the Director of Corporate Enforcement is now included. Finally, *subsection (9)* provides that the court may make any order it sees fit under this section, including an order for a trial of any issue relating to the irregularities concerned.

*Section 534* derives from section 18 of the Companies (Amendment) Act 1990, as amended. It requires the examiner to formulate rescue proposals for the company as soon as practicable after his or her appointment, put these proposals to the creditors and members and report back to the court within 35 days of his or her appointment, or such longer period as the court may allow. If the court is satisfied that the examiner is unable to produce the report under this section within the 70 day period of examinership, the court may extend that period by not more than 30 days to enable the examiner to produce the report. If the examiner has submitted the report but the 70 day time period is about to expire, the court may extend the period as necessary to give the court time to make a decision about the proposals.

*Subsections (5) and (6)* list the parties to whom the examiner must supply a copy of the report under this section. *Subsection (6)(b)* is new and now includes the Director of Corporate Enforcement in this list of parties. The court may direct that certain parts of the report be omitted from it before it is supplied to any of the parties.

*Section 535* lays down the procedure to be followed where the examiner is unable to secure agreement or formulate proposals for a compromise or scheme of arrangement. It allows the examiner to apply to the court for direction in the matter and permits the court to give such directions as it sees fit. This includes allowing the court to order the winding up of the company. This section derives from section 18(9) of the Companies (Amendment) Act 1990, as inserted by section 22(d) of the Companies (Amendment) (No. 2) Act 1999.

*Section 536* gives details as to what the examiner's report must include. This section derives from section 19 of the Companies (Amendment) Act 1990.

*Section 537* comes from section 20 of the Companies (Amendment) Act 1990 and allows the company, subject to court approval, to either formally accept or to reject certain uncompleted contracts to which it is party. Such an option only arises where proposals for a compromise or scheme of arrangement are to be formulated in relation to the company. Under *subsection (2)*, any party to a contract which suffers loss or damage because it is repudiated becomes an unsecured creditor for the amount of such loss or damage. *Subsection (3)* follows on from the previous subsections by providing that the courts may hold a hearing and make an order determining the amount of any loss or damage sustained by a party through the company repudiating a contract. Where the court makes such an order, the amount will become a judgment debt. Under *subsection (4)*, an examiner is entitled to notice of any application to the court under this section and may also appear and be heard at the court hearing of the application. Finally, *subsection (5)* operates to give maximum flexibility to the court to enable it make whatever order it sees fit to give effect to the company's proposed affirmation or repudiation of the contract, as appropriate.

*Section 538* provides that the examiner may appoint a committee of creditors to help him or her perform his or her functions. Alternatively, the court may direct that such a committee be formed.

The committee will consist of not more than 5 members and it is specified under *subsection (2)* that the holders of the 3 largest unsecured claims will sit on the committee (if they are willing to serve). The committee is to be provided with a copy of any proposals devised by the examiner and is entitled to express an opinion on these proposals. Under *subsection (4)*, the examiner is obliged to meet with the committee as soon as practicable after the appointment of the committee. This section is an amended version of section 21 of the Companies (Amendment) Act 1990.

*Section 539* lays down the requirements as to what must be included in the proposals for a compromise or scheme or arrangement prepared by the examiner under this Part. The court may also direct that in preparing his or her proposals, the examiner shall include whatever provisions the court deems fit. Under *subsection (2)*, a statement of the assets and liabilities (contingent and prospective liabilities included) of the company as at the date of the examiner's proposals must be attached to the copy of the proposals which will be submitted to the meetings of members and creditors under *section 540*. *Subsection (3)* makes it necessary to provide the examiner's estimate of what would be the outcome if the company were to be wound up insofar as each class of member or creditor is concerned. This will enable the alternative outcomes to be compared and informed decisions taken.

*Subsection (5)* contains, in effect, a definition of what is meant by a creditor's claim against a company being impaired. This also applies for the purposes of *sections 541 to 543*. A creditor's claim against a company is impaired if he receives less in payment of his claim than the full amount due in respect of the claim at the date of the presentation of the petition for the appointment of the examiner. *Subsection (6)* follows on from this and provides a definition for what is meant by the interests of a member of a company being impaired.

This section has its origins in section 22 of the Companies (Amendment) Act 1990.

*Section 540* provides that where creditors and members are consulted on proposals, certain rules must be obeyed in regard to voting at the meeting or meetings convened for the purpose. This section has its origins in section 23 of the Companies (Amendment) Act 1990, as amended. The meetings under this section can be of members or creditors of the company or any class of members or creditors of the company. Under *subsection (3)*, modifications to the examiner's proposals can be put to any of the meetings at which these are discussed. However, any such modifications may only be accepted with the consent of the examiner.

At a meeting of creditors, or a class of creditors, a proposal will be deemed to have been accepted if it is approved by a majority in number representing a majority in value of the claims represented at that meeting, whether voting in person or by proxy. *Subsection (5)* specifies that, where a creditor abstains from voting or fails to vote, this shall not be regarded as a vote against the proposals. As per the amendment introduced by section 23(b) of the Companies (Amendment) (No.2) Act 1999, the members of the company cannot veto the proposals.

*Subsection (6)* is designed to ensure that the State as a creditor, particularly in the form of the Revenue Commissioners, should be entitled to accept the proposals and participate fully in a rescue scheme without any question that such participation might be precluded under some other general statute.

*Subsection (9)* applies certain parts of *section 452* of the Act (concerning information in relation to the compromise or scheme of arrangement) subject to the modifications laid down in *subsection (10)*. *Subsection (11)* provides that every notice of a meeting under this section sent to a member or creditor shall be accompanied by a statement explaining the effect of the proposed compromise or scheme of arrangement. In particular, any material interests of the directors of the company and the effect thereon of the compromise or arrangement must be outlined.

Under *subsection (12)*, the Central Bank is also given an opportunity to consider the proposals for a compromise or scheme of arrangement where the company concerned is one mentioned in *section 510(3) or (4)* of the Act.

*Section 541* governs the court's consideration of the rescue proposals and derives from section 24 of the Companies (Amendment) Act 1990, as amended. It provides that the report of an examiner under *section 534* shall be set down for consideration by the court as soon as possible after it has been received. *Subsection (2)* lists the parties that are entitled to be heard at the court's hearing of the proposals. The court can confirm, confirm subject to modifications or refuse to confirm the proposals for a compromise or scheme of arrangement drawn up by the examiner. The rights conferred on the court however are not absolute and are subject to the provisions of this section and *sections 542 and 543*.

*Subsections (4) and (5)* set down the circumstances in which the court is permitted to confirm the examiner's proposals. It is necessary that at least one class of creditors whose interests or claims would be impaired by the compromise or arrangement has accepted the proposals and the court must be satisfied that the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposal. In addition, a new requirement that the proposal must also not be unfairly prejudicial to the interests of any interested party has been inserted. Furthermore, the effect of the proposal must not be to avoid the payment of tax due. Under *subsection (5)*, the proposals must now not have the effect of impairing the interests of the creditors of the company in such a manner as to "unfairly" favour the interests of the creditors or members of any company to which the company is related.

*Subsection (6)* provides that where the court confirms the proposals, with or without modifications, the proposals at that stage become binding on all the members or classes of members affected by the proposals and also on the company. *Subsection (7)* makes similar provision for creditors and classes of creditors – in this case, notwithstanding any enactment, the proposals shall be binding on all the creditors or classes of creditors affected by the proposals in respect of any claims against the company and against any other person who is liable to pay all or part of the debts of the company.

*Section 542* contains supplemental provisions in relation to the confirmation of proposals under *section 541* and is also drawn from section 24 of the Companies (Amendment) Act 1990, as amended. Under *subsection (1)*, where an examiner has included recommendations in his proposals regarding the amendment of the constitution of the company, this subsection provides that any alterations, additions or deletions from the constitution contained in the proposals come into effect on a date specified by the court, once the proposals have been confirmed by the court.

The court is allowed to make such orders for the implementation of its decisions as it deems fit and it is given certain powers to fix the date from which the proposals as confirmed by it shall be deemed to commence. However, in the absence of a definite direction in the matter, the compromise or arrangement will be deemed to come into effect 21 days after it has been confirmed by the court. The court has the discretion to delay the effect of a scheme of arrangement past 21 days after the confirmation, where it is appropriate. A copy of the proposals confirmed by the court, and any order made by the court under this section, must be delivered by the examiner, or any other person so directed by the court, to the Registrar. If the court refuses to confirm the proposals, it may order the winding-up of the company (or any other order it sees fit) under *subsection (5)*.

*Subsection (6)(a)* derives from section 24(12) C(A)A 1990, as amended and provides that the examiner is entitled to include in his or her report proposals which do not involve the impairment of the interests of members or creditors of the company. This would enable an examiner to draw up proposals where his examination found the company was in better shape than expected, and it was not actually necessary to impair the interests of members or creditors.

*Subsection (6)(b)* is new and has been inserted as a result of the High Court judgment in *Re McEnaney Construction Ltd* [2008] IEHC 43. There, Finlay-Geoghegan J. held that she could not approve a scheme of arrangement which included a provision to cancel issued paid up shares unless the consequential reduction of share capital of the company was expressly authorised by the legislation. Given that a court should be in a position to authorise a reduction of capital in a scheme of arrangement or compromise, *subsection (6)(b)* has been inserted accordingly. A proviso is included in *subsection (7)* in that the court may not approve a proposal which reduces company capital where such a reduction would result in an amount of company capital which is “manifestly inadequate”. Alternatively, the court may confirm the proposals subject to a modification that a lower level of reduction shall have effect. In making its determination under this subsection, the court is to have regard to the scale and nature of the business carried on by the company and also the likely liabilities which the company will incur on an on-going basis after the period of protection has ended.

*Subsection (8)* is also newly inserted. Its purpose is to clarify that acceptance by a class of creditors or members of proposals means the acceptance of the proposals by the passing of a resolution by the requisite majority at the relevant meeting held. The requisite majority in the case of creditors is to be found at *section 540(4)* and the requisite majority for members is laid down in *section 191(1)*.

*Section 543* lays down the grounds on which members or creditors whose interests would be impaired by the examiner's proposal may object to the confirmation of the proposals by the court. It is taken from section 25 of the Companies (Amendment) Act 1990, as amended. The grounds on which members and creditors are able to object before the courts are specifically circumscribed under *subsection (1)*. *Subsection (2)* contains the two grounds on which a person who has voted to accept the proposals at the meeting of creditors or members respectively may object to their confirmation by the court. The two grounds on which they can base their objections are:- that the acceptance was obtained by improper means; or, that after voting to accept the proposals he became aware that the proposals were put forward for an improper purpose.

*Subsection (3)* effectively gives the court the right to make whatever order it considers proper where it is of the opinion that an objection under either of the two previous subsections should be upheld. It is specifically provided that the court may order that the decision of the meeting of the creditors or members be set aside or that any meeting be reconvened.

*Section 544* contains provisions with respect to leases and derives from section 25B of the Companies (Amendment) Act 1990, as inserted by section 26 of the Companies (Amendment) (No.2) Act 1999. *Subsection (1)(a)* ensures that a compromise or scheme of arrangement shall not contain any provision in respect of a lease of land which reduces the amount of any rent or other periodic payment due after the coming into effect of the compromise or scheme of arrangement or which cancels the right of the lessor to such payment. The effect of this is to protect a lessor from having to accept reduced rents into the future. *Subsection (1)(b)* provides for a situation where there may be a failure by the company to pay any rent or other periodic payment or to comply with any covenant or other obligation under a lease of land. In such a case, the examiners' proposals cannot contain any restriction which would prohibit the lessor from (i) exercising the right to recover possession of the land; (ii) effecting a forfeiture on the lease or otherwise entering on the land; (iii) recovering the amount of rent or other payment; or (iv) claiming damages or other relief.

Under *subsection (2)*, a proposal will not satisfy the condition that it must not unfairly prejudice the interests of any interested party (and therefore cannot be approved by the court) if the proposal contains a provision in relation to a lease or hiring of property other than land where the value of that property is substantial and that provision in the proposal has the same effect as a provision referred to in *subsection (1)(a)* or *(b)* of this section. *Subsection (4)* gives guidance to the court on how to decide whether the value of a property is “substantial”.

*Subsection (3)* provides by way of exception to *subsections (1) or (2)* that a lessor may accept (in writing) a reduced rent for a future period, and such acceptance should be included in the compromise or scheme of arrangement.

## Chapter 4

### Liability of third parties for debts of a company in examination

*Section 545* highlights what provisions are contained in this Chapter, namely in relation to the liability of third parties for debts of a company in examination. The provisions in this Chapter derive from section 25A of the Companies (Amendment) Act 1990, as inserted by section 25 of the Companies (Amendment) (No.2) Act 1999. The provisions have been split up into a number of sections for the sake of clarity.

*Section 546* contains definitions for the purposes of this Chapter, including definitions for “creditor”, “debt”, “liability” and “third person”.

*Section 547* provides that the subsequent provisions of this Chapter have effect in relation to the liability of any third person (under a guarantee or otherwise) in respect of a debt of a company (in examinership) owed to a creditor.

*Section 548* provides that the liability of a third party will not be affected by the fact that a compromise or scheme of arrangement has taken effect. Thus, the approval of a compromise or scheme of arrangement will not affect a creditor's right to recover any loss incurred, due to a write down imposed under such a compromise or scheme of arrangement, from a guarantor under a third party guarantee. However, *subsection (2)* respects the freedom of the third person and the creditor to come to some other arrangements by mutual agreement.

*Subsection (3)* states that the provisions referred to in *subsection (1)* and the remainder of this Chapter will not apply if the third person (i.e. the guarantor) is a company to which an examiner has also been appointed. The purpose of this is to ensure that the examiner, in drawing up the proposal, and the court in subsequently considering the proposals, are not constrained in the course of action they may take.

This *section 548* is taken from section 25A(1)(a) & (b) of the Companies (Amendment) Act 1990, as inserted by section 25 of the Companies (Amendment) (No.2) Act 1999.

*Section 549* provides that where a creditor proposes to enforce a guarantee, any rights the creditor has to vote on a scheme of arrangement that is associated with the particular debt in question shall first be offered to the guarantor (i.e. third party). This section is drawn from section 25A(1)(c) of the Companies (Amendment) Act 1990, as inserted by section 25 of the Companies (Amendment) (No.2) Act 1999.

*Subsection (3)* contains a simplified mechanism to the effect that the offer to transfer the vote made by the creditor can be accepted by the third party and then operate without any further legalities and will be accepted by the examiner at the meeting. It is made clear that the transfer of a vote under this section shall not in any way prejudice the right of the creditor to object to proposals under *section 544*.

*Subsection (5)* provides for a situation where the creditor fails to offer voting rights to the guarantor. In such circumstances a creditor will not be entitled to enforce by legal proceedings or otherwise the obligations of the guarantor in respect of the liability. This subsection will not apply if a compromise or scheme of arrangement is not entered into. The creditor will however need to get the approval of the court before enforcing the guarantee. This will act as a protection to a guarantor in such circumstances.

*Section 550* applies where the third person has made a payment to the creditor after the period of protection has expired. In such circumstances it is provided that any payment due to the creditor under the compromise or scheme of arrangement will be paid to the guarantor under the same terms and conditions that would have applied to the creditor if the guarantee had not been enforced. This section derives from section 25A(1)(d) of the Companies (Amendment) Act 1990, as inserted by section 25 of the Companies (Amendment) (No.2) Act 1999.

*Section 551* contains a saver to the effect that nothing in this Chapter shall affect the operation of *section 520(4)(f)* (which provides that the enforcement of a guarantee is frozen while the company is under the protection of the court). Similarly, nothing in this Chapter will affect the circumstance laid down in *section 551(b)* – namely where by an operation of any rule of law, a discharge or release of the third person's liability to the creditor occurs. This is drawn from section 25A(2) of the Companies (Amendment) Act 1990, as inserted by section 25 of the Companies (Amendment) (No.2) Act 1999.

## **Chapter 5** Conclusion of examinership

*Section 552* provides for the circumstances in which the protection afforded to the company will cease – namely the coming into effect of a compromise or scheme of arrangement; or on an earlier date so directed by the court. This derives from section 26 of the Companies (Amendment) Act 1990. Usually, the maximum length of time for an examiner's involvement will be 70 days (with a possible extension of 30 days). However, it is felt that there is no reason to prolong unnecessarily the involvement of the examiner in a case where it is possible for the work to be done much more quickly. *Subsection (2)* provides that once a company ceases to be under the protection of the court, the examiner's appointment terminates. The date of the termination is deemed to be the date of the cessation of the protection of the court.

*Section 553* is an important saver for any of the parties who may be involved in a company rescue under this Part. It is taken from section 27 of the Companies (Amendment) Act 1990, as amended. If the company or any interested party discovers that the scheme of arrangement or compromise was procured by fraud, then, within 180 days (6 months) after the confirmation of the proposals by the court, it can apply to the court to have the confirmation revoked. If it is so revoked, a certified copy of the order must be sent to the Registrar, the Central Bank (where appropriate) and the Director of Corporate Enforcement. The court may also direct that it be forwarded to any other person.

*Section 554* deals with the costs and remuneration of examiners and has its origins in section 29 of the Companies (Amendment) Act 1990, as amended. *Subsection (1)* simply provides that the court may from time to time make such orders as it thinks proper for payment of the remuneration and costs of, and reasonable expenses properly incurred by, the examiner. This is similar to the powers exercisable by the court in relation to a liquidator appointed by the court.

*Subsection (2)* stipulates that, unless the courts otherwise order, the remuneration, costs and expenses of the examiner shall be paid and the examiner shall be indemnified in respect of these expenses out of the revenue of the business of the company. Alternatively, the expenses can be met out of the realisation of the assets of the company, including investments. Thus, the remuneration, costs and expenses of the examiner will be met out of the company as a going concern or if it has to go into receivership or liquidation, out of the monies realised in the receivership or winding up of the company.

*Subsection (3)* makes specific provision for which debts are to be given priority by distinguishing between the actual expenses of the examiner *per se*, and those expenses which an examiner certifies as payable under *section 529* of the Act. The examiner is to be paid in full and before any other claim under any compromise or scheme or arrangement or in any receivership or winding up. *Subsection (4)* deals with the expenses incurred by the company which have been certified by the examiner – such expenses should be paid in full but not ahead of any claim secured by a mortgage, charge, lien or other encumbrance of a fixed nature. The expenses detailed in *subsections (3) and (4)* are to be given priority to those of the official liquidator of that company if the company is subsequently wound up.

Under *subsection (6)*, the examiner will be entitled to secure the assistance of other persons to enable him carry out his functions. However, *subsection (7)* requires him or her, as far as possible, to use the existing staff and facilities of the company concerned. When considering any matters relating to costs expenses or remuneration of an examiner, the court shall have particular regard to this particular proviso.

*Section 555* makes provision for the publication in the CRO Gazette of orders made under *section 534* (Hearing regarding irregularities), *section 541* (Confirmation of proposals) or *section 553* (Revocation of confirmation of proposals) of this Part. Failure to comply with the provisions of this section results in a category 4 offence. This section derives from section 30 of the Companies (Amendment) Act 1990, as amended.

*Section 556* re-enacts section 31 of the Companies (Amendment) Act 1990 and provides that proceedings under this Part may be held otherwise than in public if the court considers that interests of justice or of the company or of its creditors so require.

*Section 557* allows the court to make an order to return assets which have been improperly transferred and is taken from section 139 of the Companies Act 1990, as applied to examiners by section 180(2) CA 1990. If it can be shown to the satisfaction of the court that the effect of the disposal of any property of a company under court protection was to perpetrate a fraud on the company, its creditors or members, the court may order the return of that property or order the payment of a sum in respect of it to the examiner. These provisions do not apply to assets transferred with a view to giving an unfair preference described under *section 604* of the Act. When making a decision under this section, the court is to have regard to the rights of persons who have bona fide and for value acquired an interest in the property in question.

*Section 558* applies section 58 of the Company Law Enforcement Act 2001 to examiners. It provides that professional bodies must report to the Director of Corporate Enforcement if they find that a member of the body concerned has not kept proper records in relation to an examinership they are conducting, or if the professional body believes that such a member has committed a category 1 or 2 offence during the course of the examinership. The professional body itself and/or any relevant officer thereof will be guilty of a category 3 offence for failure to comply with this section.



## **Part 11 – Winding Up**

### *Preliminary Note*

*Part 11* consolidates and modernises the law relating to the winding up of companies. In the first instance, the law relating to winding up has been reordered in a more logically coherent way. *Part 11* also seeks to introduce greater consistency between the three different methods of winding up (members' voluntary, creditors' voluntary and court ordered). This is most evident in the changes to the court-initiated mode of winding up (court ordered liquidation). Broadly, the approach has been to place court ordered windings-up on the same footing as creditors' voluntary windings-up once the order for winding up is made, thereby reducing the court's supervisory role in favour of greater involvement for creditors.

*Chapter 1* provides interpretation for the Part as a whole.

*Chapter 2* deals with winding up by the court. It introduces various reforms including *section 569(g)* which states that the Director of Corporate Enforcement will have the right to petition the court to have a company wound up on the grounds that it is in the public interest to do so. The minimum amount of indebtedness to entitle a creditor to serve a statutory demand is increased to €10,000 in *section 570* from the old amount of €1,269.74. Further to a recommendation of the CLRG in its second report in 2004, large numbers of small creditors are now permitted to jointly petition for the winding up of a company where the combined debts total €20,000 or more. Such small creditors would otherwise be unable to petition individually due to costs associated with presenting a petition to court.

*Chapter 3* is concerned with members' voluntary winding up. It sets out the procedure in relation to the alternative means of commencing a members' voluntary winding up. A members' voluntary winding up (except in the most unusual of cases, such as fixed duration companies) will now be commenced in accordance with the Summary Approval Procedure. Where a company has passed a resolution for its voluntary winding up, it must publish a notice of that resolution in *Iris Oifigiúil* within 14 days of it passing. Protections and remedies for shareholders are contained here in cases where a declaration of solvency is made by the directors of a company.

*Chapter 4* deals with the resolution for and commencement of a creditors' voluntary winding up. The procedure for the appointment of a liquidator is set out in this Chapter.

*Chapter 5* deals with the conduct of a winding up whether voluntary or court ordered.

*Chapter 6* is concerned with the realisation of assets and related matters.

*Chapter 7* concerns the distribution of the assets of the company among the creditors. *Section 617* sets out the order of priority of costs, charges and expenses properly incurred in a winding up. This is now a provision common to all modes of winding up. *Section 623* sets out a common process for dealing with unclaimed dividends which applies to all modes of winding up.

*Chapter 8* contains new provisions and sets out the powers and duties of liquidators. A provisional liquidator will only have such powers as are provided for by the court appointing him or her. Liquidators are given specific powers under *section 627*. For the first time liquidators will be required to be qualified (member of prescribed accountancy body, practising solicitor, other professional body recognised by IAASA, person qualified in another EEA state or persons with suitable experience). *Section 646* introduces a common approach to the determination of a liquidator's remuneration for the various modes of winding up.

*Chapter 9* governs the area of contributories. The liquidator is given increased powers in this Chapter. For example, in *sections 656 and 657* the liquidator now has the power to settle the list of contributories and to make calls on contributories in respect of the debts and liabilities.

*Chapter 10* deals with committees of inspection. *Section 666* is new and provides for the committee of inspection in a court winding up to be established on the initiative of the liquidator or a minimum proportion in value of the creditors, without requiring court sanction.

*Chapter 11* concerns the powers of the court in a winding up.

*Chapter 12* contains other necessary provisions supplemental to the conduct of a winding up.

*Chapter 13* sets out the general rules as to meetings of members, contributories and creditors of a company in liquidation. It incorporates a number of provisions which were previously contained in the Rules of the Superior Courts.

*Chapter 14* deals with the completion of a winding up. *Section 704* is new and deals with the dissolution of a company by the court. The method of dissolution required in a creditors' voluntary winding up is also applied to a court ordered winding up unless the court orders the liquidator to return to the court at the end of the winding up.

*Chapter 15* contains provisions related to the Insolvency Regulation. This largely reproduces the relevant provisions of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002).

*Chapter 16* sets out the offences by officers of companies in liquidation, offences of fraudulent trading and certain other offences including referrals to the Director of Public Prosecutions.

## *Explanatory Memorandum*

### **Chapter 1**

#### Preliminary and interpretation

*Section 559* deals with interpretation for *Part 11*. The definition of contributory is a re-enactment of section 208 of the Companies Act 1963. The definition of a "members' voluntary winding-up" is derived from section 256(11) of the CA 1963. The definition of a "creditors' voluntary winding-up" is derived from section 256(11) of the CA 1963. The definition of a "connected person" is derived from sections 286(5) and 288(4) of the CA 1963 which formerly duplicated each other.

The definition of "property" is new. It extends beyond common law and equitable concepts of property to the proceeds of any statutory rights conferred upon the liquidator or company by this Act, which may not otherwise as a matter of statutory interpretation confer a "property" right. The definition of "provisional liquidator" is also new.

*Section 560* re-enacts section 343A of the Companies Act 1963 and states that *Part 11* is subject to Chapters I (general provisions) and III (secondary insolvency proceedings) of the Insolvency Regulation.

*Section 561* states that the winding up of a company may be by the court or voluntarily. This section is taken from section 206 of the Companies Act 1963.

*Section 562* provides a general statement as to the position under the Act with regard to the types of voluntary winding up. The voluntary winding up of a company may be either a members' voluntary winding up or a creditors' voluntary winding up.

*Section 563* stems from section 206 of the Companies Act 1963 and states that the provisions of this Part relating to winding up apply unless the contrary appears.

*Section 564* provides that the court will have jurisdiction to wind up a company. This section is drawn from section 212 of the Companies Act 1963. It also states that the 'rule making authority' in this section means the powers under section 36 of the Courts of Justice Act 1924 and section 68 of the Courts of Justice Act 1936.

*Section 565* states that any powers conferred on the court by this Act are in addition to, and not in restriction of, any existing powers of instituting proceedings against any contributory or debtor of the company or the estate of any contributor or debtor, for the recovery of any call or other sums. This section re-enacts section 248 of the Companies Act 1963.

*Section 566* provides that the court may have regard to the wishes of creditors and contributories. This section re-enacts section 309 of the Companies Act 1963.

*Section 567* re-enacts section 251 of the Companies Act 1990, as amended by section 54 of the Company Law Enforcement Act 2001. The effect of this section is to allow the Director of Corporate Enforcement and individual creditors and contributories to invoke various remedies against delinquent directors and officers which would otherwise be exercisable only in a winding up. In order to avail of *section 567*, the applicant must satisfy the court that a judgment decree or court order has been returned unsatisfied or that the company is otherwise unable to pay its debts, and that the reason or main reason why the company has not been wound up is that there are insufficient assets (i.e. that there would not be enough assets in a winding up to even meet the costs and expenses of a liquidator).

If the proceedings are successful, the court may determine which persons are to receive the benefit of any financial awards made by it. *Subsection (7)* provides that a person having a claim against the company has 30 days from the date of judgment to apply for a share in the award.

## **Chapter 2** Winding up by court

*Section 568* is a new section and states that, save to the extent that it is otherwise expressly provided, each provision of *Chapter 2* applies only to a court ordered winding up.

*Section 569* sets out the circumstances in which a company may be wound up by the court. This section derives from section 213 of the Companies Act 1963, as amended by section 3 of the Companies (Amendment) Act 1983, section 260 of the Companies Act 1990, Regulation 11 of the European Communities (Single Member Private Limited Companies) Regulations 1994 and section 93 of the Company Law Enforcement Act 2001. *Subsection (g)* is new and gives the Director of Corporate Enforcement the right to petition to have a company wound up on the grounds that it is in the public interest to do so. This replicates a power that has been available and utilised in the United Kingdom for a number of years. Such power would be exercised by an officer of the Director of

Corporate Enforcement with the appropriate delegated power, and all the normal procedures and protections that come with an official winding up apply in such cases.

*Section 570* derives from section 214 of the Companies Act 1963 as amended by section 123 of the Companies Act 1990. It sets out the four circumstances in which a company will be deemed to be unable to pay its debts. In *paragraph (a)*, the minimum amount of indebtedness to entitle a creditor to serve a statutory demand is increased to €10,000 from the previous level of €1,269.74. *Paragraph (b)* is new. It seeks to enable petitions for winding up by creditors where there are large numbers of small creditors who would otherwise be unable to petition individually.

*Section 571* sets out the provisions as to applications for winding up. An application to the court for the winding up of a company shall be by petition presented either by the company or by any creditor or creditors, contributory or contributories or by all those parties, together or separately. This section re-enacts section 215 of the Companies Act 1963 as amended by section 3 of the Companies (Amendment) Act 1983, Schedule 3 Part 1 of the Companies (Amendment) Act 1983 and Schedule 1 Paragraph 18 of the Companies Amendments Act 1983 and section 94 of the Company Law Enforcement Act 2001. *Subsection (4)* is new and names the Director of Corporate Enforcement as an applicant upon the grounds detailed in *section 569(1)(g)* i.e. if the court is satisfied that it is in the public interest to wind up a company.

*Section 572* details the powers of the court on hearing the petition. *Subsection (1)* re-enacts section 216 of the Companies Act 1963, as amended by Schedule 3 of the Companies (Amendment) Act 1983. *Subsections (2)* and *(3)* reproduce the new subsections inserted by section 233 of the National Asset Management Agency Act 2009. *Subsection (4)* is new. It empowers the court to provide that, in the circumstances set out in any of paragraphs *(a)*, *(b)*, *(c)*, *(e)*, or *(f)* of *section 570(1)*, the court may order that the company be wound up as if it were a members' voluntary winding up. *Subsection (5)* incorporates the substance of Order 74 rule 18 of the Rules of the Superior Courts (RSC).

*Section 573* re-enacts section 226(1) of the Companies Act 1963. An application to appoint a provisional liquidator may be made at any time after the presentation of a winding up petition and before the first appointment of a liquidator.

*Section 574* re-enacts section 217 of the Companies Act 1963. It provides that the court may, in the period between the presentation of the winding up petition and the making of a winding up order, stay or restrain the proceedings accordingly on such terms and for such period as it thinks fit.

*Section 575* provides for the appointment of a liquidator or liquidators by the court. This stems from section 225 of the Companies Act 1963.

*Section 576* provides that an order for winding up shall operate in favour of all the creditors and of all the contributories of the company, as if made on the joint petition of a creditor and of a contributory. This derives from section 223 of the Companies Act 1963.

*Section 577* provides a saving for creditors and contributories and re-enacts section 282 of the Companies Act 1963. The mere fact that the company is in voluntary liquidation is not a bar to it being wound up by the court. In the case of an application by the contributory, the court must be

satisfied that the rights of the contributories will be prejudiced by a voluntary winding up, were it allowed to continue.

### **Chapter 3** Members' voluntary winding up

*Section 578* is a new section and states that, save to the extent that the provision expressly provides otherwise, each provision of *Chapter 3* applies only to a members' voluntary winding up.

*Section 579* sets out the procedure for the commencement of a members' voluntary winding up. *Subsection (1)* is new and states that a company may be wound up voluntarily as a members' voluntary winding up. Initiation of a members' voluntary winding up is effected by use of the Summary Approval Procedure as set out in *Chapter 7* in *Part 4* of the Act (*subsection (2)*). *Subsection (3)* stems from section 251 of the Companies Act 1963. As an alternative to the employment of the Summary Approval Procedure, a members' voluntary winding up may be commenced in accordance with *section 580* on either the expiry of the period (if any) that is fixed for the duration of a company by its constitution, or should such happen on the occurrence of the event upon which a company's constitution provides that the company is to be dissolved.

*Section 580* deals with alternative means of commencing members' voluntary winding up. If it falls under *section 579(3)*, a members' voluntary winding up may be commenced if the company in a general meeting has passed a resolution that the company be wound up voluntarily and the other provisions of this section are complied with. *Subsection (2)* states that where in either of the instances mentioned in *section 579(3)* it is proposed to wind up a company voluntarily, the directors may make a declaration to the effect that they have made a full enquiry into the affairs of the company and that they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up.

*Subsection (3)* states that a declaration of the directors will have no effect unless it is made at a meeting of directors held not earlier than 30 days before (i) the date of the meeting referred to in *subsection (1)* or (ii) if the resolution is passed by the means provided under *section 193* or *194*, the date of the signing of the resolution by the last member to sign. To be valid, the declaration must also state the company assets and liabilities as at the last practicable date before the making of the declaration, and in any event not more than 3 months before the date of making the declaration. It must also be accompanied by a report by a qualified person stating whether, in the opinion of that person, the declaration is not unreasonable. Furthermore, the company must have forwarded a copy of the declaration with each notice of the meeting at which the resolution is to be considered. Alternatively, if the means referred to in *section 193* or *194* for passing the resolution is followed, the company must have appended to the resolution a copy of the declaration. Finally, the company must have delivered within 14 days after the commencement of the members' voluntary winding up a copy of the declaration to the Registrar. *Subsection (6)* is new and states that a members' voluntary winding up may be carried on before the expiration of those 14 days allowed for delivery to the Registrar of the declaration, but, if the declaration is not delivered by the end of the 14 days, the carrying on of the winding up will be invalidated. This section is drawn from section 256 of the Companies Act 1963, inserted by section 128 of the Companies (Amendment) Act 1990.

*Section 581* provides that where a company has passed a resolution for its voluntary winding up it shall within 14 days after the date of the passing of the resolution, give notice of the resolution by advertisement in *Iris Oifigiúil*. This section derives from section 252 of the Companies Act 1963.

*Section 582* deals with protections and remedies for creditors in cases where a declaration of solvency is made. *Subsection (2)* provides that, if on application to it by a creditor of the company, the court (a) is satisfied that such creditor, together with any creditors supporting him or her in the application, represents one-fifth at least in number or value of the creditors of the company; and (b) is of the opinion that it is unlikely that the company will be able to pay its debts or liabilities within the period specified in the declaration concerned referred to in *section 207* and *580(2)*, the court may order that all the provisions of this Act relating to a creditors' voluntary winding up shall apply to the winding up of the company. An application under *subsection (2)* shall be made within 30 days after the date on which the resolution for voluntary winding up of the company has been advertised under *section 581(1)*. This section is drawn from section 256 of the Companies Act 1963, inserted by section 128 of the Companies (Amendment) Act 1990.

*Section 583* makes provision for the appointment of one or more liquidators by the company in a general meeting. This derives from section 258 of the Companies Act 1963.

*Section 584* imposes a duty on the liquidator to call a creditors' meeting if at any time in the course of the members' voluntary winding up he or she is of the opinion that the company will not be able to pay its debts in full within the time specified in the declaration made by the directors referred to in *section 207* or *580 (2)*. The liquidator shall cause notice of the creditors' meeting to be advertised in *Iris Oifigiúil* and not the CRO Gazette as under existing law. He or she must lay before the creditors a statement of the company's affairs. From the date on which the creditors' meeting is held under this section, the winding up shall become a creditors' voluntary winding up and any appointment made or committee established by the creditors' meeting shall be deemed to have been made or established by that meeting so mentioned. This section derives from section 261 of the Companies Act 1963 as substituted by section 129 of the Companies Act 1990.

## **Chapter 4**

### **Creditors' voluntary winding up**

*Section 585* is a new section and states that, save as otherwise provided, each provision of *Chapter 4* applies only to a creditors' voluntary winding up.

*Section 586* sets out the procedure for the commencement of a creditors' voluntary winding up. *Subsection (1)* is new and states that a company may be wound up voluntarily as a creditors' voluntary winding-up. *Subsection (2)* derives from paragraph 251(1)(c) of the Companies Act 1963 and states that where a company is insolvent, that company can resolve at a general meeting to wind up. The members must pass a resolution at which it is declared that the company is unable to pay its debts as they fall due.

*Subsection (3)* provides for the three circumstances (other than those referred to in *subsection (2)*) in which a company is liable to be wound up as a creditors' voluntary winding up. These are (a) if a creditors' meeting is held in accordance with *section 584*; (b) if the court makes an order under *section 582(2)*; or (c) if the declaration referred to in *section 207* or *580(2)* is not made in accordance with the relevant provisions of *Chapter 7* of *Part 4* or *section 580*, as the case may be.

*Subsections (4), (5) and (6)* are new. They provide for the publication of a notice of the resolution to wind up a company by creditors' voluntary winding up. If default is made in complying with this publication requirement in *Iris Oifigiúil*, the company and any officer of it who is in default shall be guilty of a category 3 offence. The liquidator for these purposes shall be deemed to be an officer of the company.

*Section 587* contains provisions which govern the meeting of creditors. This section derives from section 266 of the Companies Act 1963 as amended by section 130 of the Companies Act 1990. *Subsection (1)* and *(2)* stem from section 266(1) of the CA 1963. These sections provide that a creditors' meeting must be held on the same day or the next day following the members' general meeting. Notices of the creditors' meeting must be sent to the creditors at least 10 days before the date of the meeting. *Subsection (3)* is new. It details the contents of the notice under *subsection (2)*. *Subsections (4)* and *(5)* are new. They provide, in the event that a copy of the list of creditors is not provided to a person with the notice of the meeting, that the person may inspect or obtain a copy of the list upon written request. *Subsections (6)* to *(9)* re-enact sections 266(2) to (5) of the CA 1963. *Subsections (10)* and *(11)* are the offence provisions and replace section 266(6) of the CA 1963.

*Section 588* deals with the appointment of a liquidator. It has its origins in section 267 of the Companies Act 1963 as amended by section 47 of the Company Law Enforcement Act 2001. This section only applies to the initial appointment of a liquidator. *Subsection (2)* provides that, if the creditors and the company nominate different persons, the person nominated by the creditors will be the liquidator; and if no person is nominated by the creditors then the person (if any) nominated by the company will be the liquidator. *Subsection (4)* and *(5)* provide for circumstances where different persons are nominated as liquidator. Any director, member or creditor may within 14 days after the date on which the nomination was made apply to the court for an order directing that the person nominated as liquidator by the company shall be liquidator instead of the person nominated by the creditors; or appointing some other person to be liquidator instead of the person nominated by the creditors. *Subsection (6)* provides that, in the case of a resolution to appoint the creditors' nominee as liquidator at a meeting of creditors mentioned in *section 587*, such a resolution shall be deemed to be passed when a majority of the creditors present personally or by proxy and voting on the resolution have voted in favour of the resolution.

## **Chapter 5**

### Conduct of a winding up

*Section 589* derives from section 220 of the Companies Act 1963 and deals with the commencement of a court ordered winding up. *Subsection (1)* states that the date of the commencement of a winding up by the court relates back to the date of the presentation of the petition. *Subsection (2)* states that if the company was previously in voluntary winding up, the date of the commencement of the winding up is the date of the winding up resolution, even where the resolution was passed after the presentation of the petition and before the date of the making of the winding up order.

*Section 590* states that a voluntary winding up shall be deemed to commence at the time of the passing of the resolution for a voluntary winding up.

*Section 591* contains provisions requiring a copy of the order for winding up or appointment of a liquidator to be forwarded to the Registrar. *Subsection (1)(a)* stipulates that the obligation to furnish to the Registrar particulars of the winding up order on the making of a winding up order rests with such officer of the court as may be prescribed or directed by the court. *Subsection (1)(b)* incorporates a modified version of Order 74 rule 22 RSC and provides that a copy of the order shall be served by the petitioner or such other person as the court may direct upon the company at its registered office, or if there is no registered office or notice has not been given to the Registrar of such office, at its principal or last known principal place of business or upon such other person or persons or in such other manner as the court may direct. *Subsection (2)* replaces section 227(1) of the

Companies Act 1963. The obligation to deliver notice now rests with the officer of the court, rather than the liquidator.

*Section 592* contains provisions that relate to the giving of notice by a liquidator of his or her appointment in the case of a voluntary winding up and re-enacts section 278 of the Companies Act 1963, as amended by section 48 of the Company Law Enforcement Act 2001. The liquidator must, within 14 days of his or her appointment, deliver to the Registrar a notice of his or her appointment and the Registrar must forward a copy of the notice of appointment to the Director of Corporate Enforcement.

*Section 593* derives from section 224 of the Companies Act 1963. *Subsection (1)* has been amended to require the filing of the statement of affairs with the Registrar instead of the court. The statement of affairs must be in the prescribed form and verified by affidavit. *Subsection (5)* provides that the statement must be filed within 21 days of the relevant date or such extended time as the court may for special reasons appoint.

*Section 594* contains provisions that are supplemental to *section 593*. *Subsection (3)* incorporates a modified version of Order 74 rule 24(1) RSC. *Subsection (4)* is new and is designed to give effect to the liquidator's entitlement to obtain information under *subsection (3)* and states that, where any person fails to comply with the request of a liquidator, the court may, on the application of the liquidator, direct that the person comply with such a request. If any person fails to comply with the requirements of *section 593* or this section he or she shall be guilty of a category 3 offence.

*Section 595* makes provision for the notification of the fact that a company is in liquidation. This section has its origins in section 303 of the Companies Act 1963, with the insertion of *subsection (3)* which requires notice of appointment of a provisional liquidator, and the insertion of a new *subsection (5)* which re-enacts section 23(6) of the CA 1963, as amended by section 87 of the Company Law Enforcement Act 2001. *Subsection (4)* is also new and provides that any website of a company that is being wound up and any electronic mail sent to a third party, by, or on behalf of, such a company, shall contain a statement that the company is being wound up.

## Chapter 6

### Realisation of assets and related matters

*Section 596* deals with custody of a company's property. It provides that the liquidator must take into his or her custody or under his or her control the seal, books and records of the company, and all the property to which the company appears to be entitled. *Subsection (2)* is new and is designed to facilitate recovery of records and assets generally by liquidators from persons who would not have a right in law to withhold these records and assets from the liquidator. This section has been amended so that it now applies to voluntary windings-up. Provisional liquidators are now excluded from the operation of this section since the duties of a provisional liquidator (including the extent of their duties to take possession of property) will now be determined by the court (*section 624(3)*).

*Section 597* sets out the circumstances in which a floating charge will be invalid. The section is intended to prevent a company that is being wound up from creating floating charges to secure past debts or for monies which do not go to increase their assets and become available for creditors. It creates a presumption of invalidity where a floating charge is created within 12 months of the liquidation. This section is derived from section 288 of the Companies Act 1963. *Subsection (2)* provides a saver for the charge to the extent of money paid, goods sold or services supplied at the time



of or subsequent to the creation of, and in consideration for the charge. The reference in *subsection (2)(b)* to an interest rate of five per cent has been changed to the “appropriate rate”, which is defined in *section 2(1)* of the Act.

*Section 598* lays out the other circumstances in which a floating charge is invalid. This section re-enacts section 289 of the Companies Act 1963.

*Section 599* provides that a related company may be required to contribute to the debts of the company being wound up. This section is derived from section 140 of the Companies Act 1990, which introduced a means by which a liquidator can bolster the assets of the company being wound up by applying to the court for an order directing that a related company contribute to its assets. The definition of creditor in *subsection (7)* has been modified to correspond with the requirement for a creditor to have standing to petition the court for the winding up of a company.

*Section 600* allows a court to order that the assets of a company which is also being wound up to be pooled between the creditors of both companies. This section is derived from section 140 of the Companies Act 1990. The effect of this provision is that, upon application to have a related company wound up, the assets of two or more companies can be realised together and then distributed amongst the creditors of all the companies.

*Section 601* deals with the power of a liquidator to accept shares as consideration for sale of property of a company. This section re-enacts section 260 of the Companies Act 1990 and has been amended so that it now explicitly states that it only applies to members’ voluntary windings-up.

*Section 602* contains provisions that relate to avoidance of dispositions of property after the commencement of a winding up. This section prohibits the post-liquidation disposition of property, any transfer of shares and any alteration in the status of members of a company. This subsection is a merger and expansion of section 255 of the Companies Act 1963, which dealt with voluntary winding up, and section 218 of the CA 1963, which dealt with court ordered windings-up. This section now creates an express avoidance of property dispositions in voluntary windings-up, identical to that in court ordered windings-up.

*Section 603* contains provisions that relate to avoidance of executions against property of a company. If a winding up order is made, any attachment, sequestration, distress or execution which is being effected against the property of the company and which has been put in force after the commencement of the winding up shall be void. This section re-enacts section 219 of the Companies Act 1963. It has been amended to apply to all types of winding up and not merely to court ordered windings-up. This recognises that two primary objectives of winding up, common to both court ordered and voluntary windings-up, are to enable the orderly realisation and the fair distribution of the company’s assets. Both of these objectives are subverted by allowing individual creditors to obtain payment out of a company’s assets other than by the ordinary rules of realisation and distribution in a winding up.

*Section 604* deals with unfair preference and the effect of a winding up on antecedent and other transactions. It restricts the powers of the controllers of the company to dispose of its assets on the verge of it being wound up. If a transaction is an unfair preference and is made within 6 months of the winding up of the company, it is invalid. *Subsection (4)* provides that if the preferential transaction is made in favour of a connected person, it is invalid where it is made within two years of

the commencement of the winding up. This section derives from section 286 of the Companies Act 1963, as substituted by section 135 of the Companies Act 1990. The term “fraudulent” has been changed to “unfair” to reflect that the section may be triggered in the absence of fraud.

*Section 605* concerns liabilities and rights of persons who have been unfairly preferred. This section re-enacts section 287 of the Companies Act 1963. The term “fraudulent” has been changed to “unfair” to reflect that the section may be triggered in the absence of fraud.

*Section 606* provides for a restriction of rights of a creditor as to execution or attachment in the case of a company being wound up. This section re-enacts section 291 of the Companies Act 1963. The term “fraudulent” has been changed to “unfair” to reflect that the section may be triggered in the absence of fraud. The principle behind this section is to ensure that unsecured creditors of the company are to be treated equally in the case of a winding up. If execution is not complete before the commencement of the winding up, the creditor cannot rely upon a security. *Subsection (2)* states that where a creditor has had notice of a meeting at which it is proposed to resolve to wind up a company, the date of the notice is substituted for the date of the commencement of the winding up.

*Section 607* sets out the duties of the sheriff as to goods taken in execution. Where goods are taken but not yet sold, or the proceeds of a sale are not handed over to the execution creditor and the sheriff is notified in writing that a provisional liquidator has been appointed or a winding up order has been made or a resolution for a voluntary winding up has been passed, then the sheriff must deliver to the liquidator the goods and money seized or received in satisfaction of the execution. This section derives from section 292 of the Companies Act 1963. The monetary figure in *subsection (3)* is updated from €25.39 to €1,000.

*Section 608* deals with the power of the court to order the return of assets which have been improperly transferred. In order for the liquidator to set aside a disposition of assets, the liquidator must establish that the effect of the disposition has been to defraud the creditors or members of the company. This section re-enacts section 139 of the Companies Act 1990.

*Section 609* provides for the imposition of personal liability on officers of a company where proper books of account are not kept. This section re-enacts section 204 of the Companies Act 1990.

*Section 610* provides for the imposition of personal liability on officers and other persons for fraudulent or reckless trading. This section re-enacts section 297A of the Companies Act 1963, inserted by section 138 of the Companies Act 1990.

*Section 611* contains provisions that are supplemental to *section 610*.

*Section 612* sets out the power of the court to assess damages against certain persons. This section provides for a summary procedure whereby redress may be obtained in respect of breaches of duty perpetrated by directors and other officers. This section derives from section 298 of the Companies Act 1963, inserted by section 142 of the Companies Act 1990 and amended by section 50 of the Company Law Enforcement Act 2001. The title has been amended to reflect that it does not relate solely to damages against directors.

*Section 613* sets out the power of the court to assess damages against a director of the company's holding company. The effect of this section is to extend the misfeasance provisions of *section 612* to a situation where a director of a holding company has been guilty of wrongdoing in relation to the assets or affairs of any subsidiary. This section re-enacts section 148 of the Companies Act 1990.

*Section 614* makes provision for the vesting of property of the company in a liquidator. This section derives from section 230 of the Companies Act 1963. It has been amended so that it applies to voluntary windings-up.

*Section 615* applies rules governing the disclaiming of onerous obligations in the case of a company being wound up. The power to disclaim onerous property and certain contracts is given to the liquidator to enable him or her to realise and dispose of the company's assets without needlessly protracting the winding up. The liquidator must apply to the court within 12 months of the commencement of the winding up seeking its leave to disclaim. Where the existence of "onerous property" does not come to the liquidator's notice until more than one month has elapsed from the date of the commencement of the liquidation, the 12 month period runs from when he or she became aware of that property and that period may be extended by the court in appropriate circumstances. This section comes from section 290 of the Companies Act 1963.

*Section 616* relates to rescission of contracts and contains provisions which are supplemental to *section 615*. *Subsection (1)* states that a party to a contract with the company or a person 'entitled to the benefit of or subject to the burden' of such contract can apply to the court for an order to have it rescinded. This section derives from section 290 of the Companies Act 1963.

## Chapter 7 Distribution

*Section 617* sets out the order of priority of costs, charges and expenses properly incurred in a winding up. *Subsection (1)* stems from section 281 of the Companies Act 1963, and incorporates part of Order 74 rule 128(1) RSC. *Subsection (1)* was formerly restricted to voluntary windings-up. The provision now applies to all modes of winding up. *Subsection (2)* is new and sets out the order of priorities as to payment set out in Order 74 rule 128(1) RSC, with the addition of a newly inserted second in the order of priority of any costs and expenses necessarily incurred in connection with the summoning, advertisement and holding of a creditors meeting under *section 587*. References to "assets" have been changed to "property of the company".

*Section 618* relates to the distribution of the property of a company. *Subsections (1), (2) and (5)* re-enact section 275 of the Companies Act 1963, as substituted by section 132 of the Companies Act 1990. *Subsection (2)* provides for an exception to the *pari passu* principle for subordination agreements.

*Subsections (3) and (4)* re-enact Article 137 of Table A of the First Schedule to the Companies Act 1963. The provision has been amended so that its application is subject to the general provisions of *Part 11* (in particular those in relation to the distribution of the proceeds of a realisation of assets) and the scope of its application is clearly limited to members' voluntary windings-up. The use of the term "asset" has been changed to "property" so that a consistent term is used within this section and within this Part.

*Section 619* provides for the application of bankruptcy rules in the winding up of insolvent companies. This section derives from section 284 of the Companies Act 1963. *Subsection (1)* provides that the bankruptcy rules apply in relation to the winding up of insolvent companies in respect of (a) the respective rights of secured and unsecured creditors; (b) debts provable; and (c) the valuation of annuities and future contingent liabilities. *Subsection (3)* has been altered to reflect that section 331 of the Irish Bankrupt and Insolvent Act 1857 has been replaced by section 51(1) of the Bankruptcy Act 1988. This also necessitates substituting the reference to “filing the petition” with “date of adjudication” being the term now used in section 52(2) of the Bankruptcy Act 1988.

The former section 284(3) of the Companies Act 1963 has not been re-enacted as judgment mortgages registered before the commencement of the 1963 Act are not declared well charged and would not remain enforceable.

*Section 620* sets out the types of debt which may be proved in a winding up. This section derives from section 283 of the Companies Act 1963.

*Section 621* contains provisions in regard to preferential payments in a winding up. This section derives from section 285 of the Companies Act 1963 as amended by section 10 of the Companies (Amendment) Act 1982 and section 134 of the Companies Act 1990. References to other acts have been updated. The principle benefactors of this section are the Revenue Commissioner and employees. Where there are not sufficient sums to pay the preferential creditors in full, they are to rank equally amongst themselves. Former paragraphs (a)(ii) and (iii) of section 285(2) have been amended to alter the period of calculation and update statutory references. Former paragraph (f) of section 285(2) and section 285(5) have been repealed to reflect the fact that there is no longer any statutory right to compensation such as that in Workmen’s Compensation Acts 1934 to 1955, and that any liability under former acts would be statute barred. There are a number of new taxes included in the preferential payments *subsection (2)(iv), (v) and (vi)*. These are any tax and interest for which the company is liable under the Value-Added Tax Consolidation Act 2010 in relation to taxable periods which shall have ended within the period of 12 months next ended before the relevant date; any local property tax that the company is liable to remit to the Revenue Commissioners under section 74 of the Finance (Local Property Tax) Act 2012 during the period of 12 months next ended before the relevant date and any interest payable in relation to that tax under section 149 of that Act; and an amount of local property tax payable, under section 16 of the Finance (Local Property Tax) Act 2012, by the company at the relevant date to the extent that such tax is payable in respect of any one liability date (within the meaning of section 2 of that Act) falling before the relevant date and any interest payable in relation to that tax under section 149 of that Act.

*Section 622* contains provisions that are supplemental to *section 621*. In the event of a landlord or other person having distrained goods or effects of a company within the period of 3 months before the relevant date, the debts to which priority is given by *section 621* shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof. Discretion is given to the Minister to alter by order the amount specified in *section 621(4)*.

*Section 623* concerns unclaimed dividends and balances to be paid into a particular account. The Minister may prescribe the most cost-effective manner in which the courts service can maintain unclaimed dividends and balances. This section derives from section 307 of the Companies Act 1963 however, Section 307 provided that such money was to be maintained in a credit institution. The wording of the 1963 Act no longer reflected the practice in relation to the management of funds lodged with the High Court. The Courts Service now uses a unitised fund structure which provides less administrative burdens on it and provides ultimately a better financial return for the future beneficiaries of the funds in question, including the Exchequer. This practice is in line with the

Trustees (Authorised Investments) Acts 1958. The application of the section has been extended from voluntary windings-up to include court ordered windings-up. *Subsection (4)* incorporates the provisions of Order 74 rule 131(3) RSC.

## Chapter 8 Liquidators

*Section 624* is a new section that sets out the duties of liquidators. *Subsections (1)* and *(2)* seek to codify the duties in law of a liquidator. *Subsection (3)* states that, subject to *section 559(3)* to *(5)*, the duties of a provisional liquidator appointed by the court shall be confined to those duties provided in the order appointing him or her.

*Section 625* concerns how a liquidator is to be described and provides for the validity of his or her acts. This section derives from section 228 of the Companies Act 1963. Section 228(a) has been removed as liquidators will now require professional indemnity insurance in order to be qualified. Section 228(c) has been removed and is now dealt with in *sections 638* and *641*. Section 228(e) has been deleted; however, the law is maintained in *section 638* by expanding the scope of section 277 of the CA 1963 to also apply to court ordered windings-up. Section 228(f) of the CA 1963 has been deleted and is now dealt with in *section 640*. *Subsection (2)* derives from section 228(g) of the CA 1963.

*Section 626* sets out the powers of provisional liquidators. *Subsection (1)* replaces section 226(2) of the Companies Act 1963. This subsection reverses the previous position where a provisional liquidator's powers were commensurate with the powers of a non-provisional liquidator, except to the extent that the court limited his or her powers in the order appointing that person. This new subsection reflects the desire that a provisional liquidator have as little impact as possible on the running of a company, while fulfilling his or her obligations to secure and preserve the assets of the company from dissipation. This subsection would not prevent the court from making an order that the provisional liquidator have the same powers as an ordinary liquidator with some limitations which effectively maintain the status quo.

*Subsection (2)* is new. The Companies Acts were previously silent as to the effect on directors' powers of the appointment of a liquidator by the court (whether provisional or not). The ability of the court to tailor the extent to which provisional liquidators' powers replace or overlap with those of officers or to remove powers from officers without granting them to the provisional liquidator is intended to facilitate the continuation of the running of a respondent company as normally as possible when securing or preserving its assets.

*Section 627* is new and contains a table setting out the liquidator's powers. *Paragraphs (1)* and *(2)* of the Table derive from section 231(1)(a) to (f) of the Companies Act 1963, expanded so as to explicitly allow for recommencement and continuation of the carrying on of the company's business. *Paragraph (3)(a)* is new and provides the liquidator with the power to ascertain the debts and liabilities of the company. *Paragraphs (3)(b), (4), (5), (6), (7), (8)* and *(10)* stem from the powers referred to in section 231(2) of the CA 1963. *Paragraph (9)* re-states the powers referred to in section 131(3) of the Companies Act 1990.

This section and those that immediately follow replace the separate provisions granting powers to liquidators in court, members' and creditors' voluntary windings-up. The powers of liquidators and the restrictions on those powers in the three types of winding up are, with the exception of the powers

of a liquidator in a creditors' winding up prior to the first meeting of meeting of creditors, now uniform.

*Section 628* contains provisions relating to the summoning of general meetings of the company by the liquidator and is an expanded version of section 276(1)(e) of the Companies Act 1963. It expands the old section by also explicitly empowering the calling of meetings of members, creditors and the committee of inspection, powers that were in any event most likely previously implied in the 1963 Act as amended.

*Section 629* deals with the notice to be given with respect to the exercise of a liquidator's powers and restrictions on self-dealing. *Subsection (1)* states that a liquidator shall give notice of the exercise of any power specified in *paragraphs 1* or *2* of the Table to *section 627* and such notice must be given within 14 days of the exercise of the power in question. This subsection replaces parts of section 231(1) and (3) of the Companies Act 1963. The requirements for sanction previously contained within section 231(1) of the CA 1963 (for court ordered windings-up) and paragraph 276(1)(a) of the CA 1963 (voluntary windings-up) have been removed. The provisions covered by section 231(1) (of which the provisions covered by section 276(1)(a) are a subset) are now covered by the new notice provisions. Having exercised any of these powers, the liquidator must advise relevant stakeholders of the exercise of the power concerned.

*Subsections (3), (4) and (5)* re-enact section 231(1A) of the Companies Act 1963, as inserted by section 124 of the Companies Act 1990. *Subsections (6) to (9)* incorporate the restrictions provided for in Order 74 rules 39 and 40 RSC. These are modified to allow for sanction to be given by the committee of inspection, or a majority in number and value of the creditors or members, as the case may be. *Subsection (10)* incorporates a restriction similar to that provided for in Order 74 rule 41 RSC.

*Section 630* lays down procedures to be followed in the case of certain defaults in the context of a creditors' voluntary winding up. This section re-enacts section 131 of the Companies Act 1990. The powers referred to in section 131(3) CA 1990 have now been moved to *section 627*.

*Section 631* is new and sets out the power to apply to court for determination of questions or concerning exercise of powers. It replaces section 231(3) and section 280 of the Companies Act 1963.

*Section 632* derives from section 244A of the Companies Act 1963, as inserted by section 125 of the Companies Act 1990. It ensures that advisors and other third parties cannot withhold possession of files or documents belonging to the company by exercising a lien over them as security for unpaid fees. This provision now applies to members' voluntary windings up as well as court ordered or creditors' voluntary windings-up. *Subsection (4)* is new.

*Section 633* is new and sets out the qualifications for appointment as liquidator or provisional liquidator. While there are certain disqualification provisions in existing law that ply to persons to be appointed as liquidators, up until now there have been no requirements to hold particular professional qualifications or to have previous experience in this field in order to be appointed. For the first time under the law, liquidators will be required to be qualified and 5 categories of persons who will qualify to be a liquidator are set out:

- (i) members of a prescribed accountancy body;
- (ii) practising solicitors;

- (iii) member of another professional body recognised by IAASA for the purposes of this section;
- (iv) persons entitled to act as a liquidator under the laws of another EEA state; and
- (v) persons with practical experience of windings up and knowledge of the relevant law ('grandfathering' provision).

*Section 634* contains provisions supplemental in relation to *section 633* (including requirements for professional indemnity cover). This section is new and places a new requirement that prospective liquidators must hold appropriate professional indemnity cover, in such terms as prescribed by IAASA, before they act as a liquidator. A person who acts as a liquidator without being qualified will be guilty of a category 2 offence. It also provides that a person ceasing to be qualified as a liquidator must vacate the office and comply with various notification requirements.

*Section 635* is substantially unchanged from existing law and provides for specific disqualification from appointment as liquidator or provisional liquidator. *Subsection (1)* derives from section 300A of the Companies Act 1963 and lists a number of categories of person who will not be qualified to act as liquidator. The offence provision has been amended to conform to the standard form of such provision throughout the Act, and are now category 2 and 3 offences.

*Section 636* is partly new and supplements existing law. It sets out the manner in which a liquidator can be appointed and removed in a members' voluntary winding up. In part, it supplements the re-enactment of section 258 of the Companies Act 1963, effected by *section 583* and replaces section 259 of the Companies Act 1963. It provides for minimum notice requirements of such meetings and empowers the court to make orders preventing the exercise of the power to appoint or remove a liquidator by the members.

*Section 637* sets out the manner in which a liquidator can be appointed and removed in a creditors' voluntary winding-up. It supplements the re-enactment of section 267 of the Companies Act 1963, as amended by section 47 of the Company Law Enforcement Act 2001, effected by *section 588* of the Act. It provides minimum notice requirements for meetings of creditors to appoint or remove a liquidator and empowers the court to make orders in relation to the power of the creditors to so appoint or remove a liquidator. The requirement for meetings to remove liquidators to be convened for that purpose reflects the law currently in place in the UK. In so far as it requires meetings to appoint liquidators to be convened for that purpose, the new provision goes beyond the UK position.

*Section 638* is substantially unchanged from existing law. It empowers the court to appoint and remove a liquidator. This amends and expands section 277 of the Companies Act 1963. *Subsection (1)* replaces section 277(1) of the Companies Act 1963 and extends that provision to all modes of winding-up. *Subsection (2)* is new. It provides that the court may give consequential directions as it thinks fit. This section does not retain the power of the court to require security from the liquidator which is in contrast to section 228(a) of the CA 1963.

*Section 639* relates to a liquidators consent to act. *Subsection (1)* states the liquidators appointment shall be of no effect unless the nominated person has, prior to his or her appointment, signified their written consent to the appointment. This replaces section 276A(1) of the Companies Act 1963, which applied only to voluntary windings-up. It now applies to all types of winding-up. *Subsection (2)* states that a provisional liquidator must not be appointed unless the court is satisfied the nominated person has consented to the appointment.

*Section 640* is new and sets out the position when there is more than one liquidator. It replaces section 228(f) of the Companies Act 1963 and merges that provision with section 276(3) of the CA 1963. It expands to appointments by members or creditors the obligation to specify upon appointment how joint liquidators are to perform their duties or exercise their powers. It provides that, in default of such determination, such acts may be performed by any number of the liquidators, but not less than two.

*Section 641* provides that a liquidator may resign in any winding up. This section replaces section 288(c) of the Companies Act 1963, in so far as it relates to resignation. It extends the express permission to resign to voluntary windings-up. It also introduces a notice requirement for resignation.

*Section 642* prohibits the giving, agreeing or offering of rewards on appointment to any member or creditor of a company. This section derives from section 301 of the Companies Act 1963.

*Section 643* deals with notification and filings of appointments and removals of liquidators. *Subsection (1)* replaces section 276A(2) of the Companies Act 1963 which only applied to appointments in voluntary windings up. The time period for notification has been reduced from 7 days and it is now required that the necessary notification be made “forthwith”. *Subsection (2)* is new and provides for the deemed appointment of the first signatory as chairman where a chairman is not elected by the meeting. *Subsection (3)* is new and introduces an obligation to notify the Registrar of a removal. *Subsections (5) and (6)* are new and derive from section 278(1) of the Companies Act 1963, as amended by section 48 of the Company Law Enforcement Act 2001. *Subsection (7)* reduces the time for notification from 14 days. There is now a requirement for the necessary notification to be made “forthwith”. The form of notice may now be prescribed. *Subsection (8) and (9)* are new and replace section 227(1) of the Companies Act 1963 which placed the notice requirement upon the liquidator in such circumstances. The time period for notification has been reduced from 21 days. The particulars of the notice may now be prescribed. *Subsections (10) and (11)* are new and replace a number of offence provisions relating to various filings now subsumed by the new section. *Subsection (10)* makes it an offence to fail to comply with the filing obligations created by this section. The filing obligations imposed upon an officer of the court under *subsection (7)* and the obligation imposed on the Registrar to forward documents or information to the Director of Corporate Enforcement are excluded from the scope of the offence provision.

*Section 644* is new. It provides for the custody of books and property upon vacation of office by a liquidator. Where there is no other person appointed to act as liquidator, the former liquidator shall retain custody of the books and property until either a new liquidator is appointed or is directed by the court (upon application of the former liquidator, the Director of Corporate Enforcement or a member or creditor of the company) to effect delivery or disposal of the relevant item as the court thinks fit. It is stated that documents and records which seal property are deemed to be relevant items for the purposes of this section.

*Section 645* is new and provides that the remuneration of provisional liquidators is set by the court.

*Section 646* is new. It sets out the procedure for fixing a liquidator’s entitlement to remuneration. *Subsection (2)* states that the terms upon which a liquidator has an entitlement to remuneration are set by the creditors or the committee of inspection (for court ordered windings-up or creditors’ voluntary windings-up) or by members (for members voluntary windings-up). There is a



residual power for the court to set remuneration, or appoint a person to fix the amount of remuneration if it is not so set. *Subsection (4)* provides that liquidators must seek to have their entitlement to remuneration set as soon as possible after being appointed. *Subsection (5)* deals with the terms upon which a liquidator's entitlement to remuneration may be varied and *subsection (6)* states that no variation may, without the consent of the liquidator, reduce the entitlement of the liquidator to remuneration for work that may already have been performed.

*Section 647* is new and deals with the liquidator's entitlement to receive payment where entitlement to remuneration exists. A liquidator must (in addition to having the terms upon which he is entitled to be remunerated set) have any amounts claimed under the entitlement approved by committee of inspection, creditors, members, or the court, depending on the type of liquidation, prior to taking remuneration.

*Section 648* contains provisions which are supplemental to *sections 646* and *647*. It allows a dispute as to the amount of remuneration payable to be referred to arbitration. It also sets out the criteria upon which remuneration is to be reviewed.

*Section 649* provides that any creditor who has a connection with the proposed liquidator must, before the resolution is put to the creditors for the appointment of that person as liquidator, disclose the connection to the chairman of the meeting. This stems from section 301A of the Companies Act 1963, as inserted by section 146 of the Companies Act 1990.

*Section 650* requires a liquidator, in a situation where he or she is obliged to make periodic returns in relation to his or her activities as a liquidator, to incorporate into the report details of whether at the date of such return any past or present director or officer or any member of the company was made personally liable under any provision of this Act for the debts of the company or whether such a person is deemed to be disqualified or restricted under *Part 14* of the Act.

*Section 651* derives from section 145 of the Companies Act 1990. It provides that where a liquidator is in default in relation to making certain accounts and returns this will result in a category 4 offence.

*Section 652* empowers the Director of Corporate Enforcement, the Registrar and any creditor or contributory of the company to make an application to the court directing the liquidator to make good the default in making a return within such time as may be specified in the order. This derives from section 302 of the Companies Act 1963.

*Section 653* confers a power on the Director of Corporate Enforcement either on his or her own motion or on foot of a complaint by a member, contributory or creditor to examine a liquidator's books. This section derives from section 57 of the Company Law Enforcement Act 2001. It effects a significant increase in the powers of the Director of Corporate Enforcement because it extends the requirement to produce the books from the liquidator to the company, an officer of the company, the auditor and the receiver. It also increases the area for potential investigation because the request may cover all liquidation or receiverships subject to the 6 year time limit in *subsection (7)*.

## Chapter 9 Contributories

*Section 654* re-enacts section 209 of the Companies Act 1990. It provides that the liability of a contributory shall create a debt accruing by him or her at the time when his or her liability commenced but until a call is made that debt does not accrue due. Any action to recover a debt from a contributory must be brought within 12 years from the date on which the cause of action accrued.

*Section 655* sets out the liability as contributories of past and present members. It is drawn from section 207 of the Companies Act 1963.

*Section 656* derives from section 235 of the Companies Act 1963. The section has been amended to confer power to settle the list of contributories on the liquidator, rather than the court. Previously only liquidators in voluntary windings-up could exercise this power, by operation of section 276 of the CA 1963. This section also now states on its face that it also applies to voluntary windings-up in addition to court ordered windings-up.

*Section 657* empowers the liquidator and the court to make calls on the contributories in respect of the debts and liabilities of the company together with costs, charges and expenses of winding up. This section derives from section 238 of the Companies Act 1963. *Subsection (1)* has been inserted to enable a liquidator to make calls. Previously only liquidators in voluntary windings-up could exercise this power. *Subsection (2)* has been amended to provide that the court may exercise this power upon the application of the liquidator only. The net effect of this amendment is to make the function of making calls primarily one of the liquidator, with the court only providing a back-up role if the liquidator seeks its assistance.

*Section 658* amends section 242 of the Companies Act 1963. The functions of adjustment of rights of contributories and distribution of any surplus have been transferred from the court to the liquidator.

*Section 659* provides for payment of debts due by contributories to the company and details the extent to which set-off is allowed. It derives from section 237 of the Companies Act 1963. *Subsection (1)* has been altered by the removal of the words “at any time after making a winding up order”, so as to extend the application of this provision to voluntary windings-up.

*Section 660* states that an order made by the court in relation to a contributory shall be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due. It re-enacts section 240 of the Companies Act 1963.

*Section 661* deals with liability in case of death of a contributory. It re-enacts section 210 of the Companies Act 1963.

*Section 662* is new and clarifies that the Civil Liability Act 1961 is not affected by *section 661* or any other provision of this Part.

*Section 663* derives from section 211 of the Companies Act 1963 and relates to a situation where a contributory becomes bankrupt either before or after he or she has been placed on the list of contributories.

*Section 664* is based on section 211 of the Companies Act 1963 and supplements *section 663*. This section covers the insolvency of corporate members, rather than the insolvency of members who are natural persons.

*Section 665* deals with the winding up of a company that had been an unlimited company before re-registration as a private company limited by shares. This re-enacts section 53(7) of the Companies (Amendment) Act 1983. If the company goes into liquidation within three years of the date of such re-registration, any person who was a member at the date of re-registration will have unlimited liability for debts and liabilities incurred before the company became a limited company.

## **Chapter 10** Committee of inspection

*Section 666* is new. It provides for the committee of inspection in a court ordered winding up to be established on the initiative of the liquidator or a minimum proportion in value of the creditors without requiring court sanction. It replaces section 232 of the Companies Act 1963 and is based in part on section 268 of the CA 1963.

*Section 667* empowers creditors, without recourse to the court, to appoint a committee of inspection in the case of a creditors' voluntary winding up. This section is derived from section 268(1) and (2) of the Companies Act 1963.

*Section 668* contains provisions relating to the composition and proceedings of committees of inspection. *Subsections (1) to (8)* re-enact section 233(2) to (9) of the Companies Act 1963, subject to some amendments. *Subsection (1)* is an amended version of section 233(2) of the CA 1963, having been amended so as to clearly state that it is referring to a committee of inspection appointed under the Act. *Subsections (2) to (8)* re-enact section 233(3) to (9) of the CA 1963. *Subsection (9)* is new. This subsection places restrictions upon the ability of members of such committees to engage in conduct that may result in a profit from the liquidation.

## **Chapter 11** Court's powers

*Section 669* empowers the court to annul an order for winding up or to stay a winding up. *Subsections (1), (3) and (5)* re-enact sections 234(1) to (3) of the Companies Act 1963 respectively as amended by section 15 of the Companies (Amendment) Act 1982 and section 57 of the Companies (Auditing and Accounting) Act, 2003. Section 234(4) of the CA 1963 has been amended. There is an obligation to file a certified copy of the court order with the Registrar and the order becomes effective from perfection of the order not the making of the order. *Subsection (2)* is new. Its purpose is to ensure that the public register accurately records the change of status of the company following an order for annulment. *Subsection (4)* is new. It provides that the court may give such directions as to the retention or disposal of the company's seal, books and papers as it thinks fit.

*Section 670* derives from section 246 of the Companies Act 1963. The court shall, on the application of the Director of Corporate Enforcement, the liquidator, or on its own motion, make an order requiring the attendance of any officer of the company at meetings of creditors, contributories, members or any meeting of a committee of inspection. The scope of this section has been extended to include voluntary windings-up.

*Section 671* empowers the court to summon persons for examination. The section derives from section 245 of the Companies Act 1963, as amended by section 123 of the Companies Act 1990 and by section 44 of the Company Law Enforcement Act 2001. The amended section extends to voluntary windings-up. The section also now provides that the liquidator may make an application in this context.

*Section 672* empowers the court to make an order for payment or delivery of property against a person examined under *section 671*. This section amends section 245A of the Companies Act 1963, as inserted by section 127 of the Companies Act 1990 and amended by section 45 of the Company Law Enforcement Act 2001. *Paragraph (1)(b)* has been amended to give *locus standi* to liquidators. It should be noted that liquidators were mentioned in section 245A(2) of CA 1963 which indicates that it may already have been intended to grant them standing. As the amended section 245A of the CA 1963 now covers voluntary windings-up, the former section 282C of the CA 1963 is not re-enacted.

*Section 673* provides for delivery of property of the company to a liquidator. This re-enacts section 236 of the Companies Act 1963 and is expanded to incorporate provisions of the RSC mentioned below. The section has been amended so that it now also applies to voluntary windings-up and companies to which a provisional liquidator has been appointed. *Subsection (1)* incorporates the requirements of Order 74 rule 91 RSC and applies them to all liquidations. *Subsection (2)* expressly confers *locus standi* on the liquidator to seek such an order. A simple reference to one month is removed in this subsection as it has the potential for confusion and inconsistency. Thus the subsection now refers to 30 days. There is also a power for the court to make such an order on its own motion. *Subsection (4)* incorporates the provisions of Order 74 rule 90 RSC, and applies to all liquidations.

*Section 674* empowers the liquidator to exclude creditors from the benefit of any distribution made before those debts or claims are proved. This derives from section 241 of the Companies Act 1963. The power to fix time for proof on penalty of exclusion from sharing in a distribution has been amended so that it lies with the liquidator and not the court. Up until now only liquidators in voluntary windings-up could exercise this power. The power to place a limit on the time for proving a claim is subject to the power of the court to extend any such limit. The liquidator cannot fix a deadline that is earlier than 28 days from the notification to the creditors that a deadline has been fixed.

*Section 675* empowers the court to make an order for arrest and seizure of books, papers and moveable personal property. This section amends section 247 of the Companies Act 1963, inserted by section 46 of the Company Law Enforcement Act 2001 and also replaces section 282D of the CA 1963, as amended by section 49 of the CLEA 2001. The scope of this section has been extended to all windings up in effect resulting in a merger of sections 247 and 248D of the CA 1963. This section has been amended so that an order may only be made after the filing of a petition or the passing of a resolution to voluntarily wind up a company. The court now has the power to make orders to secure any books, papers and movable personal property that falls short of seizing such property.

*Section 676* contains provisions as to arrangements which bind creditors. This section amends section 279 of the Companies Act 1963. The scope of this section has been expanded so that in

addition to voluntary windings-up it also applies to court ordered windings-up. The reference to three weeks in *subsection (2)* has been amended to be stated in days. *Subsection (3)* expressly applies the provisions generally applicable to compromises or arrangements to companies in the course of being wound up.

## Chapter 12

### Provisions supplemental to conduct of winding up

*Section 677* deals with the effect of a winding up on a business and the status of the company. *Subsections (1)* and *(2)* replace section 254 of the Companies Act 1963 and provides that the company must cease to carry on its business except in so far as may be required for its beneficial winding up. *Subsection (3)* states that, on the appointment of a liquidator, all the powers of the directors of the company shall cease except in the case where the committee of inspection or the creditors sanction the continuance of those powers, or in the case of a members' voluntary winding up, where the members in a general meeting sanction the continuance of those powers. This subsection replaces sections 258(2) and 269(3) of the CA 1963. It does not apply to the appointment of provisional liquidators. This section extends to court ordered windings-up as well as voluntary windings-up.

*Section 678* provides that actions against the company are stayed on a winding-up order. This section replaces section 222 of the Companies Act 1963 and section 23 of the Companies (Amendment) Act 1986. The amendments to *subsection (1)* extend section 222 of the CA 1963 beyond court windings-up to all modes of winding up.

*Section 679* is new. It provides that the Director of Corporate Enforcement may direct the convening of meetings. It has been introduced to support *section 680*. This section also applies to other meetings required to be held under this part.

*Section 680* imposes a duty on the liquidator to call a meeting at the end of each year if the winding up continues for more than 12 months. It replaces sections 262, 264 and 272 of the Companies Act 1963. *Subsections (1)* to *(3)* apply to members' voluntary windings-up and will require a general meeting on each anniversary of the commencement of the winding up. *Subsections (4)* to *(7)* apply to creditors and court ordered windings-up. There is a requirement on the liquidator to convene a meeting of either the committee of inspection or, if no committee of inspection exists, to call a creditors meeting. *Subsection (8)* applies to a winding up that has commenced as a members' voluntary winding up and has, pursuant to *section 584*, become a creditors voluntary winding up. It provides that *subsections (4)* to *(7)* shall apply in this instance. The annual general meeting must be held within 28 days of the anniversary of the commencement of the winding up (in a voluntary winding up) or the making of the order to wind up (in a court ordered winding up).

*Section 681* relates to a situation where the winding up of a company is not concluded within 12 months. It provides that the liquidator must send to the Registrar at specified intervals, a statement in the prescribed form containing particulars about the proceedings and position of the winding up. This section derives from section 306 of the Companies Act 1963. *Subsection (4)* provides that this obligation is subject to a contrary order of the court. The period after which the liquidator is required to draw up his first report has now been reduced from 2 years under the old law to 1 year and the section provides for reports at intervals of 6 months thereafter.

*Section 682* obliges the liquidator to report on the conduct of directors. This section derives from section 56 of the Company Law Enforcement Act 2001.

*Section 683* imposes an obligation (unless relieved) on the liquidator of an insolvent company to apply for a restriction of directors. This derives from section 56(2) of the Company Law Enforcement Act 2001.

*Section 684* derives from section 243(1) and (2) of the Companies Act 1963. It provides that the court may, at any time after the making of a winding up order or the commencement of a voluntary winding up, make such an order for inspection of the books of the company by the creditors or contributories as the court thinks just. This section has been extended so that it now applies to voluntary windings-up.

*Section 685* derives from section 308 of the Companies Act 1963. Where a resolution is passed at an adjourned meeting of any creditors or contributories of a company, the resolution shall be treated as having been passed on the date on which it was in fact passed and shall not be deemed to have been passed at any earlier date.

*Section 686* provides that books of the company shall be admissible in all civil proceedings. This derives from section 304 of the Companies Act 1963. The amendments made to this section are designed to address the problems associated with proving a document pursuant to section 304 CA 1963. In order to prove a document generally, the person who prepared the document must give evidence as to the making of that document. Normally, the persons in the company who make the document mostly affected by the contents tend to be contributories or members of the company. Consequently, the member or contributory who made the document would be unwilling to give evidence if it would prejudice the position of the member or the contributory and, in such circumstances, a case taken against such member would fail unless there was a method of formally proving the contents of the document. As a result, in actions involving the company against members or officers of the company in the course of liquidation by the liquidator or the ODCE, the documentary evidence contained in the books and records of the company will be prima facie evidence of the contents unless proof to the contrary is submitted.

*Section 687* is new. The liquidator may have regard to the wishes of the creditors and contributories. It parallels section 309 of the Companies Act 1963. *Subsection (2)* provides that, in the case of a conflict, any direction given by the creditors or contributories would override any directions given by the committee of inspection. *Subsection (3)* provides that the liquidator will be empowered to convene general meetings of the creditors or contributories for the purpose of ascertaining their wishes and will be obliged to do so if so requested in writing by at least 10% in value of the creditors or 10% in number of contributories.

*Section 688* is new. Where a disciplinary committee or tribunal of a prescribed professional body finds that a member of the body is engaged in misconduct, the professional body shall report the matter to the Director of Corporate Enforcement.

## **Chapter 13**

### **General rules as to meetings of members, contributories and creditors of a company in liquidation**

*Section 689* is new and relates to court ordered windings-up. *Subsection (2)* provides that, if the court directs, notice of the meeting may be given by advertisement in the manner directed by the court, in which case the object of the meeting need not be stated. *Subsection (3)* replaces Order 74

rule 55 RSC and provides that a certified copy of the court order appointing a chairperson shall be sufficient authority for the person appointed to preside.

*Section 690* states that the provisions of sections 691 to 703 shall apply in relation to meetings of creditors, contributories or members held or to be held under this Part.

*Section 691* sets out the rules on entitlement to attend and notice requirements. It provides that every person who is a creditor, contributory or member of the company is entitled to attend a meeting of creditors, contributories or members of the company. The liquidator must give at least 7 days' notice before the meeting of creditors, contributories or members. This section replaces Order 74 rules 57 and 64 RSC.

*Section 692* replaces Order 74 rule 59 RSC. Every meeting shall be held in a place that is convenient to the majority of the creditors, contributories or members. Different times or places may be named for the meetings of these different categories.

*Section 693* contains provisions that relate to the costs of meetings. This section replaces Order 74 rule 60 RSC. It provides that any person other than the liquidator, who summons a meeting, shall be liable for the costs of summoning the meeting.

*Section 694* replaces Order 74 rule 61 RSC. If a meeting is summoned by the liquidator, the liquidator shall be the chairperson and if the liquidator is unable to act as chairperson, someone nominated by him or her shall be the chairperson.

*Section 695* deals with procedural requirements in relation to the passing of resolutions and replaces Order 74 rule 62 RSC.

*Section 696* provides for the registration by the liquidator with the Registrar of resolutions of creditors, contributories and members within 14 days of the date upon which the meeting was held. It replaces Order 74 rule 63 RSC. *Subsection (2)* is new and it states that a liquidator shall be guilty of a category 4 offence if he or she fails to comply with *subsection (1)*.

*Section 697* sets out the rules for proceedings at meetings. It replaces Order 74 rule 65 and 66 RSC. *Subsection (1)* provides that the chairperson may adjourn the meeting with the consent of the meeting. *Subsection (2)* states that at least 3 creditors are required to be present, and in the case of a meeting of contributories or members, at least 2 contributories or members are required to be present at the meeting before it may act for any purpose. *Subsection (3)* provides that, if within 30 minutes the quorum is not present, the meeting shall be adjourned to the same day in the following week at the same time and place, or to such other day or time or place as the chairperson may appoint. *Subsection (4)* provides that this day shall not be less than 7 days and not more than 21 days from when the meeting was adjourned.

*Section 698* deals with creditors' entitlement to vote. It replaces Order 74 rules 67 to 72 RSC. Proof of debt is required to be lodged with the liquidator before a creditor is entitled to vote.

*Section 699* contains provisions which are consequent on *section 697* regarding secured creditors including deemed surrender of security.

*Section 700* sets out the duties of the chairperson. *Subsection (1)* replaces Order 74 rule 73 RSC. *Subsection (2)* is new and provides that, if the chairperson fails to comply with *subsection (1)*, he or she will be guilty of a category 3 offence.

*Section 701* sets out the rules relating to proxies. *Subsections (3)* and *(4)* provide that a creditor, contributory or a member may appoint any person as a specified proxy or a general proxy.

*Section 702* contains provisions which are supplemental to *section 701*. *Subsection (1)* provides that the instrument of proxy must be lodged before four o'clock on the day before the meeting or adjourned meeting at which it is to be used. This section and *section 701* replace Order 74 rules 74 to 83 RSC.

*Section 703* is new and clarifies the application, in the case of a liquidation, of the general rule regarding representation of bodies corporate at meetings which is contained in *section 185* in *Part 4* of the Act.

## **Chapter 14**

### **Completion of winding up**

*Section 704* is new and deals with dissolution of a company by the court. The method of dissolution required in a creditors' voluntary winding up is the same as that required in a court ordered winding up, unless the court orders the liquidator to return to the court at the end of the winding up. This new section explicitly states the grounds upon which the court may make an order for dissolution if it is satisfied that the affairs of the company have been completely wound up. This section replaces section 249 of the Companies Act 1963.

*Section 705* sets out the procedure for the final meeting and dissolution in a members' voluntary winding up. It derives from section 263 of the Companies Act 1963. Time periods have been amended to be stated in days. *Subsection (3)* has been amended to provide that written notice of the meeting must be given to members. *Subsection (12)* replaces section 264(1) of the CA 1963. This section now explicitly states that it applies to members' voluntary windings-up, due to the relocation of the section to this Chapter which has general application.

*Section 706* sets out the procedure for the final meeting and dissolution in a creditors' voluntary winding up. It derives from section 273 of the Companies Act 1963, as amended by section 15 of the Companies (Amendment) Act 1982, together with Schedule 1 to the Companies (Amendment) Act 1982. *Subsection (3)* has been amended to provide that written notice of the meeting must be given to the creditors and members. This replaces the obligation to advertise the meeting. This section now explicitly states that it applies to creditors' voluntary windings-up, due to the relocation of the section to this Chapter which has general application.

*Section 707* deals with disposal of books and papers of a company in a winding up. It is drawn from section 305 of the Companies Act 1963. Disposal in court ordered windings-up is to occur in the same manner as a creditors' voluntary winding up. *Subsection (2)* extends the period for



which documents must be retained from three years to six years. The six year period is already present in *Part 6* of the Act, and a three year period would be out of proportionate to other record retention requirements, including requirements under tax law and anti-money laundering law. Subsections (4) and (5) incorporate the provisions of Order 74 rule 129 RSC.

*Section 708* empowers the court to declare the dissolution of a company void. It re-enacts section 310 of the Companies Act 1963. The limitation on the fine that may be imposed as contained in section 310(2) of the CA 1963 has been removed. Failure to comply with *subsection (3)* will result in a category 4 offence.

*Section 709* authorises the Registrar, on the expiration of 20 years after the date of dissolution of a company, to send all the documents filed in connection with the company to the National Archives. This section re-enacts section 313 of the Companies Act 1963.

## **Chapter 15**

### **Provisions related to the Insolvency Regulation**

*Section 710* states that “insolvency proceedings” means insolvency proceedings opened in the State under Article 3 of the Insolvency Regulation where the proceedings relate to a company.

*Section 711* provides for publication in relation to insolvency proceedings. *Subsections (1) to (3)* re-enact, with minor amendments, section 227B of the Companies Act 1963, as inserted by Regulation 3(c) of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002). The reference to CRO Gazette is replaced with reference to *Iris Oifigiúil*.

*Section 712* enables the liquidator to have the winding up confirmed by the court for the purposes of the Insolvency Regulation. This section re-enacts section 276A of the Companies Act 1963, as inserted by Regulation 3(e) of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002).

*Section 713* re-enacts section 313A of the Companies Act 1963, as inserted by Regulation 3(f) of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002). It authorises the proper officer of the Central Office of the High Court to provide certain documents to a liquidator or examiner.

*Section 714* provides that a claim lodged with a liquidator may need to be translated if the claim is not in the Irish or English language. This section re-enacts Regulation 11 of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002).

## **Chapter 16**

### **Offences by officers of companies in liquidation, offences of fraudulent trading and certain other offences, referrals to D.P.P., etc.**

*Section 715* provides that *sections 716 to 720 apply* to all modes of winding up and deals with the construction of certain references to a company including the reference to a “relevant person”.

*Section 716* creates an offence for failure to make disclosure or to deliver certain things to the liquidator. This section re-enacts section 293(1)(a) to (c) of the Companies Act 1963.

*Section 717* sets out the offences for certain fraudulent acts within a period of 12 months preceding the winding up of the company or at any time thereafter. This section re-enacts with minor amendments section 293(1)(d), (e) and (i) to (k) of the Companies Act 1963.

*Section 718* sets out the offences for other fraudulent acts (relating to obtaining credit including irregular pledges) within 12 months preceding winding up or any time thereafter. This section re-enacts section 293(1)(m) to (p) of the Companies Act 1963.

*Section 719* sets out the offences for material omission relating to a company's affairs including failure to report debt. This section re-enacts section 293(1)(f), (g), (h) and (l) of the Companies Act 1963. A simple reference to one month is removed in *subsection (2)* as it has the potential for confusion and inconsistency. Thus the subsection now refers to 30 days.

*Section 720* sets out an additional offence with respect to section 718(c) and certain defences. *Subsection (2)* provides a defence to some of the offences enumerated in *subsection (2)(a)* where the accused had no intention to defraud. For certain of the other offences, an absence of intent to conceal the state of affairs of the company is a good defence. In each instance, the onus is on the accused to prove that he did not have such intent.

*Section 721* provides that where an officer of a company which is ordered to be wound up by the court or which subsequently passes a resolution for voluntary winding up is found guilty of fraud, he or she shall be guilty of a category 2 offence. This re-enacts section 295 of the Companies Act 1963.

*Section 722* provides that any person knowingly concerned in the carrying on of business in a fraudulent manner shall be guilty of a category 1 offence. This is drawn from section 297 of the Companies Act 1963.

*Section 723* deals with prosecution of offences committed by officers and members of the company. This section re-enacts section 299(1) to (3) of the Companies Act 1963, as amended by section 143 of the Companies Act 1990 and section 51 of the Company Law Enforcement Act 2001. This section applies whether the winding up is court ordered or voluntary.

*Section 724* contains provisions which are supplemental to *section 723*, specifically the duty to provide assistance to the D.P.P. and the Director of Corporate Enforcement. This section re-enacts section 299(4) and (5) of the Companies Act 1963, as amended by section 143 of the Companies Act 1990 and section 51 of the Company Law Enforcement Act 2001.

## **Part 12 – Strike Off and Restoration**

### *Preliminary Note*

*Part 12* combines into one Part the many diverse provisions of the law regarding the strike off and restoration of companies.

*Chapter 1* contains the provisions concerning both voluntary and involuntary strike off of a company. It provides for a statutory distinction between voluntary and involuntary strike off. In the case of involuntary strike off, the Registrar is now obliged, at the start of the process, to write to the directors of the company at their home address (as contained in CRO records) enclosing a copy of the strike off notice which is being sent to the company at its registered address.

A company under this Act may take a “remedial step” in order to avert the strike off process. Such a step will involve the company responding in a manner appropriate to the reason for the initiation of the strike off.

The concept of voluntary strike off is placed on a statutory footing, with certain conditions being established before the process can commence. In particular, the company must pass a special resolution to seek the strike off of the company. The other provisions follow the main outline of the previous non-statutory voluntary strike off process.

In line with the recommendation of the Company Law Review Group (CLRG), the Director of Corporate Enforcement is empowered to require the directors of a company being struck off to produce a statement of affairs. Upon examination of such statement, the Director of Corporate Enforcement can then decide to make an application to court to require the director of the company to appear before it and answer on oath any question relating to the statement.

*Chapter 2* governs the process of restoration of the company to the register. What was previously known as “administrative restoration” is now referred to as restoration on application to the Registrar. Such application must be made within one year of the date of the strike off, with an additional three months being provided for all of the documentation necessary for the restoration to be prepared and filed.

Restoration on application to the court can be made within 20 years of the date of dissolution however, provision has been added so that the court may order the company to change its name upon making the restoration order. This is to cater for the possibility that a new company may have been incorporated while the company was struck off, with a name that is the same or similar to the name of the struck off company.

*Chapter 3* is entitled “Miscellaneous” and contains a provision to ensure that the Revenue Commissioners have the necessary authority to communicate information to the Registrar which it has in relation to making, or failure to make, returns under the Taxes Consolidation Act 1997, without breaching its obligations to confidentiality contained in other legislation.

### *Explanatory Memorandum*

#### **Chapter 1** Strike off of company

*Section 725* is new. It distinguishes between voluntary and involuntary strike off, and makes clear that the Registrar may only strike a company off the Registrar where one or more of the relevant grounds exist, and the appropriate procedure is followed. Previously the grounds for strike off were spread across more than one enactment, and there was no distinction between involuntary and voluntary strike off.

*Section 726* is new and lists the grounds for involuntary strike off. It is a consolidated interpretation of several different strike off provisions included in the existing Companies Acts. Some provisions have been newly inserted in accordance with the recommendations of the CLRG. The grounds for involuntary strike off are as follows:-

*Paragraph (a)*: failure to make an annual return. This is drawn from section 12(1) of the Companies (Amendment) Act 1982, as inserted by section 46 of the Companies (Amendment) (No.2) Act 1999.

*Paragraph (b)*: where the Revenue Commissioners have given a notice to the Registrar of the company's failure to deliver the required statement under the Taxes Consolidation Act 1997. This comes from section 12A(1) C(A)A 1982, as inserted by section 46 C(A)(No.2)A 1999.

*Paragraph (c)*: where the Registrar has reasonable cause to believe that none of the directors of the company are EEA resident. This derives from section 43(15) C(A)(No.2)A 1999.

*Paragraph (d) and (e)*: where the company is being wound up and no liquidator is acting or returns have not been made by the liquidator for a period of 6 consecutive months. These paragraphs are drawn from section 311(3) of the Companies Act 1963.

*Paragraph (f)*: where there are no persons recorded in the CRO as being current directors of the company. This is taken, in substance, from section 48 C(A)(No.2)A 1999. The CLRG recommended that it was not necessary to continue to restrict the scope of the provision (as in section 48 C(A)(No.2)A 1999) to situations where the company fails to send notification to the Registrar of the fact that a person has ceased to be a director or secretary of the company, despite that person's request to the company to send notification of his or her resignation to the Registrar. Section 48 C(A)(No.2)A 1999 artificially deemed such circumstances to be sufficient evidence that the company had ceased to trade and could therefore be struck off the register under section 311 CA 1963. This new *paragraph (f)* instead elevates such a situation to be an independent ground for strike off in itself.

*Section 727* is new and provides the structure (together with *section 728*) of the notification procedure whereby the Registrar sends notice of the commencement of the strike off process to the company. This notification procedure has not been re-stated for each of the circumstances of strike off envisaged in the preceding section. Instead, a general procedure is provided for here.

There is a simplified notice procedure when the company has not, for more than 20 consecutive years, made an annual return and where no notice of the situation of the registered office of the company has been given to the Registrar. In such circumstances, the Registrar may publish a notice of the strike off in the CRO Gazette. This provision derives from section 12B(8A) of the Companies (Amendment) Act 1982, as inserted by section 65 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

In all other circumstances, the Registrar should follow the notice procedure under *subsections (1) and (2)*, whereby notice must be sent by registered post to the company at its registered office, unless the company is being wound-up, and in such case notice must be sent to the liquidator of the company.

*Subsection (3)* is a new provision and has been inserted in accordance with the views of the CLRG that, at the start of the strike off process, the Registrar should write to the directors of the company at

their home address (as contained in CRO records) enclosing a copy of the strike off notice which is being sent to the company at its registered address. Failure to do so does not affect the validity of a notice that otherwise complies with *subsection (1)*.

*Section 728* lays down what is to be included in the notice from the Registrar to the company of the intention to strike it off the register. This section is new but is drawn from section 311 of the Companies Act 1963, as amended, section 12 of the Companies (Amendment) Act 1982 and section 12A C(A)A 1982, as inserted by section 46 of the Companies (Amendment)(No.2) Act 1999. The notice must state that this is the first step in a process that may lead to the company being struck off and it must state the ground(s) for strike off and that the company will be dissolved if it is so struck off. *Subsection (1)(e) – (g)* deal with the “remedial step”, which is elaborated on in *section 729*, which, if taken, can halt the strike off process. The company has 28 days within which to take the appropriate remedial step. Except in the case of incomplete liquidation induced strike off, or where there is no director of the company recorded in the CRO, the notice to the company should also state that each director of the company is liable to be disqualified under *section 842(h)* of the Act if the company is eventually struck off the Register.

*Section 729* is new and lays down the meaning of “remedial step”. This affords an opportunity to the company to avert the continuation of the strike off process by doing one of the things listed in this section. Depending on the circumstances which led to the initiation of the strike off procedure, this could be; to deliver all outstanding annual returns to the Registrar; to deliver the required statement under the Taxes Consolidation Act 1997 to the Revenue Commissioners; to provide evidence to the Registrar that it is not the case that none of the directors of the company are EEA resident; or to appoint a director in the case where no person is recorded in the CRO as being current director of the company. Where the strike off is for reason of incomplete liquidation, the provision of both the details of the liquidator and of the up-to-date periodic statements to the Registrar will constitute the remedial step.

*Section 730* deals with the public notice of the Registrar’s intention to strike a company off the register. It is new but has its origins in section 311 of the Companies Act 1963, as amended. Where the company has not taken the remedial step required of it to avoid strike off, the Registrar may publish a public notice in the CRO Gazette of his or her intention to strike the company off the register. The notice should specify the grounds for striking off and the appropriate remedial step. The company then has a further 28 days in which it can take the remedial step and halt the strike off process.

*Section 731* is new and specifies the conditions for voluntary strike off. Voluntary strike off was previously available under section 311(1) of the Companies Act 1963. This happens in practice when a company takes the initiative to be struck off by requesting the Registrar to exercise his or her powers under section 311(1) CA 1963 in the context of the Registrar having “reasonable cause to believe that the company is not carrying on business”. In practice, the Registrar has made it clear that this is a discretionary power which he or she is prepared to use only if a director of a company furnishes a statement to the effect that the company has ceased trading or has never traded, that it has no assets or liabilities and that it wishes that its name be struck off the register. In addition, such a statement must be accompanied by all outstanding annual returns (including accounts, filing fees and late filing fees, where applicable), a letter of no objection from the Revenue Commissioners and a copy of an advertisement in the prescribed form, published in one daily newspaper indicating the intention to have the company struck off the register.

The CLRG took note of this procedure and recommended that it be put on a statutory basis, albeit with some amendments. *Subsection (1)* sets out the conditions to be satisfied before a company may

apply to the Registrar to be struck off. It is now required that the company pass a special resolution to such effect within the 3 months preceding the date of the application. The maximum permitted value of the assets of the company has been increased to €150 – similarly with the liabilities of the company. The requirement that the amount of the issued share capital of the company does not, and did not in the 3 years prior to strike off, exceed €100 has been removed. All the other conditions laid down in *subsection (1)* correspond to those used currently in practice and set out in the paragraph above.

*Subsection (2)* makes provision for the circumstance where an application for voluntary strike off is made within 1 year of the company changing its name or registered office. In such a case, the company must then also provide to the Registrar its former name and the address of its former registered office, as appropriate.

*Section 732* is new and contains provisions in relation to the public notice in cases of voluntary strike off. Where the Registrar receives an application from a company to be struck off the register, the Registrar shall publish a notice of the fact of that application in the CRO Gazette. That notice should invite objections to the strike off and should stipulate that, if no objections are received within 90 days, the Registrar may proceed to strike the company off the register. Within that 90 day period, the company is entitled to cancel the process of its being struck off the register.

*Section 733* describes the act of striking off by the Registrar (in voluntary and involuntary cases) and states the point at which a company will be deemed to be dissolved. This section is new but derives in part from section 311 of the Companies Act 1963. In cases of involuntary strike off, where the Registrar has given the required notice and where the company has not taken the remedial step required of it, the Registrar is entitled to strike the company off the register. In cases of voluntary strike off, the Registrar may proceed to strike the company off the register where, after the giving of the requisite notice, no objection has been received and no request has been received from the company to cancel the strike off process. The notice of the striking off must be published in the CRO Gazette, and the date that it is so published will be the “date of dissolution”.

*Section 734* details the effect of the removal of the company from the Register and its dissolution. *Subsection (1)* provides that, even where a company is dissolved, the liability of a director, other officer or member of that company shall continue as if the company had not been dissolved. This comes from section 311(6) of the Companies Act 1963. *Subsection (2)* re-enacts section 311(7) CA 1963 and states that nothing in this section affects the power of the court to wind up a company that has been struck off the register or dissolved.

*Subsection (3)* provides that a company that has been struck off shall have the capacity necessary to apply for a restoration. This subsection is new and is introduced on the recommendation of the CLRG. It was noted that where a company has been struck off the register and purports to be re-instated, one of the difficulties facing the directors and auditors of the company is that, although an application may be successful and the company will be deemed to have never been struck off, at the time of the purported re-instatement the company will not, in fact, exist. The CLRG recognised that it is implicit that the company has a “shadow existence” for the purpose of achieving restoration. It recommended, however, that such an implicit position be made explicit in the restoration process. Accordingly, all actions necessary for the restoration process may be taken on the basis that, for this purpose only, the company has, in fact, an existence.

*Subsection (4)* follows on from this and makes it clear that this provision does not authorise the dealing with, or exercising of control over, any property which has become the property of the State under the State Property Act 1954. Under this Act, where the name of a company is struck off the

register, all property which was vested in or held in trust for such company upon its dissolution becomes the property of the State.

*Section 735* gives the Director of Corporate Enforcement the power to obtain information where a company has been struck off the register further to an involuntary strike off under *section 733(1)*. This is new and was inserted in accordance with the recommendations of the CLRG in its First Report. The CLRG recommended that it would be important to give the Director of Corporate Enforcement powers such that, in the event of a strike off, he or she could require a director of a company to produce a statement of affairs as at a date preceding the commencement of the strike off of the company. Upon examination of such statement, the Director of Corporate Enforcement could then decide whether to make an application to court to require the director of the company to appear before it and answer on oath any question relating to the statement. The requirement to produce a statement of affairs of the company is analogous to the examination as to the solvency status of a company under section 183A of the Companies Act 1963, as inserted by section 40 of the Company Law Enforcement Act 2001, and the requirement to file a statement of affairs of the company under section 224 CA 1963 where the company is being wound up.

## **Chapter 2**

### Restoration of company to register

*Section 736* clarifies that this Chapter applies to companies that have been struck off the register under *Chapter 1* of this Part.

*Section 737* details how an application may be made to the Registrar to have the company restored to the register. The application must be received by the Registrar (in the prescribed form) within 12 months of the date of dissolution of the company. This derives from section 311A of the Companies Act 1963, as inserted by section 246 of the Companies Act 1990 and amended by section 50 of the Companies (Amendment) (No.2) Act 1999. Some amendments have been made in that the application for restoration may no longer be made by “a company” that feels “aggrieved” by the strike off – it must now be made by a person who was a member or officer of the company at the date of its dissolution who feels “disadvantaged” by the company having been struck off. The use of the word “disadvantaged” instead of “aggrieved” makes the position more certain where the person making the application for the restoration caused the dissolution in the first place.

*Subsection (2)* remedies a lacuna in section 311A(1) CA 1963, whereby restoration by the Registrar is only possible following the delivery of outstanding annual returns to the Registrar, even where the strike off occurred for reasons other than the failure to make annual returns to the Registrar. For this reason, the requirements are now stated cumulatively, including those which were not the basis of the original strike off meaning that all of the requirements must be addressed before the restoration can occur.

*Subsection (3)* preserves the existing practice concerning strike off that has been initiated by the Revenue Commissioner. If Revenue has given the Registrar notice under section 882(3) of the Taxes Consolidation Act, 1997, the Registrar has grounds, pursuant to section 726 (b) of this Act to effect involuntary strike off of the company from the register. In order for the Registrar to have powers to restore such a company administratively to the register, the Registrar must be in receipt of a letter of no objection from Revenue before such a company can be administratively be restored.

*Subsection (6)* makes it clear that, subject to any order made by the court in the matter, the restoration of a company to the register shall not affect the rights and liabilities of the company in respect of any debt or obligation incurred, or any contract entered into, by, with or on behalf of the company between the date of its dissolution and the date of restoration.

*Section 738* contains provisions governing the restoration of a company to the register by way of court application. This is a new section but derives in part from section 311(8) of the Companies Act 1963 and section 12B(3) of the Companies (Amendment) Act 1982, as inserted by section 46 of the Companies (Amendment) (No.2) Act 1999. The application can be brought by the company, a creditor of the company, a member or officer of the company or a person who had an entitlement to be registered as a member of the company. The court may restore the company to the register where not more than 20 years has passed since the dissolution of the company and where the striking off of the company has “disadvantaged” the applicant. Again, the word “aggrieved” has been replaced by the word “disadvantaged” in order to make the position more certain where the person making the application for the restoration caused the dissolution in the first instance. In addition to these requirements, the court must also be satisfied that it is just and equitable to restore the company to the register. *Subsection (3)* states that a company will be deemed to have continued in existence as if it had not been struck off the register, provided that the Registrar receives a certified copy of the court order for restoration within 28 days of its perfection.

*Section 739* lists the notice requirements for making an application to the court under the preceding *section 738*, and *subsection (1)* provides that the Registrar, the Minister for Public Expenditure and Reform and the Revenue Commissioners must be notice parties to such an application. This derives from section 12B(3) of the Companies (Amendment) Act 1982, as inserted by section 46 of the Companies (Amendment) (No.2) Act 1999.

*Subsection (2)* contains additional notice requirements in circumstances where the application to have the company struck off is made by a creditor. This provision is new and is designed to ensure that, in a creditor’s application, the parties who ought to be subject to the restoration order are notified of the application – namely relevant officers and members of the company. There is a change to the reference from Minister for Finance to the Minister for Public Reform and Expenditure to reflect the reality that the function under the *State Property Act, 1954* transferred in July 2011 to the Minister for Public Expenditure and Reform under the Ministers and Secretaries (Amendment) Act, 2011 and S.I. No. 418/2011 — Finance (Transfer of Departmental Administration and Ministerial Functions) Order, 2011.

*Section 740* lists what must happen before the order of the court to restore the company to the register can have effect. *Subsections (1) to (3)* deal with applications from a member or officer of the company and provide that, in relation to the company, all outstanding annual returns must be delivered to the Registrar and all outstanding statements required under the Taxes Consolidation Act 1997 must be delivered to the Revenue Commissioners before the court order can have effect. In addition, the company must appoint a director and deliver the notification and consent in relation to that appointment to the Registrar. The rules in *Part 4 (sections 137 and 140)* relating to the EEA residency of the director and the necessity for a bond to be submitted in certain circumstances also apply here.

*Subsections (4) to (6)* deal with applications from creditors and mirror the provisions in relation to applications from members and officers of the company. It is necessary to procure the delivery of all outstanding annual returns to the Registrar together with any outstanding statements to the Revenue Commissioners. Furthermore, specified members or officers must take all reasonable steps to ensure that a director is appointed to the company and that the notification and consent concerning that appointment is sent to the Registrar.



These provisions are drawn from section 12B(5) and (6) of the Companies (Amendment) Act 1982, as inserted by section 46 of the Companies (Amendment) (No.2) Act 1999. However, it is now provided that there must be compliance with all the circumstances that can justify strike off and not merely the circumstances that led to the company being struck off the register.

*Subsection (6)* is newly inserted in accordance with the recommendation of the CLRG that, in circumstances where the application for restoration is made by a creditor, the court should be permitted to award the applicant the costs of the application against the company.

*Section 741* is similar to *section 738* and governs the situation where the Registrar applies to the court to have the company restored. Such an application must be made within 20 years of the date of dissolution of the company and must be on notice to each person who, to the knowledge of the Registrar, was an officer of the company at that date. The court may grant the restoration order if it is just and equitable to do so and on the making of the order, the company will be deemed to have continued in existence as if it had never been struck off the Register. This derives from section 12B(7) of the Companies (Amendment) Act 1982, as inserted by section 46 of the Companies (Amendment) (No.2) Act 1999. *Subsection (4)* has been newly inserted and allows the court to award the Registrar the costs of the application against the company restored to the register.

*Section 742* provides for supplementary orders that the court may make when restoring a company to the register, whether on application from the Registrar or any of the parties listed in *section 739*. Under *paragraph (a)*, the court may give directions so that the company and other persons are placed as nearly as possible in the same position as if the company had not been struck off the register. This derives from section 311(8) of the Companies Act 1963 and section 12B (3) of the Companies (Amendment) Act 1982, as inserted by section 46 of the Companies (Amendment) (No.2) Act 1999. *Paragraph (b)* is new and deals with the situation where the name of the company is too similar to the name of another company already on the register – in such a case the court may order that the company being restored change its name.

*Paragraph (c)* allows the court to order that the officers of the company be liable for a debt or liability incurred by or on behalf of the company during the period when the company was struck off the register. This subsection re-enacts section 311(8A) CA 1963 and section 12B(4) C(A)A 1982, as inserted by sections 49(b) and 46 C(A)(No.2)A 1999 respectively.

Finally, under *paragraph (d)*, the court may make any other order as it sees fit. This slightly amends the language of the provision in the 1963 Act and the 1982 Act, which allows the court to make any other order “as seems just”.

*Section 743* clarifies that the term “court” means the High Court or the Circuit Court, for the purposes of this Chapter. It amends section 12B(9) of the Companies (Amendment) Act 1982, as inserted by section 46 of the Companies (Amendment) (No.2) Act 1999. The amendment is to clarify the uncertainty which arose following the Supreme Court decision in *Re Deauville Communication Worldwide Limited* [2002] 2 I.R. 32, where it was held that, although the language used in the 1982 Act was capable of being construed so as to make it obligatory that an application for restoration be brought in the Circuit Court as opposed to the High Court, a creditor was still permitted to bring an application for restoration in the High Court.

*Subsection (2)* explains which circuit of the Circuit Court the application should be made in, in cases where the application is made to the Circuit Court by a creditor. *Subsection (3)* provides that an application by the Registrar for restoration to the Circuit Court should be made to the Dublin Circuit.

*Section 744* contains transitional provisions for companies struck off the register before the commencement of this Chapter.

### **Chapter 3** Miscellaneous

*Section 745* is designed to ensure that the Revenue Commissioners have the necessary authority to communicate information to the Registrar which they have in relation to making, or failure to make, returns under the Taxes Consolidation Act 1997, without breaching their obligations to confidentiality contained in other legislation. This is drawn from section 12D of the Companies (Amendment) Act 1982, as inserted by section 46 of the Companies (Amendment) (No.2) Act 1999.

DELETED

## **Part 13 – Investigations**

### *Preliminary Note*

*Part 13* substantially re-enacts, without any significant amendments, the law regarding the appointment of inspectors to companies.

*Chapter 1* provides interpretation for the Part as a whole.

*Chapter 2* governs inspections by court appointed inspectors. This Chapter is drawn from the previous provisions which regulated investigations under the previous Companies Acts.

*Chapter 3* concerns investigations initiated by the Director of Corporate Enforcement.

*Chapter 4* contains miscellaneous provisions relating to this Part. It includes *section 795* which contains a saving for privileged information.

The principal changes are (a) updating of definitions and terminology, (b) facilitating access to the investigations procedure in respect of small and medium companies, (c) facilitating the work of the Office of the Director of Corporate Enforcement by empowering the court to make orders in respect of a variety of matters under the Part, and (d) removing administrative burdens.

(a) New definitions and updated terminology make the provisions of the Part clearer, and remove uncertainties created by obsolete usages.

(b) *Sections 747, 748 and 750* provide for applications to be made to the Circuit Court rather than to the High Court in respect of small and medium companies. This is hoped to improve accessibility of the investigations procedures to smaller companies, and persons involved with them.

(c) *Sections 751, 767 and 788* extend the powers of the Court to make orders and directions to assist the Office of the Director of Corporate Enforcement in investigations. These provisions will help to ensure prompt compliance with investigations.

(d) *Section 770* changes the requirement that notice must be published in two daily newspapers to a requirement that notice be published in the *Iris Oifigiúil* this will reduce administrative burdens while at the same time increasing the nationwide availability of information.

### *Explanatory Memorandum*

#### **Chapter 1** Preliminary

*Section 746* is new, and introduces particular definitions of “share capital” and “relevant share capital” for the purposes of this Part, restricting them to share capital conferring a right to vote in all circumstances at a general meeting, but extends the definition of “shares in a company”, “share capital of a company”, “shareholding in a company”, and “interest in shares in a company” to include membership and the rights and obligations attaching thereto.

#### **Chapter 2** Investigations by court appointed inspectors

*Section 747* provides for the appointment of inspectors by the court on the application of a company, its members (subject to specified thresholds in *subsection (2)*), its directors or its creditors. It derives from section 7 of the Companies Act 1990, as amended by section 20 of the Company Law Enforcement Act 2001. The most significant change to this power applies to all parties who have the power to apply to the High Court to seek the appointment of an inspector. For companies that are classified as small or medium sized, parties now need only apply to the Circuit Court. Where third parties are making an application they are now also under an obligation to give the Director of Corporate Enforcement 14 days' notice of the application, and the Director is entitled to appear and be heard at the hearing of the application (*subsection (5)*).

*Subsection (8)* states that *subsection (6)* (which provides for limited jurisdiction for the Circuit Court in relation to small and medium sized companies) does not confer jurisdiction on the Circuit Court to wind up any body corporate, however, the Circuit Court may in the exercise of its jurisdiction refer an inspectors' report made to it under this Part to the High Court. Provision is also made in this section for the reduction of audit exemption criteria which is required to complement the changes introduced by the Companies (Miscellaneous Provisions) Act 2013.

*Section 748* is partly new. The scope of *subsection (1)*, which limits the circumstances in which the court can appoint inspectors, has been extended in accordance with section 67 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. It has also been made clear that directors and other officers of the company may be appointed as inspectors of the company, and now applicants in respect of small and medium companies, within the definitions ascribed to those terms by *section 350*, will be permitted to apply to the Circuit Court instead of the High Court. This section stems from section 8 of the Companies Act 1990.

*Subsection (9)* is drawn from section 282A(2) of the Companies Act 1963.

*Section 749* empowers the court to give directions in relation to an investigation if it considers it necessary. It has its origins in section 7(4) of the Companies Act 1990.

*Section 750* enables inspectors to expand their investigation into the affairs of related companies if (a) they consider it necessary and (b) if court approval has been obtained. *Subsection (3)* clarifies the meaning of 'related company' for the purposes of this section. This term will be construed widely so as to include companies that have a 'commercial relationship' simply through supplying goods and services to one another. This section stems from section 9 of the Companies Act 1990, as amended by section 22 of the Company Law Enforcement Act 2001. *Subsection (4)* has been added and states that the Circuit Court will only have the power to approve the expansion of the inspectors' investigation under *subsection (1)* if the company in question is classed as a small or medium sized company under *section 350* of the Act.

*Section 751* is new. It empowers the court to make an order for the inspection of books or documents of a company in liquidation. It is considered appropriate to specially grant this power to the court.

*Section 752* sets out the expanded meaning of "officer" and "agent" for the purposes of sections 753 to 757. This operates to include present and past officers, bankers, solicitors and other advisors to the company.

*Section 753* requires a company officer or agent of a company under investigation to produce books or documents and give assistance if required. This derives from section 10(1) of the Companies Act 1990, as amended by section 23 of the Company Law Enforcement Act 2001.

*Section 754* requires persons other than officers or agents of the company whom an inspector believes to possess information concerning the affairs of a company when under investigation to produce books or documents and give assistance if required. This derives from section 10(2) of the Companies Act 1990, as amended by section 23 of the Company Law Enforcement Act 2001.

*Section 755* contains a supplementary power to compel production of books or documents in relation to certain banking transactions. This section derives from section 10(3) of the Companies Act 1990, as amended by section 23 of the Company Law Enforcement Act 2001. The terminology has been updated in accordance with changes elsewhere in the Act.

*Section 756* empowers the inspector to examine on oath officers, agents and others. It derives from section 10(4) of the Companies Act 1990, as amended by section 23 of the Company Law Enforcement Act 2001.

*Section 757* allows the court to make an order in relation to refusal or failure to produce documents or to attend before or answer questions asked by an inspector. It derives from section 10(5) and (6) of the Companies Act 1990, as amended by section 23(c) of the Company Law Enforcement Act 2001.

*Section 758* replicates section 11(1) and (2) of the Companies Act 1990. This section relates to reports of inspectors appointed under *sections 747(1) or 748(1)* to investigate the affairs of a company. *Subsection (2)* provides that an inspector may, at any time in the course of the investigation, inform the court of matters coming to his or her knowledge as a result of the investigation that tend to show that an offence has been committed.

*Section 759* deals with the distribution of the inspectors' report. It is drawn from section 11 of the Companies Act 1990, as amended by section 24 of the Company Law Enforcement Act 2001. It sets out a list of persons to whom and the purposes for which the court may furnish a copy of the report of an inspector. The requirement for a person to pay a fee for a copy of an inspector's report to the court is removed as a person should not have to pay a prescribed fee for a document that is deemed necessary for them to possess. *Subsection (5)* provides that the court may direct that a particular part of an inspectors' report be omitted.

*Section 760* gives the court a broad jurisdiction as to the orders it may make having considered the contents of the inspector's report. Of its own motion, the court may order that the body corporate be wound up. The court may also make an order under *subsection 2(b)* to remedy any disability suffered by any person whose interests were adversely affected by the way in which the affairs of the company were conducted. This section derives from section 12 of the Companies Act 1990, as amended by section 14 of the Company Law Enforcement Act 2001.

*Section 761* provides that the Director of Corporate Enforcement may present a petition for winding up following consideration of an inspectors' report. This section derives from section 12 of the Companies Act 1990, as amended by section 14 of the Company Law Enforcement Act 2001. It is

clarified that the winding-up partition is not limited to any information or document obtained by the Director under this Part as this wording is unduly restrictive, because it ignores the fact that the Director may obtain information or documents in the exercise of his functions and powers, other than by use of *Part 13*. For instance, the Director may demand various registers and minutes of company meetings; he or she may obtain information under the Bankers' Books Evidence Acts (1879 and 1959), and he or she may obtain information which is volunteered to him or her by cooperative witnesses. Where the decision to make a winding-up petition is informed by a mix of documents and information acquired by various means, the Director should not be limited to putting before the Court only those documents and information which have been acquired in the exercise of his or her powers under *Part 13* alone.

*Section 762* relates to the expenses of court investigations and provides that the costs are to be borne in the first instance by the Minister for Justice and Equality in a *section 747(1)* investigation and by the Director of Corporate Enforcement in a *section 748(1)* investigation. The court may direct that a body corporate dealt with in the report or the applicant or applicants for the appointment of the inspector reimburse the Minister for Justice and Equality or the Director of Corporate Enforcement. Where successful criminal or civil proceedings are brought against a wrongdoer as a result of the investigation, the court hearing those proceedings may direct the wrongdoer to reimburse all or part of the costs of the investigation. *Subsection (5)* allows the court in civil proceedings brought as a result of the investigation to direct that anyone who has recovered damages or property in consequence shall pay up to 10% of the costs of the investigation.

### **Chapter 3**

#### **Investigations initiated by Director**

*Section 763* deals with investigation of share dealing by an inspector appointed by the Director of Corporate Enforcement in circumstances suggesting a contravention of *Chapter 5* of *Part 5*. That Chapter places limitations or prohibitions on certain types of share dealings involving directors and connected persons, and imposes an obligation on such persons to register their interests in shares and debentures. It derives from section 66 of the Companies Act 1990.

*Section 764* empowers the Director of Corporate Enforcement to appoint an inspector to investigate the ownership of a company. This section is derived from section 14 of the Companies Act 1990, as amended by section 14 and section 26 of the Company Law Enforcement Act 2001. *Subsection (1)* states that an inspection can be in relation to the membership of a company or any other matter regarding the company for the purpose of determining the true persons who are or have been financially interested in the success or failure (real or apparent) of the company or able to control or materially influence the policy of the company. The purpose of such an investigation is to look behind the separate legal personality of the company.

*Section 765* deals with the application of certain provisions of this Part to investigations into company ownership. It is drawn from section 14 of the Companies Act 1990, as amended by section 14 and section 26 of the Company Law Enforcement Act 2001.

*Section 766* empowers the court to direct a company that is the subject of an investigation under *section 764* to repay the Director of Corporate Enforcement such proportion of the expenses of the investigations as the court directs. It is drawn from section 14 of the Companies Act 1990, as amended by section 14 and section 26 of the Company Law Enforcement Act 2001.

*Section 767* permits the Director of Corporate Enforcement to carry out his or her own inquiry into share and debenture ownership where he or she considers that a formal investigation is unnecessary. The conditions warranting him or her to conduct such an inquiry are the same as for the appointment of an inspector under *section 764(2)*. It is derived from section 15 of the Companies Act 1990, as amended by section 14 Company Law Enforcement Act 2001. The offence under this section has been brought into line with the general scheme of offences under Part 14, and is now a category 2 offence. For ease of enforcement, the Director can apply to the court for an order requiring a person to comply with the requirements of the Director.

*Section 768* confers on the Director of Corporate Enforcement the power, by written notice, to impose restrictions on shares in connection with an investigation or inquiry under *sections 764* or *767*. These restrictions can include (for example) non-exercise of voting rights or restrictions in shares. This is drawn from section 16 of the Companies Act 1990, as amended by sections 14 and 27 of the Company Law Enforcement Act 2001.

*Section 769* provides that the Director of Corporate Enforcement may lift the restrictions imposed under *section 768* if the relevant information as to ownership of the shares has been disclosed, or if the shares are to be sold and the court or the Director of Corporate Enforcement approves the sale. This is drawn from section 16 of the Companies Act 1990, as amended by section 14 and 27 of the Company Law Enforcement Act 2001.

*Section 770* provides that the Director, as soon as practicable after giving a direction under *section 768* or *769*, must cause notice of that direction to be (a) sent to the company concerned at its registered office (b) delivered to the Registrar and (c) published in the *Iris Oifigiúil*. The requirement to publish a notice in at least two daily newspapers has been deleted and a requirement to simply publish the notice in the *Iris Oifigiúil* has been put in place.

*Section 771* provides that the court may lift restrictions imposed on shares under *section 768*.

*Section 772* derives from section 16(7) and (8) of the Companies Act 1990, as amended by sections 14 and 27 of the Company Law Enforcement Act 2001. It provides that the court may order the sale of shares and direct that the restrictions imposed under *section 768* cease.

*Section 773* provides that where the court makes an order under *section 772*, the court may stipulate that the costs of the applicant shall be paid out of the proceeds of the sale of the shares. The applicant shall be entitled to payment of costs out of the proceeds of sale before any person interested in the shares sold receives any part of the proceeds. This re-enacts section 16(11) of the Companies Act 1990, as amended by sections 14 and 27 of the Company Law Enforcement Act 2001.

*Section 774* deals with the proceeds of a court ordered sale of shares. It is drawn from section 16(9) and (10) of the Companies Act 1990, as amended by sections 14 and 27 of the Company Law Enforcement Act 2001.

*Section 775* provides for a continuance of certain restrictions. This derives from section 16(12) of the Companies Act 1990.

*Section 776* sets out a number of category 2 offences in relation to shares that are subject to restrictions. This section has its origins in section 16(14) and 16(15) of the Companies Act 1990.

*Section 777* provides that *sections 768 to 776* shall apply in relation to debentures as they apply in relation to shares. This derives from section 16(17) of the Companies Act 1990, as amended by sections 14 and 27 of the Company Law Enforcement Act 2001.

## **Chapter 4**

### Miscellaneous provisions

*Section 778* reproduces the power of the Director of Corporate Enforcement – section 19(1) of the Companies Act 1990, as replaced by section 29 of the Company Law Enforcement Act 2001 – to require the production of company documents in certain defined circumstances.

*Section 779* sets out the circumstances in which the Director of Corporate Enforcement may exercise the power to require a company to produce books or documents. This is no different from previous law, however, an expansion of its use is that a new ground has been added, where the affairs of the company are being or have been conducted in an unlawful manner. This section derives from section 19(2) of the Companies Act 1990, as replaced by section 29 of the Company Law Enforcement Act 2001 and amended by section 67 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Section 780* empowers the Director of Corporate Enforcement to require a third party to produce books or documents that do not belong to the company but relate to the company's records. This derives from section 19(3) of the Companies Act 1990, as replaced by section 29 of the Company Law Enforcement Act 2001.

*Section 781* provides a saving in relation to *section 780* above and corresponding amendments effected by the Companies (Amendment) Act 2009. This reproduces section 4(2) of that Act.

*Section 782* places a restriction on the power of the Director of Corporate Enforcement to require a third party to produce certain books or documents. This derives from section 19(4) of the Companies Act 1990, as replaced by section 29 of the Company Law Enforcement Act 2001 and amended by section 67 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 and section 4 of the Companies (Amendment) Act 2009. The Director must give at least 21 days' notice to the third party unless he or she believes that the records might otherwise be concealed, falsified, destroyed or disposed of.

*Section 783* empowers the court to order a third party to comply with the requirement to produce books or documents. This stems from section 371A of the Companies Act 1963, as inserted by section 97 of the Company Law Enforcement Act 2001. It was necessary to insert 371A as the provisions under section 371 of the CA 1963 only dealt with orders to require the company or other officers of the company to comply.

*Section 784* contains powers ancillary to the power to require production of books or documents under *section 778* or *780*. This derives from section 19(5) of the Companies Act 1990.



*Section 785* sets out the offences in relation to the requirement to produce books or documents. This section is drawn from section 19(6) to (9) of the Companies Act 1990, as amended by section 29 of the Company Law Enforcement Act 2001 and section 67 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 and section 4 of the Companies (Amendment) Act 2009.

*Section 786* confers on the court (on the application of the Director of Corporate Enforcement) the power to direct a company to repay the Director the expenses relating to the examination of the books or documents. This section derives from section 19(10) to (12) of the Companies Act 1990, as amended by section 29 of the Company Law Enforcement Act 2001 and section 67 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 and section 4 of the Companies (Amendment) Act 2009.

*Section 787* deals with entry and search of premises and is drawn from section 20 of the Companies Act 1990, as amended by section 30 of the Company Law Enforcement Act 2001 and section 68 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 and section 5 of the Companies (Amendment) Act 2009. A search warrant may issue from a District Court Judge authorising a named designated officer and such other persons as the officer thinks necessary, to enter premises specified in the warrant, using force if necessary to search the premises, to require persons found on the premises to give details of their name, home address and occupation and to produce material information that is in their custody or possession, to seize and retain any material or information found and to take any other steps considered necessary to preserve or prevent inference with material information. The length of validity of a warrant is changed from one month to a period of 30 days from its issue. This change removes the potential for confusion and inconsistency. Computer based information may be searched and disclosure of passwords and other assistance can be required of persons identified as having that knowledge.

*Section 788* contains provisions that are supplemental to *section 787(3) to (5)* and deals with arrangements for storage, access to and confidentiality of information seized under this Part. It empowers the court to make directions in respect of the exercise of an extended power of seizure, to ensure timely return of items seized under such a power.

*Section 789* sets out offences in relation to entry and search of premises and other provisions. *Subsection (1)* lays down a category 2 offence for a number of obstructions and failures, including obstruction of the exercise of a right of entry or search conferred by a search warrant issued under *section 787*. *Subsections (2) to (7)* are new and deal with circumstances where the designated officer named in a search warrant has ceased to be an officer of the Director of Corporate Enforcement or is otherwise unable to act – in such a case another designated officer may apply to a judge of the District Court for an order that his or her name be substituted for the original designated officer's name on the search warrant.

*Section 790* imposes a restriction on disclosure of information, books or documents that have been obtained under *sections 778 to 780, 783 or 787*. It derives from section 21 of the Companies Act 1990, as amended by section 53 of the Companies (Amendment) (No.2) Act 1999 and section 31 of the Company Law Enforcement Act 2001. The offence under this section has been brought into line with the general scheme of offences under Part 14, and is now a category 2 offence.

*Section 791* provides that any information, book or document relating to a company that has been obtained under any of *sections 778 to 780, 783 or 787* may be published or disclosed without the consent of the company, if in the opinion of the Director of Corporate Enforcement publication or disclosure is required under specific circumstances. This section derives from section 21 of the Companies Act 1990, as amended by section 53 of the Companies (Amendment) (No.2) Act 1999 and section 31 of the Company Law Enforcement Act 2001. *Paragraph (e)* now contains a reference to the Commissions of Investigations Act 2004.

*Section 792* states that any information, book or document relating to a company that has been obtained under any of *sections 778 to 780, 783 or 784* may be disclosed to a competent authority without the consent of the company. *Subsection (2)* lists the bodies or persons that are categorised as a competent authority. *Subsection 2(d)* has been extended to include the Registrar and *subsection 2(g)* now includes the Revenue Commissioners in the list of competent authorities. Under the previous law the Revenue Commissioners were not specified in the list whereas a revenue authority outside the State was. This was an unbalanced position. This section is drawn from section 21 of the Companies Act 1990, as amended by section 53 of the Companies (Amendment) (No.2) Act 1999 and section 31 of the Company Law Enforcement Act 2001.

*Section 793* provides for the offence of falsifying, destroying or otherwise disposing of a document or record. This section re-enacts section 19A of the Companies Act 1990, as inserted by section 29 of the Company Law Enforcement Act 2001. The offence under this section has been brought into line with the general scheme of offences under Part 14, and is now a category 2 offence.

*Section 794* provides that the Director of Public Prosecutions, the Director of Corporate Enforcement or a Superintendent of the Garda Síochána may seek an order from the District Court authorising the inspection of books or papers of a company requiring their production. This section effectively crystallises what was in practice a useful power as regards third party information which was obtainable but in a more awkward manner under previous law. This section stems from section 384 of the Companies Act 1963, as amended by section 14 of the Company Law Enforcement Act 2001. The references to High Court have been changed to the District Court.

*Section 795* sets out a saving for privileged information. This section derives from section 23 of the Companies Act 1990, as amended by section 32 of the Company Law Enforcement Act 2001. It clarifies that the powers under this Part are subject to any person's entitlement to legal professional privilege and limited to certain defined circumstances, the instances in which the Director of Corporate Enforcement may exercise his or her powers under *sections 778 to 780*, to access banking records. Similarly it is confirmed that the publication of reports, information, books or documents in pursuance of this Chapter are privileged.

*Section 796* empowers the Director of Corporate Enforcement to exercise his or her powers of inquiry to assist an investigation by a foreign company law authority. It derives from section 23 of the Companies Act 1990, as amended by section 32 of the Company Law Enforcement Act 2001.

## **Part 14 – Compliance and Enforcement**

### *Preliminary Note*

This Part brings together the various compliance and enforcement provisions found in prior Company Law legislation.

*Chapter 1* deals with compliance and protective orders. The court may make an order to compel a company or any officer thereof to comply with the provisions of this Act. The court is also permitted under this Chapter to make a Mareva-type injunction to prevent the dissipation of the company's assets. The circumstances in which an injunction can be granted are now limited to cases where the primary cause of action also arises under this Act. Alternatively, the cause of action must arise under the provisions of the constitution of the company or relate to the holding of an office of the company.

*Chapter 2* regarding disclosure orders re-enacts, with slight amendments, the prior provisions under which persons who have a financial interest in a company may apply to the court for an order compelling the disclosure of certain information about interests held by other persons in shares or debentures of a company. Specific provisions in relation to disclosure orders in cases of share acquisition agreements are included in this Chapter.

*Chapter 3* deals with the restriction of directors of insolvent companies. Conditions are placed on the involvement in corporate life of those who have acted as directors of a company that has become insolvent. The restriction is not automatic – an application will have to be made to the court by the Director of Corporate Enforcement, the liquidator of the insolvent company or a receiver of the property of the company for a restriction order which will apply for a period of 5 years. To avoid being restricted, a director may avail of the defence of having acted honestly and responsibly in relation to the conduct of the affairs of the company. A director relying on that defence must now also show that they have, when requested to do so by the liquidator, cooperated as far as could reasonably be expected in relation to the conduct of the winding up of the insolvent company and that there is no other reason why it would be just and equitable that he or she should be subject to a declaration of restriction.

A restricted director may act in relation to a company, provided that the company meets the capitalisation requirements as laid down in *section 819(3)*. The required nominal value of the allotted share capital has been rounded up to €500,000 (from €317,434.52) in the case of a PLC (other than an investment company) or a public unlimited company and €100,000 (from €63,486.90) in the case of all other companies.

The law has been further clarified so that if, when restricted, a person becomes a director of a guarantee company without a share capital, one of the members of the company is now required to give a guarantee of not less than €100,000.

A director may apply for relief from a restriction order under *section 822* of the Act. This provision removes the limitation found in the 1990 Act, under which a relief application was only capable of being brought within one year of the person's restriction – the application may now be brought at any stage during which the person is restricted. The Director of Corporate Enforcement must now also be included as a notice party in any application for relief.

Finally, *section 827* contains a new provision whereby a company is prohibited from utilising the Summary Approval Procedure (as laid down in *Part 4, Chapter 7* of the Act) where that company has a restricted person within the meaning given to this term by *section 818*.

*Chapter 4* sets out general provisions relating to disqualification, which is a sanction that involves a total ban on the involvement of the disqualified person with companies for the period of the

disqualification order. Disqualification as a sanction is not limited to directors only – it can also apply to promoters, officers, statutory auditors, receivers, liquidators and examiners. Disqualification can either be automatic (under *section 839*), which lasts for 5 years or such other period as the court sees fit, or court ordered (*section 842*) for such period as the court sees fit. As with the provisions above in relation to restriction, a disqualified person may apply for relief from a disqualification order. *Section 839* amends the law by limiting the category of offences which give rise to automatic disqualification.

*Chapter 5* is newly introduced and contains the most significant amendment to the law governing restriction and disqualification. It allows persons to give and for the Director of Corporate Enforcement to accept, disqualification and restriction undertakings. This means that it will be possible to avoid a court appearance where the person concerned agrees to give an undertaking not to act in a manner as would be prohibited if that person were the subject of a restriction or disqualification order. This process has been introduced in accordance with the recommendation of the Company Law Review Group in its 2007 Report following consideration of similar UK law provisions.

*Chapter 6* deals with enforcement in relation to disqualification and restriction orders and lays down the criminal and civil sanctions that flow from acting in a prohibited manner while restricted or disqualified. Included in this Chapter is the offence of acting on the instructions of a person who is disqualified or prohibited from acting. Provision is also made here for a register of disqualified persons, which is to be maintained by the Registrar of Companies.

*Chapter 7* contains provisions relating to offences generally. The prior provision under which all summary prosecutions under the Companies Acts may be brought by the Director of Public Prosecutions or the Director of Corporate Enforcement is re-enacted. A number of specific offences may also be prosecuted by the Registrar of Companies – however, the number of these offences has been reduced in the Act so as to include only those offences which can be prosecuted on the basis of evidence obtained directly from internal CRO records or court orders.

Under this *Chapter 7*, a new four-tier categorisation of offences is introduced. This follows on from a recommendation of the CLRG and it is proposed that, subject to a small number of exceptions in the case of the most serious offences (namely offences under prospectus, market abuse and transparency law), that all offences under the Companies Acts should be categorised according to this four-tier scheme. At the higher end of the scale, category 1 offences carry, following conviction on indictment, a term of imprisonment up to 10 years and/or a €500,000 fine. A summary prosecution for a category 1 offence will result in a Class A fine (as defined in the Fines Act 2010 – currently up to €5,000) and/or a term of imprisonment up to 12 months. A category 2 offence carries a similar penalty for a summary conviction and for a conviction on indictment, will result in imprisonment of up to 5 years and/or a €50,000 fine. Category 3 is a summary offence only, attracting a term of up to 6 months imprisonment and/or a Class A fine. Category 4 offences can also only be tried summarily and are punishable by imposition of a Class A fine.

A further new provision has been introduced at *section 872* where it is proposed that, following a conviction for an offence under this Act, the trial court may order that the convicted person should remedy any breach of the Act in respect of which they were convicted.

*Chapter 8* contains provision for enforcement of *section 27(1)* and additional general offences, including the destruction, mutilation or falsification of a book or document relating to the property or affairs of the company.

*Chapter 9* deals with how answers given to inspectors may be used in evidence, how certain documentation may be given to a jury and presumptions as to signature, content and admissibility of company documentation.

## *Explanatory Memorandum*

### **Chapter 1**

#### Compliance and protective orders

*Section 797* provides for the power of the court to order compliance by a company or officer thereof with the provisions of this Act. It derives from section 371 of the Companies Act 1963, as amended. Any member or creditor of the company or the Registrar or Director of Corporate Enforcement may apply to the court for an order that the company or officer in default of the provisions of this Act remedy the default within a specified timeframe. In making such an order, the court may stipulate that the company or the officers of it pay all the costs of the application. *Subsection (5)* states that the court may not make an order under this section if it is of the opinion that the default in question constitutes a wrong done to the company, which, under the general law, is actionable by the company alone. This section is distinct from and will not prejudice the operation of any enactment imposing penalties on a company or its officers for failing to comply with the provisions of this Act.

*Section 798* extends section 55 of the Company Law Enforcement Act 2001 and confers on the court a statutory jurisdiction to make a Mareva-type injunction against any director or other officer of a company and the company itself when, it is believed, an individual or company will try to place assets beyond the reach of the company's creditors. In effect, the injunction freezes the assets of the company or individual, preventing that person or company from removing or disposing of those assets. The court may make the order on application from the company, a director, member, liquidator, receiver or creditor thereof or the Director of Corporate Enforcement. *Subsection (4)* is new and defines the newly introduced term "qualifying claim". It limits the circumstances in which a statutory Mareva injunction (which is a freezing order to prevent the dissipation of assets outside a jurisdiction in order to frustrate a judgment) can be granted under this section to cases where the primary cause of action also arises under this Act, or where the cause of action arises under the constitution of the company or in relation to the holding of an office of the company.

### **Chapter 2**

#### Disclosure orders

*Section 799* gives guidance as to the meaning of the terms "disclosure order" and "share acquisition agreement" under this Part.

*Section 800* provides for the circumstances in which a court may make a disclosure order in respect of interests in all or any of the shares in or debentures of the company. This re-enacts subsections (2) to (6) of section 98 of the Companies Act 1990, with some additions. Under those provisions, only persons who have a financial interest in the company may apply to the court for a disclosure order. This has been extended in the Act so that the Director of Corporate Enforcement may now also apply for an order under this section.

Any application to the court must be accompanied by such supporting evidence as the court may require and the court may grant the order where it is just and equitable to do so. In applications made other than by the Director of Corporate Enforcement, the court may only make the order where the financial interest of the applicant is or will be prejudiced by non-disclosure of any interest in the shares or debentures of the company.

*Subsection (4)* permits the court to require that the applicant give security as to costs before the hearing of any application under this section.

*Subsection (5)* is new and provides that, where an application under this section is brought by the Director of Corporate Enforcement, the Director will not be able to avail of his or her powers under *section 764(1)* or *section 767* of the Act, in so far as they relate to shares and debentures which are subject to a disclosure application under this section.

*Subsection (7)* defines the term “financial interest” as used in this section.

*Section 801* re-enacts *section 98(1)* of the Companies Act 1990 and elaborates on the types of disclosure order the court may grant. The order of the court can oblige any person who has an interest in the shares or debentures of the company to disclose information about those shares or debentures. Any person whom the court believes to have or to be able to obtain any relevant information can be ordered to give such information to the court. The information referred to in the section includes the names and addresses of any persons with an interest in the shares and debentures of the company and any persons who have acted on the first-mentioned persons’ behalf in relation to those shares and debentures. The court order can also require persons to confirm or deny whether they have an interest in the shares or debentures of a company and, if they do have an interest, to give such further information as the court may require.

*Section 802* outlines the procedure for the making of an application for a disclosure order and re-enacts *section 99* of the Companies Act 1990. The person intending to apply for the order must give not less than 10 days’ notice of their intention to make the application to the company in respect of whose shares or debentures the order is sought in addition to the person to whom the order is to be directed. The court may direct that the applicant serve notice of the application on any other person. All persons notified of the application are entitled to appear and give evidence at the hearing of the application.

*Subsection (2)* is new and states that where an application is also being made under *section 809* (in relation to share acquisition agreements), the person to whom the order is to be directed must receive 10 days’ notice of the application.

*Section 803* gives more detail as to what a disclosure order may or should contain and derives from *section 100* of the Companies Act 1990. The order may require a person to give particulars of his or her interest (past or present) in shares or debentures of the company. If the person concerned currently holds shares or debentures, he or she may be required to give particulars about any other interest that subsists in the shares or debentures. If the person is a former shareholder, he or she may be required to indicate who obtained the shares after him or her (insofar as this information is within his or her knowledge).

*Subsection (2)* makes it clear that the disclosure order must actually specify what information it is seeking to obtain. Any such information given in response to a court order must be given in writing. *Subsection (3)* notes that, in the case of share acquisition agreements, *section 807* will supplement this section. *Subsection (4)* specifies that, for the purposes of this section, any interest in shares or debentures includes a past or present right (or an entitlement to acquire a right) to subscribe for shares or debentures that would be or would have been comprised in the share capital of the company or issued by it.

*Section 804* sets out some rules of interpretation regarding what is to be understood by references to interests in shares and debentures for the purposes of *section 803*. It derives in part from *section 100* of the Companies Act 1990.

*Section 805* deals with family and corporate interests for the purposes of *section 803*. It is provided that a person is taken to be interested in shares or debentures which are held by a spouse, civil partner or child (who is a minor) of theirs. Reference to a child includes a child of the person's civil partner who is ordinarily resident with the person and the civil partner.

In relation to corporate interests, a person is taken to be interested in shares or debentures if a body corporate is interested in those shares or debentures and that body or its directors act in accordance with instructions from that person, or alternatively where that person is entitled to exercise or control the exercise of at least one-third of the voting power at general meetings of that body corporate. In the latter case, where that body corporate is in turn entitled to exercise or control the exercise of any of the voting power at general meetings of another body corporate, then the person previously referred to shall be able to exercise that voting power in the other body corporate. This section derives from section 72 of the Companies Act 1990.

*Section 806* deals with the attribution of interests in the case of share acquisition agreements and is taken from section 74(1), (2) and (3) of the Companies Act 1990. Under this section, each party to the agreement is deemed to be interested not only in his or her own shares but also in all other relevant share capital held by the other parties to the agreement, regardless of whether or not the shares were acquired in pursuance of the agreement.

*Section 807* lays down the additional particulars to be given in compliance with a disclosure order in circumstances where the person who has the interest in the shares is, or was at any time specified in the order, a party to a share acquisition agreement. These particulars include the names and addresses of the other persons who are or were parties to the agreement. This derives from section 74(4) of the Companies Act 1990.

*Section 808* gives a meaning to the term "share acquisition agreement" for the purposes of this Chapter. This substantially re-enacts section 73 of the Companies Act 1990.

*Section 809* is new and gives the court a supplemental power in relation to share acquisition agreements where it has grounds to believe that all of the information sought to be obtained by the disclosure order will not be so obtained by a person against whom the order is made and who is a party or former party to a share acquisition agreement. In such circumstances, the court may make an order requiring any other party or former party to the share acquisition agreement to give information to the court in relation to matters effecting the application of *section 806* as it applies to the share acquisition agreement. The court may exercise this power on the making of an application for a disclosure order or at any time subsequent to this, on application to the court by a person having a financial interest in the company or by the Director of Corporate Enforcement.

*Section 810* provides that the court may grant an exemption for any person or interest from all or part of the requirements of a disclosure order. The court may only grant the exemption where it considers that it would be just and equitable to do so and where the financial interest of the applicant for the disclosure order would not be prejudiced by the grant of the exemption. This re-enacts section 101(3) of the Companies Act 1990.

*Section 811* lays down other powers of the court in relation to disclosure orders and derives from section 101 of the Companies Act 1990. The court may discharge or vary a disclosure order and it may specify a person, group or class of persons to whom the order applies. The court may, for a specific period of time, impose such conditions or restrictions as it sees fit on the rights or obligations

attaching to the shares or debentures that are the subject of the order. Any person affected by these conditions or restrictions may apply to the court for relief therefrom.

*Section 812* contains provisions relating to the notice to be given of the making of the disclosure order. It derives from section 102 of the Companies Act 1990 with some amendments, particularly in *subsection (3)*. The requirement to publish a notice "...in at least 2 daily newspapers which circulate in the district in which the registered office of the company, in respect of whose shares or debentures the order has been made, is located" has been replaced by a requirement to simply publish the notice in *Iris Oifigiúil*. The reasons for this are the cost of publication and the inefficiency of the notice reaching the intended recipients.

Generally, the notice (in the prescribed form) of the making of the disclosure order must be sent to the company whose shares or debentures are the subject of the order, the registered holder of the shares or debentures where that person is not resident in the State, and any other person that the court sees fit. The notice must be sent by registered post and within 7 days of the making of the order.

Section 102(5) CA 1990 has not been reproduced here as it concerns external and unregistered companies. These companies are dealt with in *Parts 21* and *22* of the Act.

*Section 813* deals with the provision of the information covered by the order. Such information must be provided in a written notice and that notice shall give the identity of the person providing the information, along with their current address. When the information is given to the court in compliance with a disclosure order, the prescribed officer of the court will pass this information on to the applicant and the company, unless the court directs otherwise. This derives from section 103 of the Companies Act 1990.

*Section 814* provides that the court may impose restrictions on the publication of information provided to the applicant or the company under *section 813(3)*. This derives from section 103 of the Companies Act 1990.

*Section 815* states that, where a person fails to comply with a disclosure order or makes a false statement to the court when they are purporting to comply with the order, that person shall not be entitled to enforce any right or interest in respect of any shares or debentures of the company in question. This re-enacts section 104(1) of the Companies Act 1990.

*Section 816* qualifies *section 815* above in that it provides that the court may grant relief from the restriction in that section where the default in complying with the disclosure order was accidental or on any other grounds where it is just and equitable to do so. This derives from section 104(2) and (3) of the Companies Act 1990.

*Section 817* deals with situations where a person authorises an agent to acquire or dispose of interests in shares or debentures of a company, in respect of which a disclosure order is made, on their behalf. That person must ensure that the agent notifies them immediately of any acquisitions or disposals of the shares or debentures concerned that would or might give rise to any obligation under the disclosure order to provide information. This derives from section 98(7) of the Companies Act 1990.



## Chapter 3

### Restrictions on directors of insolvent companies

*Section 818* provides definitions and interpretations for the purposes of this Chapter, which deals with restrictions on directors of insolvent companies. The provisions of the Chapter shall not apply to a company that commenced the winding up procedure prior to 1<sup>st</sup> August 1991. This section derives, in part, from section 149 of the Companies Act 1990.

*Section 819* deals with the declaration by the court restricting a director of an insolvent company. It derives from section 150 of the Companies Act 1990, as amended by section 41 of the Company Law Enforcement Act 2001. The court will make the declaration restricting the director upon application from the Director of Corporate Enforcement, the liquidator of the insolvent company or a receiver of any property of the company. The restriction is for a period of 5 years and the restricted person may not be appointed to act in any way, directly or indirectly, as a director or secretary or to be involved in the formation or promotion of a company, unless that company meets the capitalisation requirements set out in *subsection (3)* below.

*Subsection (2)* provides a defence for directors where they can show that they have acted honestly and responsibly in relation to the conduct of the affairs of the company, whether before or after it became insolvent and where the court can see no other reason why it would be just and equitable that the director be restricted. The subsection has been amended (as compared with CA 1990) insofar as a new *sub-paragraph (b)* has been inserted in line with a recommendation from the CLRG. The additional requirement is that the person concerned "...has, when requested to do so by the liquidator...., co-operated as far as could reasonably be expected in relation to the conduct of the winding up of the insolvent company". The reason for the insertion of this provision is to promote greater co-operation by the directors and other officers with the liquidator. Sub-paragraphs (b) and (c) of section 150(2) CA 1990 have been deleted as both of these sub-paragraphs were stated to be "subject to paragraph (a)" (the requirement to act honestly and responsibly) and accordingly, the defences therein were considered to have little operative potential in their own right.

*Subsection (3)* sets out the capitalisation requirements for a company which has a restricted person acting as director or secretary, or taking part in the formation or promotion of that company. The required nominal value of the allotted share capital has been rounded up to €500,000 (from €317,434.52) in the case of a PLC (other than an investment company) or a public unlimited company and €100,000 (from €63,486.90) in the case of all other companies. The rationale for this increase is twofold; firstly, it is to allow for inflation. Secondly, it reflects the recommendation of the CLRG in 2011 that the level of capitalisation required for companies with restricted directors should be raised because such directors have been found to have acted either dishonestly or irresponsibly but that no change be made to the law regarding minimum levels of capitalisation for the generality of companies.

*Subsection (4)* is new and makes provision for restrictions involving a guarantee company to ensure that a company may not escape a capitalisation type requirement by reason of not having a share capital. The requirement here is that at least one of the members of the company must give a guarantee of not less than €100,000.

*Subsection (5)* is new and provides that, in the case of an investment company *subsection (3)* will be read as if the requirements are that the value of the issued share capital of the company is not less than €100,000 and that an amount of not less than €100,000 in cash has been paid in consideration for the allotment of shares in the company.

*Subsection (6)* is new and is intended to ensure that a person restricted arising from his or her conduct in relation to a LTD is restricted as regards all other company types too.

*Subsection (7)* ensures that the prescribed particulars of a restriction declaration are provided to the Registrar.

*Section 820* derives from section 150(4A) and 4(B) of the Companies Act 1990, as inserted by section 41 of the Company Law Enforcement Act 2001. It provides that the application for a restriction declaration can be made by the Director of Corporate Enforcement, the liquidator of the insolvent company or a receiver of the property of the company. The person who is the subject of the restriction declaration may be made liable for the costs of the application and the costs incurred by the applicant in investigating and collecting evidence for the application.

*Section 821* requires a liquidator to form a view on the impact of the conduct of a restricted person on any other company or its creditors. If the liquidator believes that a restricted person is acting in any way as a director of, or involved with the promotion or formation of another company and the interests of that other company or its creditors may be in jeopardy by reason of the restricted person so acting, that liquidator must inform the court of the matter. Failure to do so, without reasonable excuse, results in a category 3 offence. On receipt of the information from the liquidator, the court may make any order it sees fit. This derives from section 151 of the Companies Act 1990.

*Section 822* comes from section 152 of the Companies Act 1990 and provides that the court may grant relief to a restricted person either in whole or in part from a restriction order made under *section 820(1)* or a further order made under *section 821(2)(b)*. The rule which stated that relief applications were required to be brought within 1 year of the restriction declaration has been removed. Current law allows for applications from disqualification orders to be brought at any time during which the disqualification order is subsisting and the CLRG recommended that a similar regime should operate also in so far as restriction orders are concerned.

When applying for relief, the restricted person must give 14 days' notice of the application to the liquidator of the relevant company and now also the Director of Corporate Enforcement. Although the addition of the Director as a notice party is a change in the statutory expression of the law, it has been the case that the High Court has, on occasion, allowed the Director to participate in a relief application.

After receiving notice of the application for relief, the liquidator of the company must then notify the creditors and contributories of the insolvent company of the application, and failure to so notify will result in a category 3 offence. *Subsection (5)* lists the parties who are entitled to appear and give evidence at the hearing of an application by a restricted person under this section. The Director of Corporate Enforcement may now appear and give evidence at the application for relief. While the Director of Corporate Enforcement could be joined as a party to the relief application under the Companies Act 1990, a motion needed to be issued by the Director of Corporate Enforcement for this purpose. Under this section this motion is no longer necessary.

*Section 823* relates to the keeping by the Registrar of a register of restricted persons. It derives from section 153 of the Companies Act 1990. A restricted person will be removed from the register 5 years after the date of the declaration of restriction.

*Section 824* applies this Chapter to receivers where appropriate, with the necessary modifications. This is drawn from section 154 of the Companies Act 1990.

*Section 825* provides that a restricted person must give written notice to a company of his or her restriction before accepting an appointment to or acting as director or secretary of that company. This written notice must be sent to the registered office of the company within the period of 14 days prior to the restricted person accepting the appointment. This derives from section 155(5) of the Companies Act 1990. An offence provision has been newly inserted so that failure of a restricted person to comply with this section results in a category 3 offence.

*Section 826* explains the meaning of the phrase “company that has a restricted person” within the context of this Chapter. This is new and provides that a “company that has a restricted person” is one in relation to which a restricted person is appointed or acts in any way as a director or secretary or a company in the promotion or formation of which a restricted person is concerned or takes part.

*Section 827* is new and provides that the Summary Approval Procedure may not be utilised by a company that has a restricted person, except in circumstances where that procedure is being used to effect a members voluntary winding up. Furthermore, without prejudice to *section 247* (personal liability for debts in certain cases), *section 240* (arrangements of certain value) and *section 245* (business transactions) of the Act do not apply to a company that has a restricted person.

*Section 828* provides that, when a company has a restricted person, any transaction that company enters into involving the acquisition of non-cash assets worth at least one-tenth of the nominal value of the share capital from any subscriber, director or promoter to the company must be independently valued and approved beforehand by ordinary resolution of the company. This derives from section 155(3) of the Companies Act 1990 which applies the provisions of sections 32 to 36 of the Companies (Amendment) Act 1983 in relation to non-cash assets. *Subsection (4)* excludes from the requirements of this section agreements that are entered into in the ordinary course of business or agreements entered into under the supervision of the court for the transfer of an asset.

*Subsections (5) to (8)* contain provisions in relation to the independent person and the valuation report required.

*Subsections (9) to (11)* deal with the consequences of entering into an agreement in contravention of this section.

*Section 829* also derives from section 155(3) of the Companies Act 1990 which applies the provisions of sections 32 to 36 of the Companies (Amendment) Act 1983 and contains provisions supplemental to *section 829* above. Officers of the company are obliged, where requested, to give information to the independent person to enable that person to carry out a valuation or make a report. Furthermore, where a company passes a resolution relating to the transfer of an asset under *section 828*, the company must deliver a copy of that resolution to the Registrar within 15 days of the passing thereof, together with the report required by *section 828*. Failure to comply with this requirement results in a category 4 offence.

*Subsection (3)* states that consideration given partly for a transfer of an asset will come within the scope of this section and *section 828*, and *subsection (4)* deals with the construction of references in *section 828* to a holder of shares in a company.

*Section 830* provides for a relief where any person is liable to a company under *section 828* in relation to payment in respect of any shares in the company. Such person may make an application to the court to be exempted in whole or in part from that liability and the court may grant the exemption if it is just and equitable to do so. Similarly to *sections 828* and *829* above, this derives from section

155(3) of the Companies Act 1990 which applies the provisions of sections 32 to 36 of the Companies (Amendment) Act 1983.

*Section 831* states that it is a category 3 offence to contravene *section 828* above.

*Section 832* applies where a company that has a restricted person allots a share that is not fully paid up as required by *section 819(3)(b)* of the Act (the capitalisation requirements). In such circumstances, the allottee of the share will be liable to the company for the difference between the value of any consideration made in payment and the full price of the share, including any premium thereon and also including interest at "the appropriate rate" until such time as the liability has been met. This section does not apply in the case of bonus shares or shares allotted under an employee share scheme. A subsequent holder of shares which have not been fully paid up will also be liable jointly and severally with the original holder unless he or she is a purchaser for value without notice or unless the person from whom he or she acquired the shares was not themselves liable in respect of them. This is taken from section 156 of the Companies Act 1990.

*Section 833* is similar to *section 832* above and applies where a company that has a restricted person allots a share that is not fully paid for in cash as required by *section 819(3)(c)* of the Act (the capitalisation requirements). It is provided that, where a company allots shares which are not fully paid for in cash, and then the person to whom the shares are allotted will be liable to pay to the company in cash the full price of the shares, including any premiums thereon, together with interest on the amount payable. As with *section 832* above, a subsequent holder of shares which have not been fully paid for in cash will also be liable jointly and severally with the original holder unless he or she is a purchaser for value without notice or unless the person from whom he or she acquired the shares was not themselves liable in respect of them. This section is also taken from section 156 of the Companies Act 1990.

*Section 834* states that the court may, where it is just and equitable to do so, grant relief to a company that has a restricted person and has contravened any provision of this Act or to any person adversely affected by that contravention. This derives from section 157 of the Companies Act 1990.

*Section 835* refers back to *section 819(3)* of the Act (in relation to capitalisation requirements) and provides that the Minister may increase the capitalisation amounts by order, subject to *subsection (4)* of this section. This is drawn from section 158 of the Companies Act 1990, modified to accord with the principles which underlay section 41(2) of the Company Law Enforcement Act 2001. Section 158 CA 1990 provided that the Minister could vary the threshold amounts for allotted share capital in the case of companies with which a restricted person was involved, and could require any company to increase its share capital accordingly. No such order has yet been made. Instead, under section 41 CLEA 2001 the limits were increased, but it was provided in that section that such increases could not operate retrospectively. This new *section 835* seeks to preserve the power of the Minister to increase the limits, but on the same non-retrospective basis as was thought appropriate when the 2001 Act was enacted.

*Subsection (4)* is newly inserted and provides that an order under this section may only be made where it appears to the Minister that the changes in the value of money generally in the State over a specified period of time warrant the exercise of the power to vary the capitalisation amounts so as to secure the continued effectiveness of the capitalisation requirements in *section 819* of the Act.

*Section 836* applies where a company receives notice under *section 825* that one of its directors or secretaries is restricted, the company proceeds to carry on business without complying with the capitalisation requirements in *section 819* and is then wound up and at the time of such winding up is found to be unable to pay its debts. In such circumstances, on the application of the liquidator or any creditor or contributory of the company, the court may declare that an individual shall be personally liable for all or part of the debts or other liabilities of the company if that person was an officer of the company while it carried on business without the capitalisation requirements being fulfilled. Under *subsection (3)*, the court may grant relief to the person from liability where it considers it just and equitable to do so and subject to such conditions as it sees fit. This section is drawn from parts of section 163 of the Companies Act 1990.

#### **Chapter 4** Disqualification generally

*Section 837* is drawn from section 159 of the Companies Act 1990 and lays down definitions and interpretations for the purposes of this Chapter.

*Section 838* is new and provides meanings for the terms “disqualified” and “disqualification order”. A person who is disqualified is prohibited from acting as a director or other officer, auditor, receiver, liquidator or examiner, or be concerned or take part in the promotion, formation or management of any company, friendly society within the meaning of the Friendly Societies Acts 1896 to 2014 or any society registered under the Industrial and Provident Societies Acts 1893 to 2014.

*Section 839* makes special provision for the automatic disqualification of persons who are convicted on indictment of any offence under this Act, any other enactment that may be prescribed in relation to a company, or any offence involving fraud or dishonesty. This derives from section 160(1) of the Companies Act 1990, with a change being introduced here so that where a person is to be disqualified for conviction on indictment of an offence in relation to a company that offence must now be prescribed in advance by the Minister. Under this section, the defendant may now himself apply for a variation in the period of the disqualification, whereas under previous statute law only the prosecutor was capable of doing so. This change clarifies that the disqualification person can apply for a reduction in the period of disqualification. The person will stand disqualified for a period of 5 years after the date of the conviction, or for such other period (longer or shorter) as the court may order.

*Section 840* is new. It deals with the consequences of a director becoming disqualified under the law of another State. In such a case, where the company fails to notify the Registrar of such a situation (as required by *section 149(8)* of the Act, in conjunction with *section 150*), the relevant director will be deemed to be subject to a disqualification order for a period not exceeding the remaining period of the foreign disqualification. This section is new and tightens up the position under the previous law which stated that a person was only required to notify the Registrar of their disqualification under the law of another State upon becoming a director of a company and not where the foreign disqualification occurred subsequent to them becoming a director of an Irish company. The section also provides that foreign disqualification orders made before the commencement of the Act must be declared.

*Section 841* applies where a director is disqualified in another state and there is a default in relation to compliance with *section 23* (the statement to be provided to the Registrar with the constitution) or *section 150(2)* (the statement containing particulars of the foreign disqualification to be sent to the Registrar with the original notification under *section 149(8)*). In such cases, the person

will be deemed to be subject to a disqualification order for such period of the foreign disqualification that remains unexpired. This provision derives from section 160(1A) and (1B) of the Companies Act 1990, as inserted by section 42(a) of the Company Law Enforcement Act 2001.

*Section 842* deals with disqualification orders. Disqualifications under this section are not automatic – they are ordered by the court either of its own motion or on application to it by any of the appropriate persons specified in *section 844* below. The court enjoys full discretion in determining whether to make an order of disqualification. Certain of the provisions of this section are not just directed against directors of a company, but also promoters, officers, statutory auditors, receivers, liquidators and examiners. The provisions re-enact section 160(2) of the Companies Act 1990, as amended by the Company Law Enforcement Act 2001.

*Section 843* includes provisions relating to particular grounds for disqualification. *Subsection (1)* clarifies the position regarding a person being consistently in default in relation to the relevant requirements (“relevant requirements” being defined in *section 837*). The consistent default can be proven by showing that, in the 5 years prior to the application, the person has been found guilty of 3 or more defaults in relation to the relevant requirements. *Subsection (3)* deals with disqualification orders on foot of a person being a director of a company where the company was struck off the register. In such a case, the court will not make the disqualification order where the person concerned shows that the company had no liabilities when it was struck off the register or, if the company did have such liabilities when it was struck off, that those liabilities were discharged before the date of the making of the application for the disqualification order. *Subsections (4)* and *(5)* deal with disqualification orders under *section 842(i)*, namely where a person is disqualified under the law of another state. These provisions are taken from section 160(3), (3A) and (3B) of the Companies Act 1990, as amended by section 42(c) of the Company Law Enforcement Act 2001.

*Section 844* lists the persons who may apply for a disqualification order under *section 842*. These include the Director of Corporate Enforcement for all the situations provided for in *section 842*, the DPP for the situations in *section 842(a)* to *(g)*, the Registrar under *section 842(f)* and any member, contributory, officer, employee, receiver, liquidator, examiner or creditor of the company under *section 842(a)* to *(d)*. The court may require any person making an application for a disqualification order to provide security for some or all of the costs of the application. This was limited to any member, contributory, creditor or employee in the Companies Act 1990 and so has been extended here to cover all applicants. *Subsection (5)* provides that the court may require a person who makes an application under *section 842* to provide security for costs. This expands the category of persons who may provide security for costs. This section is drawn from section 160(4) to (6A) CA 1990, as amended by the Company Law Enforcement Act 2001.

*Section 845* contains miscellaneous provisions relating to disqualification by court order. A person making an application for a disqualification order must give at least 10 days’ notice of his or her intention to make the application to the person who is the subject of the application. This derives from section 160(7), (9) and (9A) of the Companies Act 1990, as amended by the Company Law Enforcement Act 2001.

*Section 846* deals with the costs and expenses of an application under this Chapter. It provides that the court may order that the disqualified person shall bear the costs of the application and, where relevant, the costs and expenses of the applicant in investigating the matters that are the subject of the application and in collecting evidence in respect of those matters. This derives from section 160(9B) of the Companies Act 1990, as inserted by section 42(f) of the Company Law Enforcement Act 2001,

substituted by section 11(2) of the Investment Funds, Companies and Miscellaneous Provisions Act 2006.

*Section 847* concerns applications for relief for disqualification orders and procedures applicable to them. It states that the court may grant relief to a person subject to a disqualification order where it considers that it is just and equitable to do so. The relief may be granted from the disqualification order either in whole or in part and on such terms and conditions as the court sees fit. This derives from section 160(8) of the Companies Act 1990.

Under the newly inserted *subsection (2)*, notice of relief applications must be served on the original applicant for the disqualification order and the Director of Corporate Enforcement. A person applying for relief must give not less than 14 days' notice of the intention to apply to the original applicant for the disqualification order and the Director for Corporate Enforcement. In cases where the applicant for the disqualification order was the liquidator, it is the obligation of that liquidator to notify the creditors and contributories of the company of the fact of that the disqualified person has made an application for relief. Failure on the part of the liquidator to do so will result in a category 3 offence. This provision derives from section 152(3) CA 1990 in relation to restrictions, and has been carried over here to apply in the case of disqualification orders also.

*Section 848* applies where a restricted person is or becomes a director of an insolvent company that commences to be wound up within the 5 year period following the commencement of the original winding up of the company whose insolvency caused the person in question to become restricted. In such a circumstance, the liquidator shall inform the court of the facts of the situation and the court may then make a disqualification order against the restricted person for such period as it thinks fit. Failure of the liquidator to do so will result in a category 3 offence. These provisions derive from subsections (5) and (6) of section 161 of the Companies Act 1990.

## **Chapter 5**

### **Disqualification and restriction undertakings**

*Section 849* is new and contains definitions for the purposes of this Chapter. The provisions of this Chapter are newly introduced and will allow persons to give, and the Director of Corporate Enforcement to accept, disqualification and restriction undertakings. This means that it will be possible to avoid a court appearance where the person concerned agrees to give an undertaking not to act in a way as would be prohibited if they were the subject of a disqualification or restriction order given by a court. This process has been introduced in accordance with the recommendation of the Company Law Review Group in its 2007 report following consideration of similar UK law provisions.

*Section 850* relates to disqualification undertakings and explains how to initiate the procedure that provides a person with the opportunity to submit to a disqualification. This is new. The Director of Corporate Enforcement, where he or she has reasonable grounds for believing that one of the grounds of disqualification listed in *section 843* applies to a person, may deliver a notice to that person of that fact and inviting that person to notify the Director of his or her willingness to give a disqualification undertaking for the proposed period. The person has 21 days within which to accept that invitation and the Director of Corporate Enforcement must not make an application to the court for a disqualification order in respect of that person during that 21 day period. That notice period may be extended under *subsection (5)*.

*Section 851* describes what happens after the delivery of the notice by the Director of Corporate Enforcement in *section 850* above. If the person to whom it is delivered is willing to give a disqualification undertaking, the Director shall, as soon as practicable, give to the Registrar the prescribed particulars of the disqualification undertaking and the Registrar must enter those particulars on the register of disqualified persons. The person who has given the disqualification undertaking must not act as a director or other officer, or be concerned or take part in the promotion, formation or management of any company, friendly society within the meaning of the Friendly Societies Acts 1896 to 2014 or any society registered under the Industrial and Provident Societies Acts 1893 to 2014.

*Subsection (6)* provides that the Director of Corporate Enforcement must not deliver a notice under *section 850(2)* where a period of disqualification longer than 5 years is warranted or where the Director is aware that an application for a disqualification order has already been made in respect of the person arising from the same facts and circumstances.

*Section 852* deals with the initiation of the procedure for a restriction undertaking. It reproduces the provisions of *section 850* above with the necessary adaptations for the context of restriction undertakings. The Director of Corporate Enforcement must have reasonable grounds for the belief that the person in question was a director of an insolvent company. If these grounds exist the Director of Corporate Enforcement has discretion as to whether to serve a restriction notice.

*Section 853* contains provisions in relation to the effect of the delivery of the notice by the Director of Corporate Enforcement and the giving of the restriction undertaking. This replicates *section 851* above with the necessary adaptations for the context of restriction undertakings.

*Section 854* requires the Minister to make regulations to facilitate the operation of *sections 850* to *853*. Specifically, the regulations should require that a document detailing the person's voluntary submission to be subject to a disqualification or restriction (called either a "disqualification acceptance document" or "restriction acceptance document") be returned to the Director of Corporate Enforcement within the relevant timeframe.

## **Chapter 6**

### **Enforcement in relation to disqualification and restriction**

*Section 855* derives from section 161(1) to (4) of the Companies Act 1990 and provides that, where a disqualified or restricted person acts in relation to a company in a manner or capacity which he or she is prohibited from doing, that person shall be guilty of a category 2 offence.

*Subsection (2)* provides a further civil sanction for a person convicted of an offence under *subsection (1)* of "acting while restricted". Where such a person is not already subject to an "outright" disqualification order, he or she will, as a consequence of such a conviction, be deemed to be subject to an "outright" disqualification order from the date of the conviction.

*Subsection (3)* also follows on from *subsection (1)* and provides that where a person is convicted of an offence under that subsection, and he or she was already the subject of a disqualification order, the period of the order will be extended by a further 10 years or such other period as the court may order. Where a person is convicted under *subsection (1)* of acting while restricted or disqualified, an application for relief from the resulting disqualification order will not be allowed.

*Subsections (5) to (7)* are newly inserted and contain certain technical provisions.



Subsections (5) and (6) of section 161 CA 1990 are not reproduced here and can now be found at *section 837* of the Act instead.

*Section 856* takes account of the fact that a restriction or disqualification order could be circumvented, for example by the use of nominees, or of a spouse or relative, as directors or officers of a company. In such circumstances, this section makes it an offence (category 2) for a person while a director to act in accordance with the directions or instructions of another person if he or she knows that the other person is disqualified or prohibited from acting in any other manner. A person convicted of an offence under this section will themselves become subject to a disqualification order from the date of the conviction.

This section slightly amends section 164 of the Companies Act 1990 in that the offence provision now only applies to directors, whereas under the 1990 Act it also applied to any “other officer or member of a committee of management or trustee of any company”.

*Section 857* provides that, where a person is deemed to be disqualified as a result of a conviction for an offence under this Chapter (namely under *sections 855(1)* or *856(1)*), that deemed disqualification shall be for a period of 5 years beginning after the date of the conviction, or such other period (longer or shorter) as the court may order. This is drawn from section 162 of the Companies Act 1990.

*Section 858* provides that a person who acts in a prohibited manner while restricted or disqualified will be liable to return to the company concerned any payment received for services rendered while he or she was acting while restricted or disqualified. This could, for example, involve the repayment of salary or directors fees. This derives from section 163(2) of the Companies Act 1990.

*Section 859* applies where a person acts in relation to a company while restricted or disqualified in a manner in which they are prohibited from doing and where that company is wound up and is found not to be able to pay its debts as they fall due. In such circumstances, the court may declare that such a person be held liable for all or part of the debts of the company incurred in the period during which that person acted in a prohibited manner. This re-enacts section 163(3) of the Companies Act 1990.

*Section 860* provides that any person convicted of the offence under *section 857* of acting under the directions or instructions of a person who is prohibited from acting in any manner under this Part will also be personally liable for the debts of the company concerned which were incurred during the period during which he or she was so acting. This is drawn from section 165 of the Companies Act 1990.

*Section 861* states that the court may grant relief from any liability imposed on a person under *section 858*, *859* or *860* where it believes that it is just and equitable to do so and subject to such conditions as the court sees fit. This derives from section 163(5) and section 165(2) of the Companies Act 1990.

*Section 863* gives the court discretion where a director (including a shadow director) is subject to criminal or civil proceedings relating to the company or involving fraud or dishonesty to require that director to notify the court of present and recent directorships and also any past or present

disqualification to which he or she is or was subject. This re-enacts section 166 of the Companies Act 1990, as amended by section 70 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Section 863* requires a prescribed officer of the court to send to the Registrar prescribed particulars of any disqualification order, any grant or variation of relief under *section 848*, or any conviction either under *section 855(1)* or *856(1)* or the effect of which is to make the person convicted subject to a disqualification order. This derives from section 167 of the Companies Act 1990.

*Section 864* makes provision for a register of disqualified persons and is carried over from section 168 of the Companies Act 1990. The Registrar is obliged to keep a register of the particulars given to him or her under the preceding *section 863*. If the Registrar receives particulars of a grant of full relief from disqualification, those particulars should not be entered on the register and any existing particulars relating to the person concerned should be removed from the register as soon as practicable. Once the period for which a person is subject to a disqualification order has expired, the Registrar is obliged to remove any particulars relating to that person from the register.

## **Chapter 7**

### Provisions relating to offences generally

*Section 865* deals with summary prosecutions under the Act and provides that such prosecutions may be brought by the DPP or the Director of Corporate Enforcement. This derives from section 240(4) of the Companies Act 1990, as amended by the Company Law Enforcement Act 2001.

*Subsection (2)* lists offences which may be prosecuted by the Registrar. The number of offences which can be prosecuted by the Registrar has been reduced so as to include only those which can be prosecuted on the basis of evidence obtained directly from internal CRO records, or on the production of a court order. The CRO does not have an investigative function and, accordingly, it is not considered appropriate to continue to vest the Registrar with a capacity to prosecute offences which require that evidence be adduced which can be obtained only following a more comprehensive investigation. Such offences will, however, remain prosecutable by the Director of Corporate Enforcement.

*Section 866* makes provision for the District Court area within which summary proceedings against a company or an officer thereof may be brought, heard and determined. Firstly, the proceedings may be heard by a judge of the District Court as provided for in section 79 or 79A of the Courts of Justice Act 1924 - i.e. in the district where the accused resides or was arrested or where the crime was committed. Secondly, the proceedings may be heard in the District Court area in which the registered office of the company is situated immediately prior to the commencement of the proceedings. Finally, where the offence is for the failure to make an annual return as required by *section 343(11)* of the Act, the matter may be heard before the Dublin Metropolitan District Court or the district court district of which the district court area of Carlow forms part (the reason for these venues being that the CRO has offices in Dublin and Carlow). This section is adapted from section 240A of the Companies Act 1990, as inserted by section 105 of the Company Law Enforcement Act 2001.

*Section 867* re-enacts section 240(5) and (5A) of the Companies Act 1990, as amended by section 41 of the Companies (Amendment) (No.2) Act 1999 and contains provisions which will have application in place of section 10(4) of the Petty Sessions (Ireland) Act 1851 (this Act contains procedural rules in relation to the prosecution of offences that are frequently disappplied). *Subsection*

(1)(a) provides that any summary proceedings may be commenced within 3 years from the date on which the offence was committed. Alternatively, under *subsection (1)(b)*, if at the end of the period of 3 years, the person against whom the proceedings are to be brought is outside the State, then it will be possible to bring proceedings within 6 months from the date on which that person next enters the State. The effect of this is to ensure that proceedings can be brought against a party who has fled the jurisdiction, as long as those proceedings are brought within 6 months of his or her return to the jurisdiction. The final time period within which proceedings may be brought is laid down in *subsection (1)(c)* which enables the proceedings to be brought at any time within 3 years from the date of which evidence of the breach comes to the attention of the party bringing the prosecution. This allows for proceedings to be taken where evidence of the breach of company law only comes to light much later.

*Subsections (2) and (3)* provide a mechanism whereby a person bringing proceedings under *subsection (1)(c)* has to give a certificate, which will state the date on which he or she had obtained the necessary evidence to bring the proceedings. Such a certificate will be accepted as *prima facie* evidence in any legal proceedings, and will be admitted as evidence without proof of the signature of the person purporting to sign the certificate.

*Section 868* re-enacts most of the previous law that deals with procedural matters concerning the representation of companies when charged with an indictable offence and the entering of pleas. This derives from section 382 of the Companies Act 1963. However, section 382(7) has not been included as it refers to companies incorporated outside the State with an established place of business within the State. This provision is instead accommodated for in *Part 21* on external companies.

*Section 869* applies where an offence is committed by a body corporate under *section 785, 790 or 876*— these sections mainly deal with offences relating to producing, disclosing, destroying or falsifying books or documents belonging to the company. In such cases, where the offence can be proven to have been committed with the consent or connivance or due to the neglect of an officer of the company, that officer, together with the body corporate, will be guilty of the offence. Where the affairs of the body corporate are managed by its members, this section will apply to those members as if they were a director or manager of the company. This derives from section 241 of the Companies Act 1990.

*Section 870* derives from section 240(6) of the Companies Act 1990. If the contravention in respect of which a person is convicted of an offence under this Act is continued after the conviction, the person shall be guilty of a further offence on every day on which the contravention continues. Each day of continued breach following conviction constitutes an offence, and the penalties range from fines of up to €5,000 per day for a category 1 offence prosecuted on indictment, down to €50 per day for category 3 and 4 offences.

*Section 871* is new and is substitutes much of what was contained in sections 240(1), (2), (7) and (8) of the Companies Act 1990. For ease of comprehension, it is proposed that subject to a very small number of exceptions (offences under market abuse, prospectus and transparency law), the vast majority of offences under the Companies Acts should be classified according to a four-tier scheme. Category 4 offences will be prosecutable only on a summary basis and, on conviction, will give rise to no more than a Class A fine (currently set at €5,000 by the Fines Act 2010), which is an amount no greater than the District Court can impose for any other criminal offence. Category 3 offences will likewise be prosecutable only summarily but, on conviction, may give rise to a prison sentence of up to 6 months imprisonment or a Class A fine, or both. Both category 2 and category 1 offences attract the same consequences when prosecuted summarily – namely a Class A fine or imprisonment of up to 12 months or both. Both those categories may also be prosecuted on indictment and in such a case, a

category 2 offence will attract a fine of not more than €50,000 or a prison term not exceeding 5 years or both and a category 1 offence will have a penalty of a fine of not more than €500,000 or up to 10 years in prison or both.

*Section 872* is also new and provides that, following a conviction for an offence under this Act, the trial court may order that the convicted person should remedy any breach of the Companies Acts in respect of which they were convicted.

*Section 873* gives a power to the Director of Corporate Enforcement to impose on-the-spot fines where he or she has reasonable grounds for believing that a person has committed a category 3 or 4 offence. The person on whom the notice is served has 21 days to remedy the default that constitutes the offence and pay the requisite fine to the Director of Corporate Enforcement. If that person does so remedy the default and pay the fine, he or she will not be prosecuted in respect of the alleged offence. This is drawn from section 109 of the Company Law Enforcement Act 2001.

*Section 874* contains provisions which allow the Registrar to issue on-the-spot fines for outstanding returns and is taken from section 66 of the Company Law Enforcement Act 2001. It mirrors *section 863* above in relation to the corresponding power of the Director of Corporate Enforcement to issue fines where he or she has reasonable grounds for believing that a person has committed a category 3 or 4 offence.

## **Chapter 8**

### **Provision for enforcement of section 27(1) and additional general offences**

*Section 875* ensures that all company types are covered by the offence of trading under a false name. The prohibition is extended onto designated activity companies also.

*Section 876* makes provision for a category 2 offence where a person, in purported compliance with this Act, knowingly gives false information or is reckless as to whether the information is false or not. *Subsection (3)* provides for greater maximum penalties in certain cases where the conviction is on indictment and the commission of the offence has substantially contributed to the company being unable to pay its debts, or impeded the winding up of the company or facilitated the defrauding of creditors. This section derives from section 242 of the Companies Act 1990, as amended by section 106 of the Company Law Enforcement Act 2001 and section 71 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Section 877* provides a category 2 offence for the destruction, mutilation or falsification of a book or document affecting or relating to the property or affairs of the company. It shall be a defence for a person to prove that, in carrying out the destruction, mutilation or other act concerned, that the person had no intention to defeat the process of the law. This is taken from section 243(1) of the Companies Act 1990.

*Section 878* derives from section 243(2) of the Companies Act 1990 which makes it an offence to fraudulently part with, alter or make an omission in any book or document affecting or relating to the property or affairs of the company.

## **Chapter 9**

## Evidential matters

*Section 879* applies where the existence of a body corporate or undertaking outside the State is alleged or is otherwise in issue. The operation of this section is confined to *Parts 1 to 15* of the Act. It is provided that a certificate of incorporation or registration in relation to a body corporate in another country will be taken to be *prima facie* evidence of the incorporation or registration of that body corporate in the country concerned. This is taken from section 389 of the Companies Act 1963.

*Section 880* is new and deals with proof of incorporation under overseas legislation. Where the incorporation of a corporation, by virtue of any Act passed in any country other than the State, is alleged or otherwise at issue, a copy of that Act will be *prima facie* evidence of the incorporation of that corporation where that Act has been passed in any country prescribed for the purposes of this section and has been published by the Government publishers of that country.

*Section 881* provides that, where evidence is given by a person in response to a question put to him or her in the exercise of powers under a number of specified sections of this Act, the answer given by that person may be used in evidence against that individual in any civil proceedings but not in criminal proceedings, unless the prosecution is for perjury in respect of any answer given. This is taken from section 18 of the Companies Act 1990, as amended by section 28 of the Company Law Enforcement Act 2001. *Subsection (4)* deals with the admissibility of an inspectors' report as evidence in civil proceedings and derives from section 22 CA 1990.

*Section 882* deals with the provision of information to juries and is taken from section 110 of the Company Law Enforcement Act 2001. A trial judge may order a variety of documents be made available in a trial on indictment of an offence under this Act. If the prosecution wishes to apply to have a document given to the jury, a copy of the document must first be given to the accused, who then may make representations to the court in relation to that document. Under *subsection (3)*, where an affidavit by an accountant is given to the jury, the court may require that accountant to explain to the jury any relevant accounting procedures or principles in order to assist the jury in their deliberations.

*Section 883* contains provisions relating to certificate evidence which, in the context of any legal proceedings, streamline the giving of evidence by the Minister, the Director of Corporate Enforcement, an inspector appointed under *Part 13* of the Act, the Registrar or the Head of Financial Regulation of the Central Bank, in respect of their performance of their respective statutory functions. For the purpose of the legal proceedings, the relevant officer need not give evidence in court to prove the certificate in question. This section re-enacts section 110A (1) to (3) of the Company Law Enforcement Act 2001, as inserted by section 52 of the Companies (Auditing and Accounting) Act 2003 and amended by section 74 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Section 884* is concerned with documentary evidence and re-enacts section 110A (4) to (9) of the Company Law Enforcement Act 2001, as inserted by section 52 of the Companies (Auditing and Accounting) Act 2003 and amended by section 74 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. It allows for the admission in evidence of documents that are certified copies or extracts from the records of the Director of Corporate Enforcement, the Minister, an inspector or the Head of Financial Regulation of the Central Bank, without further proof. *Subsection (8)* is new and clarifies that this section does not in any way derogate from any other provision of this Act that provides for the receiving in evidence of a particular document.

*Section 885* contains a saving for privileged communications in the context of requirements under *section 447* (prosecution of offences committed by officers and members of the company) and *section 724* (duty to provide assistance to the DPP and the Director of Corporate Enforcement). This section derives in part from section 387 of the Companies Act 1963.

*Section 886* provides that statutory declarations for the purposes of the Companies Acts made overseas before Irish solicitors or local notaries or other persons authorised to take declarations are valid. This re-enacts section 6 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006.

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## **Part 15 – Functions of Registrar and of Regulatory and Advisory Bodies**

### *Preliminary Note*

*Part 15* contains provisions relating to the Registrar of Companies, the Irish Auditing and Accounting Supervisory Authority (IAASA), the Director of Corporate Enforcement and the Company Law Review Group. For the first time, the powers and duties of both the Minister and these bodies are brought together in one coherent group of legislative provisions.

The function of the Registrar is to administer the register of companies, and in particular to ensure compliance with the filing and registration requirements under the Companies Acts. The Registrar has a number of enforcement mechanisms available to be used against recalcitrant companies, including offences, fines and strike-off.

IAASA was established in 2003 (by the Companies (Auditing and Accounting) Act 2003) in light of revelations about the facilitation of tax evasion by certain accountants and auditors. Its purpose is the supervision of the regulatory activities of accounting bodies, promoting high standards of professionalism in accountancy, and monitoring compliance with certain accounting provisions of company law.

The Director of Corporate Enforcement has been in existence since the Company Law Enforcement Act 2001: the creation of that office was the most important aspect of that Act. The Director is a corporation sole, and an independent statutory officer. The Director's function is to monitor and investigate non-compliance, and where necessary to enforce compliance, with all aspects of company law.

The Company Law Review Group was also established by the Company Law Enforcement Act 2001. It functions similarly to the Law Reform Commission, with responsibility for recommending improvements to company law, and proposing new companies legislation.

*Chapter 1* contains the provisions concerning the powers and duties of the Registrar of Companies. It re-enacts a number of provisions contained in existing Companies Acts. *Section 891* provides for the transposition of the necessary elements of Directive 2012/17/EU. The Directive requires that certain information that is on the Irish register will be communicated to a central portal which connects all Member States registers. *Section 894* now provides for the destruction of documents received and recorded by the Registrar. Such destruction must be authorised by the Director of the National Archives under section 7 of the 1986 National Archives Act and a period of more than 6 years will have elapsed after its receipt by the Registrar. *Section 897* is also new and makes provision for the delivery of documents to the Registrar in electronic form.

*Chapter 2* is concerned with the Irish Auditing and Accounting Supervisory Authority (IAASA) and largely re-enacts the provisions of the Companies (Auditing and Accounting) Act 2003 which govern the powers and duties of the Authority. Funding for IAASA continues to be provided jointly by the government (40%) and the accountancy bodies (60%), subject to approval of its work programme. There is provision allowing IAASA to seek additional funding (the 'reserve levy') from companies in particular circumstances. Section 7 of the Companies (Miscellaneous Provisions) Act 2013 has been consolidated into this chapter.

*Chapter 3* effectively re-enacts sections 7 to 18 of the Company Law Enforcement Act 2001, which outline the powers and duties of the Director of Corporate Enforcement.

*Chapter 4* deals with the Company Law Review Group and re-enacts sections 67 to 71 of the Company Law Enforcement Act 2001.

## *Explanatory Memorandum*

### **Chapter 1** Registrar of Companies

*Section 887* deals with the Companies Registration Office (CRO), the Registrar of Companies (Registrar), the register which must be maintained by the Registrar, and the CRO Gazette. It derives from section 368 of the Companies Act 1963, as amended by section 52(3) of the Companies (Amendment) (No.2) Act 1999. It also, in *subsections (8) and (9)*, deals with the performance of the duties of the Registrar. These subsections are a re-statement of section 52 of the Companies (Amendment) (No.2) Act 1999, which retrospectively ratified any acts performed before 21<sup>st</sup> December 1999 on behalf of the Registrar by officials in the CRO, whether by an assistant registrar or by some other official employed in the CRO. *Subsection (2)* prospectively provides for the delegation of the Registrar's functions to assistant registrars and other officials, not only for the purposes of the Companies Acts, but also for the purposes of the Registration of Business Names Act 1963 and the Limited Partnership Act 1907.

*Section 888* is newly inserted and allows for the authentication of documents other than by signing or sealing them – in such cases the document may be authenticated in the prescribed manner.

*Section 889* allows the Minister to make regulations to prescribe fees for the registration of companies and the registration of documents and notices with the CRO. This expands upon section 369 of the Companies Act 1963. *Subsections (2) and (3)* have been added to aid in the interpretation of the section.

*Section 890* provides that the Registrar shall make a report to the Minister in writing, as soon as may be (but not later than 4 months after the end of each year), of the Registrar's activities during that year and shall cause copies of the report to be laid before each house of the Oireachtas not later than 6 months after the end of that year. This 6 month period is reduced from 7 months under the old law. This section derives from section 392 of the Companies Act 1963, as amended by section 99 of the Company Law Enforcement Act 2001. *Subsection (2)* is new and allows the Minister, after consultation with the Registrar to prescribe the form of a report under this section and the manner in which any matter is to be addressed in the report.

*Section 891* governs the inspection and production of documents kept by the Registrar. It derives in part from 370 (1) and (2) of the Companies Act 1963, as amended by section 62 of the Company Law Enforcement Act 2001. It is now clarified in *subsection (1)* that the Registrar is only obliged to provide documents for inspection that it has received and recorded. *Subsections (3) to (8)* are newly introduced to provide for the transposition of the necessary elements of Directive 2012/17/EU (of the European Parliament and of the Council of 13 June 2012 amends Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers). The Directive requires that certain information that is on the Irish register will be communicated to a central portal which connects all MS registers. It seeks no new information from companies and puts no obligations on any parties except company registers. *Subsection (3)* provides that the Registrar shall assign to each company a unique identifier which shall include elements to identify the company as a company in the State, to identify the number assigned to the company in the register and other appropriate elements to avoid identification errors. *Subsection (4) and (5)* provides that electronic copies of the information and particulars required under Article 2 of Directive 2009/101/EC must be made available and that any changes to that information must be



recorded on the register within 21 days, except for changes to the accounting documents required by Article 2 (f) of Directive 2009/101/EC. *Subsection (6)* makes provision that the Registrar shall make available as soon as practicable, through the system of interconnection of registers information on –

- (a) the opening and termination of winding up or insolvency proceedings
- (b) the opening and termination of a receivership applicable to a company; and
- (c) the striking-off of a company from the register.

*Subsection (7)* stipulates that the Registrar shall ensure that the particulars relating to a company on the register are available free of charge, through the system of interconnection of registers.

*Section 892* governs the admissibility of certified copies or extracts from documents registered with and kept by the Registrar in evidence in all legal proceedings. This is drawn from section 370(3) of the Companies Act 1963, as amended by section 62 of the Company Law Enforcement Act 2001.

*Section 893* provides that a certificate in writing from the Registrar as to the contents of a register, the date on which a document was filed, registered with or delivered to or received by the Registrar, or the date on which a requirement under the Companies Acts was complied with shall be admissible in all legal proceedings as *prima facie* evidence, provided that evidence to the contrary is not given. This derives from section 370(4) of the Companies Act 1963, as amended by section 62 of the Company Law Enforcement Act 2001.

*Section 894* is partly new. Provision is made for the destruction of documents received and recorded by the Registrar. Such destruction must be authorised by the Director of the National Archives under section 7 of the 1986 National Archives Act and a period of more than 6 years will have elapsed after its receipt by the Registrar. The provision also allows the Registrar to maintain an electronic record of every document he or she has received and recorded for a period of 20 years after a company has been dissolved. After 20 or more years have elapsed, the Registrar has an option to store such data in an archival database. This stems from section 313 of the Companies Act 1963.

*Section 895* enables the Registrar to apply a system of information classification (NACE classification) to companies. This means that persons wishing to incorporate new companies will be required to classify the principal activity of the company using the NACE classification for economic activities. This derives from section 247 of the Companies Act 1990.

*Section 896* relates to the delivery of documents to the Registrar in a legible form and derives from section 248 of the Companies Act 1990.

*Section 897* is new and makes provision for the delivery of documents to the Registrar in electronic form. Under this section, the Minister may make an order (after consultation with the Registrar) providing that the sole means to be used to deliver a document to the Registrar shall be those provided for under the Electronic Commerce Act 2000.

*Section 898* empowers the Registrar to serve notice on a company rejecting documents which are delivered to him or her in a non-compliant form. If within 14 days the company fails to re-deliver the replacement document, the document will be deemed never to have been delivered at all. This section is drawn from section 249A of the Companies Act 1990, as inserted by section 107(1) of the Company Law Enforcement Act 2001.

*Section 899* contains supplementary and clarificatory provisions following on from *section 898* above and is a restatement of *section 249A (3) and (4)* of the Companies Act 1990, as inserted by *section 107(1)* of the Company Law Enforcement Act 2001.

## **Chapter 2** Irish Auditing and Accounting Supervisory Authority

*Section 900* is concerned with interpretation provisions for this Chapter and derives from *section 4* of the Companies (Auditing and Accounting) Act 2003.

*Section 901* deals with the continuance of the Irish Auditing and Accounting Supervisory Authority and other transitional matters. It provides for the continuance of IAASA and the preservation of its membership, except insofar as it is changed by *section 902* and other provisions allowing for termination, change and increase of its membership.

*Section 902* derives from *section 6* of the C(A&A)A 2003 and provides for the membership of the Supervisory Authority. *Subsection (1)* provides for membership from each of the prescribed accountancy bodies and *subsection (2)* provides for designated bodies that will also be members of IAASA. The section contains some changes from the existing law. The list of “designated bodies” has been shortened, omitting IBEC, ICTU, the Irish Association of Investment Managers, the Pensions Board, IFSRA, and the Law Society. Bodies can be added to the list under *subsection (2)(e)*, which relates to the Minister’s power to make regulations.

*Section 903* provides that any amendment to the memorandum and articles of association of the Supervisory Authority can only take effect if the alteration is made with the Minister’s prior approval. This section re-enacts *section 7* of the C(A&A)A 2003.

*Section 904* sets out the principal objects that must be included in the memorandum of association of the Supervisory Authority and re-enacts *section 8* of the C(A&A)A 2003.

*Section 905* lists the main functions of the Supervisory Authority. It is drawn from *section 9* of the C(A&A)A 2003. The Supervisory Authority shall be responsible for monitoring the effectiveness of rules relating to auditor independence and, where necessary, the intervention in disciplinary procedures of the accountancy bodies. Changes to the existing law include the deletion of certain existing but un-commenced functions from the Supervisory Authority’s remit. The function referred to here is what is known as a “section 26 review”, that is, a review of whether accounts comply with Companies Acts. Section 26 review was introduced in the 2003 Act and provided the Supervisory Authority with the novel power of requiring the rectification of the accounts of larger organisations where such accounts fail in some respects to comply with the accounting requirements of the companies’ acts. The reason why the references are deleted is because the references are now deemed to be obsolete and unsuitable for commencement. Transparency (Directive 2004/109/EC) has provided the Supervisory Authority with a more targeted and effective way of dealing with companies’ accounts.

*Section 906* sets out the general powers of the Supervisory Authority. It re-enacts *section 10* of the C(A&A)A 2003. *Subsection (1)* deals with the general powers of the Supervisory Authority. *Subsection (3)* gives the Supervisory Authority the power to make rules. *Subsection (4)* makes

provision for a situation where a prescribed accountancy body has failed or may fail to comply with rules or guidelines adopted under this section. In such circumstances, the Supervisory Authority can apply to the court for an order compelling compliance.

*Section 907* deals with the composition of the board of directors of the Supervisory Authority. It is drawn from section 11 of the C(A&A)A 2003. The composition of the board is reduced from not more than 14 under the old law to not more than 8 directors (including the chairperson and the deputy chairperson) appointed by the Minister. *Subsection (2)(a)* provides that the directors appointed by the Minister shall now include 2 persons, each of whom is nominated by the prescribed accountancy bodies. This is in contrast to 3 persons under the old law. *Subsection (4)* reduces the maximum number of directors appointed under *subsection (2)* as members of prescribed accountancy bodies who at any one time will sit on the board from 4 directors under the old law to 3 directors. Of those 3 directors, 2 may be nominees of the prescribed accountancy bodies and one may be a nominee of a designated body.

*Section 908* contains supplementary provisions in relation to the board of directors. *Subsections (1) to (6)* re-enact subsections (8) to (13) of section 11 of the C(A&A)A 2003. *Subsections (7) and (8)* are new and provide for the circumstances in which a person is disqualified from the board and where a member of the board shall cease to hold office.

*Section 909* contains some changes from existing law. It provides for the appointment of the chief executive officer by the board of the Supervisory Authority and derives section 12 of the C(A&A)A 2003. Reference to the Minister for Finance has been replaced with reference to the Minister for Public Expenditure and Reform. *Subsection (4)* is new and makes provision for the person who held the office before the commencement of the section to remain in office for the unexpired period of his or her term unless he or she sooner retires, resigns or dies or is removed from office.

*Section 910* mandates the Supervisory Authority to prepare and submit to the Minister a work programme for each successive period of 3 years. This provision is drawn from section 13 of the C(A&A)A 2003.

*Section 911* concerns the annual programme of expenditure and derives from section 13 of the C(A&A)A 2003. *Subsection (1)* requires the annual programme of expenditure to be approved by the Minister, after having considered the views of prescribed accountancy bodies and having obtained the consent of the Minister for Public Expenditure and Reform under *subsection (2)*. *Subsection (3)* allows the Minister to make amendments to the annual programme of expenditure before approval.

*Section 912* deals with the specification in the annual programme of expenditure of the amounts for the reserve fund. It derives from section 13(3) of the C(A&A)A 2003.

*Section 913* allows IAASA to undertake an interim review of the work programme. It stems from section 13 of the C(A&A)A 2003.

*Section 914* governs funding and derives from section 14(1) and (2) of the C(A&A)A 2003. It provides that the Supervisory Authority will be paid a grant in each financial year by the Oireachtas not exceeding 40 per cent of the annual programme of expenditure approved for that year under

*section 912*. It also provides that the Supervisory Authority may impose levies on prescribed accountancy bodies under *section 917* and on certain companies under *section 918*.

*Section 915* provides that the Supervisory Authority shall not use the money received by it under this Chapter except for the purpose of meeting expenses properly incurred by it in performing its functions. *Subsection (2)* restricts the use of money from the reserve fund to the meeting of expenses under *sections 933*. It stems from section 14(3) of the C(A&A)A 2003.

*Section 916* enables the Supervisory Authority to levy a fee on prescribed accountancy bodies. This derives from section 14 of the C(A&A)A 2003. The total amount levied in any financial year by the Supervisory Authority on all prescribed accountancy bodies shall not exceed 60 per cent of the annual programme of expenditure approved for that year under *section 911*.

*Section 917* derives from section 15 of the C(A&A)A 2003. It empowers the Supervisory Authority to levy a fee on certain companies and other undertakings in the context of the reserve fund. The approval of the Minister is required in respect of the total amount of the levy in the relevant financial year on all companies and undertakings and approval is also required of the criteria apportioning the levy among the classes of companies and undertakings. Designated activity companies are included in the type of companies that the Supervisory Authority may levy.

*Section 918* is new and concerns funding in respect of functions of the Supervisory Authority under certain regulations. *Subsection (1)* provides for a definition of “public-interest entities” in accordance with Regulation 3 of the 2010 Audits Regulations. *Subsection (2)* gives the power to the Supervisory Authority (Irish Auditing and Accounting Supervisory Authority) to impose a levy (one or more) on statutory auditors/audit firms auditing public interest entities. The consent of the Minister is required for the imposition of the levy(ies). The levy(ies) may be imposed on a yearly basis – in each financial year of the Irish Auditing and Accounting Supervisory Authority. This subsection is also subject to *subsections (3) to (6)* below.

*Subsection (3)* stipulates that monies received in respect of the levy may only be used to fund the Irish Auditing and Accounting Supervisory Authority to carry out its quality assurance function as set out at Regulations 83 (system of quality assurance to be put in place) and 84 (Organisation of quality assurance system) of S.I. No. 220 of 2010 or any related Regulation therein.

*Subsection (4)* specifies that, along with the Minister’s consent, the amount collected by the Irish Auditing and Accounting Supervisory Authority through the levy in a given financial year must not be more than the amount that the Minister specifies in writing in this regard.

*Subsection (5)* sets out the conditions by which the Irish Auditing and Accounting Supervisory Authority may impose the levy. The levy is to be apportioned among all of the statutory auditors/audit firms which audit public interest entities and based on established criteria. These criteria must be submitted to and approved by the Minister prior to imposition of the levy. The date must be specified on which the levy should be paid by this group of statutory auditors/audit firms.

*Subsection (6)* provides that apportionment of the levy under *subsection (5)* may result in different statutory auditors/audit firms paying different levy amounts.

*Subsection (7)* ensures that there is no double counting in the imposition of the levy. It prevents a levy from being imposed on both the statutory auditor (in effect, the audit partner) carrying out the audit and the audit firm to which the statutory auditor belongs and was designated by to carry out the audit. In this situation, the levy will only be imposed on the statutory audit firm.

*Subsection (8)* ensures that the Irish Auditing and Accounting Supervisory Authority may sue for payment of a levy due from a statutory auditor/audit firm, where necessary.

The purpose of this new section is to consolidate the Companies (Miscellaneous Provisions) Act 2013 into this Act. Section 7 provides for a levy on statutory auditors and audit firms of Public Interest Entities in order to defray costs to the Irish Auditing and Accounting Supervisory Authority for carrying out the functions of external quality assurance in respect of these Public Interest Entities.

*Section 919* provides that the reserve fund established under section 15(1) of the C(A&A)A 2003 shall continue in being and will continue to be maintained by the Supervisory Authority subject to any limit specified by the Minister. *Subsection (2)* provides that the Minister may amend the limit from time to time.

*Section 920* permits the Supervisory Authority to borrow money for the purpose of providing for activities specified in its work programme, subject to the consent of the Minister for Public Expenditure and Reform. This section re-enacts section 14(9) of the C(A&A)A 2003.

*Section 921* provides for the transfer of unused funds by the Supervisory Authority from one year to the next. With the exception of funds set aside in the reserve fund, any unused monies will be used to cover programmes of expenditure in the subsequent year, and the amount paid to the Supervisory Authority from the State and the prescribed accountancy bodies in respect of the approved programme of expenditure for that year will be reduced by the amount carried over. This section reproduces section 16 of the C(A&A)A 2003.

*Section 922* stems from section 17 of the C(A&A)A 2003 with some changes. The section empowers the Supervisory Authority to recruit staff within the confines of staffing levels specified in its work programme. The numbers, grades and terms and conditions of appointment are subject to the approval of the Minister with the consent of the Minister for Public Expenditure and Reform (the Minister for Finance under existing law has been replaced). *Subsection (4)* contains a transitional provision and provides that a person who is employed by the Supervisory Authority immediately before the commencement of this section shall continue in the employment of the Supervisory Authority and such employment shall be of a like kind as could have been made under section 17(2) of the C(A&A)A 2003 and on the same terms and conditions as applied immediately before the commencement of the section.

*Section 923* contains standard provisions requiring the disclosure of interests by directors of the Supervisory Authority. It derives from section 18 of the C(A&A)A 2003.

*Section 924* deals with the effect of a breach of director's obligations in relation to a material interest. It provides that the Minister may remove the director from office if the director was appointed by the Minister and, in the case of a director who is the chief executive officer, the Minister may recommend to the board that the board removes such person. *Subsection (2)* provides that a director who is removed by the Minister under this section will be disqualified for future appointment as a director or chief executive of the Supervisory Authority. This stems from section 18 of the C(A&A)A 2003.

*Section 925* contains standard provisions requiring the disclosure of interests by members of the staff of the Supervisory Authority. This stems from section 19 of the C(A&A)A 2003.

*Section 926* provides that the Supervisory Authority may, if it considers it appropriate to do so, prepare superannuation schemes for the CEO and the staff of the Authority. The superannuation scheme must be approved by the Minister with the consent of the Minister for Public Expenditure and laid before each House of the Oireachtas. This section derives from section 20 of the C(A&A)A 2003.

*Section 927* requires that the Supervisory Authority must prepare and submit annual accounts to the Comptroller and Auditor General for audit within 3 months after the end of each financial year. The Minister is required to lay the annual accounts along with the report by the Comptroller and Auditor General before the Oireachtas. Under *subsection (5)* the Minister can appoint an independent person to undertake an examination of the Supervisory Authority's accounts. This section re-enacts section 21 of the C(A&A)A 2003.

*Section 928* provides that a formal annual report must be submitted by the Supervisory Authority to the Minister in relation to activities during that year, within four months of the end of each financial year. The Minister is then required to lay this report before the Oireachtas within 6 months after the end of the financial year. This section re-enacts section 22 (1) to (3) of the C(A&A)A 2003.

*Section 929* deals with the accountability of the Supervisory Authority to Dáil Éireann. The section requires the chairperson and the chief executive officer of the Supervisory Authority to account to the Public Accounts Committee or any other committee appointed by the Oireachtas, for the performance of functions of the Authority if requested, and take account of any recommendations made by such a committee in the discharge of its functions. This section derives from section 22 (4) to (7) of the C(A&A)A 2003.

*Section 930* deals with the recognition by the Supervisory Authority of bodies of accountants. This derives from subsection 1(a) of the Companies Act 1990 and section 32 of the C(A&A)A 2003.

*Section 931* contains provisions in relation to the recognition by the Supervisory Authority of bodies of accountants under *section 930* above. This derives from section 192 of the Companies Act 1990.

*Section 932* derives from the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 (S.I. No. 220 of 2010) and provides that the Supervisory Authority may consult with any body or other person as to the conditions and standards required by the body of accountants concerned in connection with membership of that body or, as the case may be, the approval of persons as statutory auditors or public auditors.

*Section 933* is based on section 23 of the C(A&A)A 2003. It empowers the Supervisory Authority to intervene in relation to the investigation and disciplinary process of a prescribed accountancy body to ensure it has complied with the investigation and disciplinary procedures approved under *section 905(2)(c)* of the Act, section 9(2)(c) of the C(A&A)A 2003 or the Companies Act 1990. If the Supervisory Authority is not satisfied after such an enquiry that the prescribed accountancy body has complied with the necessary procedures, the Supervisory Authority may advise, admonish or censure the prescribed accountancy body. Among the recourses open to the Supervisory Authority are the quashing of a decision or part of a decision in relation to the matter

which was the subject of the inquiry, or to insist that the prescribed accountancy body conduct an investigation or a fresh investigation into the matter at issue. I may also choose to fine the relevant body.

*Subsection (6)* provides that the prescribed accountancy body or member of the body in question may appeal to the court against a decision made by the Supervisory Authority. Under *subsection (11)*, if a prescribed accountancy body undertakes a fresh investigation but does not, in so doing, satisfy the Supervisory Authority that it has complied with the approved investigation and disciplinary procedures, the latter may appeal to the court against any decision of the prescribed body in this regard.

*Section 934* derives from section 24 of the C(A&A)A 2003. It authorises the Supervisory Authority where it considers it appropriate or where it is in the public interest to commence its own investigation into a possible breach of a prescribed accountancy body's standards by a member.

To facilitate such an investigation the Supervisory Authority can, among other things, require the production of relevant records or documents and compel the attendance before it of relevant persons. It can also require a relevant person to give to the Supervisory Authority all other co-operation that could reasonably be required, and it may conduct sworn hearings. If co-operation in key aspects of the investigation is not forthcoming, the Supervisory Authority can certify this refusal to the court, which can then enquire into the case and direct that the party comply in the key respects in question.

*Section 935* is new and deals with supplemental provisions in relation to *section 934* including as concerns its relationship to provisions of the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 (S.I. No. 220 of 2010).

*Section 936* stems from section 25 of the C(A&A)A 2003. It empowers the Supervisory Authority to carry out a review of members of recognised accountancy bodies to determine whether a body has been or is regulating its members in the manner approved under *section 906(2)(b)* of the Act, section 9(2)(b) of the C(A&A)A 2003 or the Companies Act 1990. Such a review is required to be facilitated and in this regard, the Supervisory Authority is permitted to inspect all relevant documentation in the possession or control of the prescribed accountancy body whose monitoring practices are in question. The member being reviewed is obliged to co-operate fully with the work of the Supervisory Authority. Failure to co-operate leaves the party open to sanctions similar to those which would be imposed by the prescribed body of which it is a member.

*Section 937* enables the Supervisory Authority to delegate its functions and powers under *sections 933 to 936* to a committee of its directors. *Subsection (4)* provides that the Supervisory Authority can have its other functions and powers performed or exercised by any of its officers or employees or any other person authorised to do so. It is drawn from section 27 of the C(A&A)A 2003. *Subsection (6)* derives from section 4 of the Companies (Miscellaneous Provisions) Act 2009.

*Section 938* deals with hearings, privileges and procedural rules. *Subsection (1)* provides that the Supervisory Authority may conduct an oral hearing in accordance with the regulations made under *subsection (4)*. *Subsection (2)* states that a witness before the Supervisory Authority is entitled to the same immunities and privileges as a witness before the court. This section stems from section 28 of the C(A&A)A 2003.

*Section 939* re-enacts section 30 of the C(A&A)A 2003 and provides for the recognition of the Supervisory Authority's seal and instruments.

*Section 940* concerns confidentiality of information. It provides that a person shall not disclose information that comes into possession of the Supervisory Authority by virtue of the performance by any of its functions under this Act and has not otherwise come to the notice of members of the public. It also identifies information obtained pursuant to this Act that may be disclosed to State bodies and statutory authorities such as the Minister for Finance, the Garda Síochána.

A breach of confidentiality of information committed by a person associated by the Supervisory Authority, is deemed to be a category 2 offence.

*Section 941* contains provisions regarding appeals and orders of the court, including orders confirming decisions of the Supervisory Authority. This section derives from section 29 of the C(A&A)A 2003.

*Section 942* affords immunity to the Supervisory Authority and its members, directors, officers, employees, professional or other advisors and duly authorised agents from liability in damages in respect of acts or omissions in relation to their functions or powers under the Act, unless they are shown to be in bad faith. It replaces section 33 of the C(A&A)A 2003.

*Section 943* empowers the Minister to make regulations for the purposes of giving effect to the provisions of this Chapter and certain other sections. It replaces section 48 of the C(A&A)A 2003.

*Section 944* stipulates certain regulations which require prior approval by both Houses of the Oireachtas before being made. This replaces section 49 of the C(A&A)A 2003.

### **Chapter 3**

#### **Director of Corporate Enforcement**

*Section 945* provides that the office of the Director of Corporate Enforcement established by section 7 of the Company Law Enforcement Act 2001 shall continue in being. It provides that the person holding the office before the commencement of this section shall continue to hold office for the remainder of the period of his or her appointment, and that any subsequent appointment shall be made by the Minister. A requirement that the Director of Corporate Enforcement be appointed in writing has been removed under the Act.

*Section 946* sets out the terms and conditions of the Director of Corporate Enforcement's appointment. The Director of Corporate Enforcement shall hold office for not more than 5 years and his or her appointment may be renewed after the first period of appointment (at the discretion of the Minister and with the consent of the Minister for Public Expenditure and Reform) for further periods, each being not more than 5 years. This section replaces section 8 of the CLEA 2001.

*Section 947* empowers the Minister to remove the Director of Corporate Enforcement at any time, which power may only be exercised for stated reasons. *Subsection (3)* provides that the Director of Corporate Enforcement shall cease to hold office on entering or being nominated for certain political positions. Similarly, *subsection (4)* provides certain holders of political positions are



disqualified from being the Director of Corporate Enforcement. This section replaces section 10 of the CLEA 2001.

*Section 948* re-enacts section 11 of the CLEA 2001. It makes provision for the Minister to appoint an acting Director of Corporate Enforcement in the event that the Director of Corporate Enforcement is unable to perform his or her functions, is suspended or there is a vacancy in the office of the Director of Corporate Enforcement.

*Section 949* sets out the functions of the Director of Corporate Enforcement and re-enacts section 12 of the CLEA 2001. The Director of Corporate Enforcement's functions include encouraging compliance with the Companies Acts, investigation of suspected offences through the appointment of inspectors, criminal investigation and prosecution, the imposition of fines and sanctions, and civil enforcement of the obligations, standards and procedures to which companies and their officers are subject.

*Section 950* provides that the Minister, with the consent of the Minister for Public Expenditure and Reform, may put in place a specific scheme or schemes for pension benefits for the Director of Corporate Enforcement, an acting Director of Corporate Enforcement and any officers of the Director of Corporate Enforcement. This section re-enacts section 9 of the CLEA 2001.

*Section 951* derives from section 12(3) and (4) of the CLEA 2001. It provides that any member of the Garda Síochána seconded to the office of the Director of Corporate Enforcement shall continue to be under the general direction and control of the Commissioner of the Garda Síochána.

*Section 952* provides that the Director of Corporate Enforcement may delegate his or her powers (other than the power to delegate) to his or her officers. The Director of Corporate Enforcement may revoke that delegation of power at will and he or she may exercise the power that has been delegated simultaneously with the officer to whom the power has been delegated. This section re-enacts section 13 of the CLEA 2001.

*Section 953* replaces section 15 of the CLEA 2001. This section exempts the Director of Corporate Enforcement and his or her officers from liability in damages for anything done by them, anything purported to be done or anything omitted to be done by him or her in performing a function under this Act, unless the act or omission is shown to have been in bad faith.

*Section 954* derives from section 16 of the CLEA 2001. The Director of Corporate Enforcement must present the Minister with a report in writing, detailing the activities and performance of the ODCE on an annual basis. The period for presentation of the report has been extended from 3 months to 4 months after the end of each year. *Subsection (3)* provides that the Minister shall ensure that copies of the annual report are laid before each House of the Oireachtas not later than 6 months after the end of the year to which the report relates.

*Section 955* provides that the Minister may, on an impromptu basis, require the Director of Corporate Enforcement to provide information as to the performance of his or her functions, and provides that the Director shall on request account to a committee of the Oireachtas on the performance of his or her functions. This section comes from section 16(3) and (4) of the CLEA 2001.

*Section 956* requires the Director of Corporate Enforcement or a former Director of Corporate Enforcement or an officer of the Director to keep confidential any information received by them in the performance of the work of the ODCE. An exception is provided for in *subsections (3) and (4)* for the disclosure of information to the Garda Síochána or to other defined competent authorities. This derives from section 17 of the CLEA 2001. *Subsection (5)* provides that a person who contravenes this section is guilty of a category 2 offence.

*Section 957* facilitates the reporting to the Director of Corporate Enforcement of information relating to offences under this Act and derives from section 18 of the CLEA 2001. Section 6 of the Companies (Miscellaneous Provisions) Act 2013 has been incorporated into this section. Section 6 of the 2013 Act added the Insolvency Service of Ireland to the list of bodies that may share information with the Director. The section restates that notwithstanding any other law, the Competition Authority, members of An Garda Síochána and officers of the Revenue Commissioners, the Irish Takeover Panel and other persons that may be prescribed may disclose information to the Director or his officers in relation to the commission of an offence under the Companies Acts.

The purpose of section 6 of the Companies (Miscellaneous Provisions) Act 2013 is to clarify the basis on which other regulatory bodies can share information with the Director of Corporate Enforcement. The need for this change came as a result of a provision in the Finance Act 2011 which prescribed the basis on which the Revenue Commissioners can share information with other bodies. The provision meant that Revenue could no longer share information with other bodies to investigate non-criminal breaches. In particular this means that Revenue is prohibited from sharing information with the Director in relation to matters relevant to the possible disqualification of a director from acting as a director of a company which is a civil sanction.

#### **Chapter 4** Company Law Review Group

*Section 958* provides that the Company Law Review Group (CLRG) established under section 67 of the Company Law Enforcement Act 2001 shall continue in being.

*Section 959* sets out the functions of the CLRG. The functions are to monitor, review, and advise the Minister on all aspects of company law, with a specific focus on promoting enterprise, facilitating commerce, simplifying the operation of this Act and enhancing corporate governance and encouraging commercial probity. This section re-enacts section 68 of the CLEA 2001.

*Section 960* deals with membership of the CLRG and re-enacts section 69 of the CLEA 2001. *Subsection (6)* provides that any appointment of a person as a member of the CLRG made before the commencement of this section shall continue in being.

*Section 961* concerns the meeting and business of the CLRG. It provides that the Minister shall, at least once in every two years, after consultation with the CLRG, determine the programme of work to be undertaken by the Review Group. This section re-enacts section 70 of the CLEA 2001.

*Section 962* concerns the annual report of the CLRG and the provision of information to the Minister. It re-enacts section 71 of the CLEA 2001. It states that no later than 3 months after the end

of each calendar year, the CLRG shall make a report to the Minister on its activities during the year and the Minister shall cause copies of the report to be laid before each House of the Oireachtas within a period of 2 months from the receipt of the report.

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## **Part 16 - Designated Activity Companies**

### *Preliminary Note*

*Part 16* of the Act makes provision for a type of private company to be known as a designated activity company or “DAC”. There will be two types of DAC under the Act - a private company limited by shares and a private company limited by guarantee, having a share capital. The primary defining feature of a DAC will be the continued existence of an objects clause in the constitution of the company. This is in contrast to the new model private company limited by shares (LTD), the constitution of which will no longer contain an objects clause.

The DAC limited by shares will be the closest type of company to the existing private company limited by shares under company law as it was prior to the enactment of CA 2014, and during the transition period, existing private companies may elect whether to opt into the new regime for private companies (the LTD) or alternatively, to retain their objects clause by converting to a DAC. This conversion process is provided for in *Chapter 6* of *Part 2* of the Act. An existing private company that does not want to opt-in to the new regime can do so easily by following the procedure laid down in *section 63* of the Act.

It is envisaged that entities which would welcome the continued availability of a private company limited by shares and having an objects clause include special purpose companies – for example those incorporated for joint ventures or for use in a financing transaction. However, the Act does not restrict the availability of DACs to persons engaged in such activities and it is open to any company to incorporate or convert to a DAC.

A DAC limited by guarantee and having a share capital should be contrasted with the company limited by guarantee (CLG) provided for in *Part 18* of the Act.

*Chapter 1* deals with preliminary matters and definitions for the purposes of this Part. The provisions of *Parts 1* to *14* of the Act are applied to DACs, except to the extent that they are disapplied or modified by the Table to *section 964*, or any other provision of the Part.

*Chapter 2* contains provisions in relation to the incorporation of DACs and other consequential matters. The key features of a DAC (as compared with a LTD) are as follows:

- There are 2 types of DACs – limited by shares or limited by guarantee and having a share capital.
- A DAC has a 2 document constitution comprised of a memorandum (containing an objects clause) and articles of association.
- The corporate capacity of a DAC is not limited by its constitution. This new formulation of the doctrine of *ultra vires* does not prejudice persons dealing with a DAC that is acting *ultra vires* but the directors of the DAC may be held to account for causing a DAC to take such *ultra vires* action. This will be in the form of an *in personam* action against the directors and not an *in rem* action that would set aside the validity of the *ultra vires* transaction. The doctrine of constructive notice has been removed by providing that a person is not bound to enquire as to whether an activity is *intra vires*.
- A DAC must have a minimum of 2 directors – the option of only having 1 director is confined to the new model private company limited by shares (LTD).
- A DAC with 2 or more members must hold an AGM (unless it is a single member company as provided for in *section 175(3) and (4)* of the Act).

*Chapter 3* contains the provisions relating to the share capital of a DAC. This Chapter adapts *section 68* of the Act and provides that the prohibition on the making of offers to the public does not extend to

debentures and other debt instruments. In this way, all private companies that have been heretofore permitted to list debentures and debt securities can continue to do so by converting to a DAC.

*Chapter 4* deals with corporate governance and provides that every DAC must have at least two directors, thus distinguishing it from the model private company limited by shares which is permitted to have only one director appointed. A DAC with two or more members may not dispense with the holding of an AGM. However, *section 196* of the Act will govern meetings of single member DACs. It is only multi-member LTDs which can dispense with holding an AGM: all other types of company must hold an AGM where they have more than one member.

*Chapter 5* adapts for DACs the provisions of *Part 6* of the Act on financial statements, annual return and audit.

*Chapter 6* makes provision for the liability as contributories of past and present members in a winding up.

*Chapter 7* applies *section 510* of the Act on petitions for examinership to a DAC with certain modifications.

*Chapter 8* applies *Chapters 1, 2 and 4 of Part 23* of the Act on public offers of securities, prevention of market abuse and transparency to DACs.

## *Explanatory Memorandum*

### **Chapter 1**

#### Preliminary and Definitions

*Section 963* is new and contains definitions for the purposes of this Part. The concept of a designated activity company (DAC) is derived from the First Report of the CLRG. The concept originally came from the recognition that there would be a need to provide for a type of company similar to the existing private company limited by shares – namely a private company with an objects clause. It was also thought appropriate to include private companies limited by guarantee and having a share capital within this Part.

*Section 964* applies the provisions of *Parts 1 to 14* of the Act (in relation to the private company limited by shares) to a DAC, except to the extent that they are disapplied or modified by the Table to this section, or any other provision of this Part.

*Subsection (5)* specifies a number of provisions contained in *Parts 1 to 14* which do not apply to DACs.

### **Chapter 2**

#### Incorporation and Consequential Matters

*Section 965* sets out the manner in which a DAC may be formed, which is drawn from *section 5* of the Companies Act 1963. It describes the two types of DAC – either limited by shares or limited by guarantee and having a share capital and it delimits the liability of any member of such a company. Single member DACs are catered for under Regulation 4 of the EC (Single Member Private Limited Companies) Regulations 1994. The maximum number of members is set at 149, but employees or former employees who are also members of the DAC shall not be taken into account in this number. This maximum number has increased from 99 to 149 as a result of the Prospectus (Directive

2003/71/EC) (Amendment) Regulations 2012. The text of this section broadly follows that in *section 17* of the Act.

*Section 966* provides that a DAC shall not be formed and registered unless it carries on an activity in the state, that activity being mentioned in its memorandum. This follows the text of *section 18* of the Act.

*Section 967* lays down the form that the constitution of a DAC must take. It is two separate documents, a memorandum and articles of association, which together are referred to throughout this Part as a constitution. The memorandum of association must state whether the DAC is limited by shares or limited by guarantee and having a share capital. Model constitutions can be found at *Schedule 7* and *Schedule 8* for the two DAC types. The signature requirements are as set out in *section 19* of the Act, in that the constitution must be signed by each subscriber in the presence of at least one witness to attest the signature or be authenticated in the manner referred to in *section 888* of the Act (authentication of documents other than by signing or sealing them). In addition, it is provided that the constitution must state the number of shares taken by each subscriber to the constitution. Amendments to the memorandum of association affecting share capital or any of the other matters provided for in *subsection (2)* must be updated in the memorandum.

*Section 968* is new and contains supplemental provisions in relation to the make-up and the continuation in force of existing memorandum and articles of association of a private company limited by shares that re-registers as a DAC under *Part 2* of the Act. *Subsection (3)* provides that the articles of association of a DAC may contain regulations. *Subsection (4)* provides that so far as the articles of a DAC do not exclude or modify an optional provision, the optional provision shall apply in relation to a DAC. *Subsection (5)* states that instead of containing regulations, the articles may consist solely of a statement to the effect that the provisions of the Act are adopted in relation to the company.

*Section 969* provides that the name of a DAC shall end with the words “designated activity company”, “d.a.c.” or “dac”, or the Irish equivalent of those terms being “cuideachta ghníomhaíochta ainmnithe”, “c.g.a” or “cga”.

*Section 970* contains the category 3 offence of trading under a misleading name, as derived from *section 56(1), (2) and (4)* of the Companies (Amendment) Act 1983. A body that is not a DAC is not permitted to carry on business under a name which includes, at the end of its name, the words “designated activity company” or “cuideachta ghníomhaíochta ainmnithe” or any abbreviation of those words. Furthermore, a DAC must not use a name which could give the impression that it is any type of company other than a DAC, where the use of a name in this way would be likely to be material to any person.

*Section 971* allows for the words “designated activity company” or “cuideachta ghníomhaíochta ainmnithe” to be dispensed with in the case of charities or other companies where all the profits of the company are applied to the promotion of that company’s objects (for example, the promotion of science, commerce, art, education or religion). This re-enacts *section 24* of the Companies Act 1963, as substituted by *section 88* of the Company Law Enforcement Act 2001. The exemption from the requirement to use the words “designated activity company” is automatic where on first registration, or on applying for a change of name, one of the directors or the secretary of the company delivers a statement in the prescribed form confirming the company’s compliance with the requirements of *subsection (1), paragraphs (a) and (b)*. A company benefiting from this exemption

may not then alter its memorandum or articles of association so that it no longer complies with those requirements. Any breach of the requirements of this section will result in a category 3 offence. Companies which have on or after 1 March 2002 availed of the exemption from the requirement to include “Limited” or “Teoranta” in their name are accommodated. This will reduce their burden on such companies as they will not be required to claim the exemption a second time which would result in filing fees and administrative overhead.

*Section 972* provides that a DAC shall have the capacity to do any act or thing stated in its objects as set out in its constitution. Therefore, the provisions in the Act in relation to the LTD that provide for unlimited capacity are disapplied here.

*Section 973* provides that the corporate capacity of a DAC is not limited by its constitution. The mitigation of the doctrine of *ultra vires* contained in section 8 of the Companies Act 1963 has been abandoned in favour of the new formulation found here. Persons dealing with a DAC that is acting *ultra vires* will not be prejudiced by this new formulation, but the directors of the DAC may be held to account for causing a DAC to take such *ultra vires* action. This will be in the form of an *in personam* action against the directors and not an *in rem* action that would set aside the validity of the *ultra vires* transaction. The doctrine of constructive notice has been removed by providing in *subsection (5)* that a person is not bound to enquire as to whether an activity is *intra vires*.

Provision is also made in this section for the ratification of an act beyond the capacity of the company by special resolution. This reverses the common law position stated in *Ashbury Railway & Iron Co. v Riche* (1875) LR 7 HLC 653 where not even a unanimous agreement of the shareholders would suffice. Such ratification offers the other party greater assurance. Ratification validates the transaction whilst a separate special resolution is required to absolve the directors or any other person from any liability arising.

*Section 974* permits a DAC to alter its objects clause by special resolution, subject to the provisions of this section. This derives from section 10(1) to (6A) of the Companies Act 1963. An application can be made to the court for the alteration to be cancelled and in such case the alteration will not have effect except in so far as it is confirmed by the court. It is clarified that a court order for the purchase by the DAC of the shares of any members of the DAC and for the reduction of the DAC's company capital may be so ordered notwithstanding anything in *section 102*.

*Section 975* contains further provisions in relation to the alteration of an objects clause by special resolution. Holders of the DACs debentures that are entitled to object to alterations of the objects of the DAC shall be entitled to notice of the meeting at which the special resolution altering the objects is intended to be proposed, or alternatively, if the written resolution procedure is to be used to effect the alteration, notice of the proposed use of that procedure. That notice must be the same as that given to members of the DAC (i.e. not less than 10 days). In the case of a DAC permitted to omit the words “designated activity company” or “cuideachta ghníomhaíochta ainmnithe” from its name, notice must be given to the Registrar of any proposal to alter the DAC's objects. Where a DAC alters its objects, a copy of the amended memorandum and articles must be sent to the Registrar and if an application is made to the court for the alteration to be cancelled, the DAC shall give notice of that fact to the Registrar.

The provisions of this section are drawn from section 10(6B) to (10) of the Companies Act 1963, as amended by the Companies (Amendment) Act 1983. Section 10(11) has not been re-enacted as it contains now irrelevant transitional provisions.

*Section 976* disapplies *section 32(1)* of the Act in the case of a DAC limited by guarantee, unless the amendment to the constitution in question is in relation to the amount that each member of the company will contribute to the assets of the company in a winding up.

*Section 977* provides that a DAC may, by special resolution, alter or add to its articles, subject to the provisions of this Act and the conditions contained in the memorandum of the DAC. This re-enacts section 15 of the Companies Act 1963 in the context of a DAC.

*Section 978* contains the power to alter provisions in the memorandum of association which could have been contained in the articles. This applies to provisions which could have been contained in the articles but which the members have seen fit to include in the memorandum instead. Such provisions may be altered by the DAC by special resolution. This is based on section 28 of the Companies Act 1963, with subsection (5) being omitted as it was a transitional provision at the time of the 1963 Act.

### **Chapter 3** Share Capital

*Section 979* provides that existing private limited guarantee companies having share capital will convert to DACs limited by guarantee following the commencement of the relevant provisions of the Bill

*Section 980* provides that existing private limited guarantee companies having share capital will convert to DACs limited by guarantee on and from the expiry of the transition period and allows for the name of the company to change during and subsequent to the expiry of the transition period.

*Section 981* adapts the provisions of section 68 of the Act (concerning the LTD) to operate in the context of a DAC. A DAC may list debt securities for sale to the public.

*Section 982* provides that a DAC may alter or modify the rights attached to any class of shares provided certain conditions are met. It is drawn principally from section 38 of the Companies (Amendment) Act 1983 and adapts the provisions of *section 89* of the Act to cater for DACs. It applies *section 90* (rights of holders of special classes of shares) of the Act in relation to a variation of rights under this section as it applies in relation to a variation, pursuant to *section 89*, of such rights.

*Section 983* explains that, in the application of *section 114* of the Act to DACs (which allows a company to acquire and hold shares in a company which is its holding company), where the holding company is a DAC limited by guarantee, references to the acquisition and holding of shares in a company includes a reference to becoming, and being, a member of the company otherwise than by means of acquiring and holding shares.

*Section 984* applies *sections 1085* to *1087* (dealing with uncertificated securities) of the Act to securities of a DAC as it applies to securities of a PLC.

### **Chapter 4**



## Corporate Governance

*Section 985* provides that a DAC must have at least 2 directors. This provision is on foot of the recommendation of the CLRG that the minimum requirement of 2 directors should remain for all companies other than the new model private company (LTD). The aim of *subparagraph (2)* is to ensure that, if for example, an unforeseen eventuality results in a company having just one director, that company will be entitled to be considered as a Sole-Director company.

*Section 986* places a limitation on the number of directorships a director of a DAC may hold. This applies *section 142* of the Act and allows a person to be a director of up to 25 DACs or 25 companies, one (or more than one) of which is a DAC and one (or more than one) of which is any other company type.

*Section 987* contains an “avoidance of doubt” provision which states that membership of a DAC limited by guarantee must be confined to subscribers to the memorandum of the DAC or shareholders.

*Section 988* disapplies *section 175(3) and (4)* of the Act to DACs, meaning that a DAC may not dispense with the holding of an AGM. However, *section 196* of the Act will govern meetings of single member DACs. It is only multi- member LTDs which can dispense with holding an AGM: all other types of company must hold an AGM where they have more than one member.

*Section 989* applies *section 193* of the Act (on unanimous written resolutions) to a DAC. A DAC may use unanimous written resolutions unless the constitution provides otherwise.

*Section 990* applies *section 194* of the Act (on majority written resolutions) to a DAC with a slight amendment. A DAC may use majority written resolutions unless the constitution provides otherwise.

## Chapter 5

### Financial Statements, Annual Return and Audit

*Section 991* states that *Part 6* of the Act does not apply to credit institutions or insurance undertakings as these bodies are subject to alternative requirements specific to those sectors.

*Section 992* applies *Chapter 3* of *Part 23* (in relation to the requirement for a corporate governance statement and other matters) to a DAC that has debentures admitted to trading on a regulated market in an EEA state.

*Section 993* provides that *section 1116* (modification of definition of “IAS Regulation”) shall apply in the case of a DAC as it applies in the case of a PLC.

*Section 994* deals with the application of *section 297* (exemption from consolidation: size of group) *section 350* (qualification of company as small or medium company) and *section 362* (audit exemption not available where company or subsidiary undertaking falls with a certain category) of the

Act to the DAC. A DAC cannot the audit exemption if it falls within any provision of Schedule 5, namely, that it is a company that is an authorised market operator.

*Section 995* deals with disclosure by a DAC that is a credit institution and applies *section 1120* of the Act in the case of a DAC.

*Section 996* disapplies *sections 347* and *348* in the case of a DAC that does not trade for the acquisition of gain by its members. Certain other provisions as detailed in *subsection (2)* will have effect in relation to a DAC that does not trade for the acquisition of gain by its members.

## **Chapter 6**

### Liability of Contributories in Winding up

*Section 997* imposes a liability on past and present members in the event of a DAC being wound up. It contains separate provisions for companies limited by shares and companies limited by guarantee, to reflect the fact that a DAC may be limited by either. It derives from *section 207* of the Companies Act 1963 with *subsection (2)* having been removed as it was a transitional provision and is no longer considered relevant by the CLRG.

## **Chapter 7**

### Examinerships

*Section 998* deals with petitions for examinerships and adapts the provisions of *section 510* of the Act to the case of a DAC.

## **Chapter 8**

### Public Offers of Securities, Prevention of Market Abuse, Etc.

*Section 999* applies the provisions of *Chapters 1, 2* and *4* of *Part 23* of the Act (in relation to Public Offers of Securities, Market Abuse and Transparency) to DACs, in so far as those provisions are applicable to companies other than PLCs.

## **Part 17 – Public Limited Companies**

### *Preliminary Note*

This Part of the Act is concerned with Public Limited Companies (PLCs). The law in *Parts 1 to 14* of the Act applies to PLCs as it does to the new model private company limited by shares (LTD), subject to the exceptions set out in the Table of disapplications contained in *section 1002* and any other adaptations made in this Part.

Many of the provisions in this Part are required by Directive 77/91/EEC (known as the 2<sup>nd</sup> Company Law Directive) on the formation of public limited liability companies and the maintenance and alteration of their capital (as amended by Directive 2006/68/EC), which was given effect in Irish law by the Companies (Amendment) Act 1983. The general aim of this Part has not been to reform the law, but rather to gather it from its dispersed sources and set it out with more clarity of presentation and wording.

It should be noted that the law on market abuse, public offer of securities and transparency which applies to listed PLCs has been housed in its own Part of the Act for the sake of clarity and ease of reference - see *Part 23*.

*Chapter 1* sets out a number of definitions that are used for the purposes of this Part.

*Chapter 2* of this Part deals with incorporation and consequential matters and corresponds in general with *Part 2* of the Act which concerns the incorporation of the LTD.

*Chapter 3* contains provisions relating to the special share capital requirements for PLCs, which derive from the Companies (Amendment) Act 1983. These include the requirement for a PLCs shares to be paid up as to 25% of their nominal value (and all of any premium), the requirement for experts' reports for non-cash consideration for the allotment of shares, and the general prohibition on the giving of financial assistance by the PLC in connection with the acquisition of shares in itself or its holding company. A PLC shall not have the power to issue any bearer instrument. However, there is a limited power for PLCs to issue certain allotments which might otherwise be caught by the prohibition.

*Chapter 4* is concerned with the disclosure of interests in shares in the case of individual or group acquisitions and has been modelled on Chapter 2 of Part IV of the Companies Act 1990. The Act aligns the disclosure threshold obligations for shareholders in all Irish PLCs and provides for increased consistency by requiring notification in all instances of interests of 3 per cent, whether or not the PLC has securities listed on a regulated market.

*Chapter 5* allows for the acquisition by a PLC of its own shares in certain circumstances and lays down the particular rules to be adhered to in both market and off-market purchases. These provisions derive from Part XI of the Companies Act 1990.

*Chapter 6* regulates the making of distributions by a PLC, thereby re-enacting the relevant provisions of Part IV of the Companies (Amendment) Act 1983.

*Chapter 7* provides the statutory basis for transfers of uncertificated securities and gives the Minister the ability to require all PLCs to procure the creation of shares and the registration of transfer of shares in electronic form. This is in line with the amendments to section 239 of the Companies Act 1990 effected by section 12 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Chapter 8* is concerned with corporate governance and includes provisions distinguishing the PLC from the LTD. In particular, a PLC must have at least 2 directors. It is clarified that a PLC with 2 or more members may not dispense with the holding of an AGM. It is only multi-member LTDs which can dispense with holding and AGM. It also deals with voting arrangements for shareholders of PLCs and in this regard, contains provisions from the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009 (S.I. 316/2009).

*Chapter 9* outlines the duties of directors and other officers of PLCs. A new statutory default is created for the directors of PLCs who will be precluded from voting on contracts in which they are interested unless the constitution of the PLC provides otherwise.

*Chapter 10* adapts, to the context of a PLC, the provisions of *Part 6* of the Act on financial statements, annual return and audit. One of the provisions of this Chapter allows directors of a PLC to prepare and circulate a summary financial statement to shareholders instead of full annual accounts. However, the shareholders may still request a copy of the full annual accounts from the company if they so wish.

*Chapter 11* contains provisions concerning registers of debenture holders, with the obligations only applying to series of debenture stock. This re-enacts sections 91 and 92 of the Companies Act 1963.

*Chapter 12* deals with examinerships and adapts the provisions of *section 510* of the Act to apply for a PLC.

*Chapter 13* is concerned with reorganisations and makes provision for circumstances where an offeror becomes bound to acquire the shares of dissenting shareholders or security holders.

*Chapter 14* deals with particular aspects of strike-off and restoration referable to a PLC not obtaining a trading certificate. It expands on section 8 of the Companies (Amendment) Act 1983.

*Chapter 15* adapts *section 747(2)* of the Act on investigations to apply to a PLC.

*Chapter 16* and *Chapter 17* deal with mergers and divisions respectively for PLCs. These provisions differ from the corresponding *Chapters 3* and *4* of *Part 9* of the Act on mergers and divisions of private companies limited by shares. These *Part 17* provisions are instead based mainly on the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987), as amended by the European Communities (Mergers and Division of Companies) (Amendment) Regulations 2011 (S.I. No. 306 of 2011).

*Chapter 18* applies *Chapters 1, 2* and *4* of *Part 23* on public offer of securities, prevention of market abuse etc. to PLCs.

## *Explanatory Memorandum*

### **Chapter 1** Preliminary and definitions

*Section 1000* contains interpretation provisions and definitions for the purposes of this *Part 17*. The definition of "authorised minimum" is taken from sections 2(1) and 19 of the Companies (Amendment) Act 1983. The amount has been set at €25,000, which complies with Directive 77/91/EEC on the formation of PLCs and the maintenance and alteration of their capital (known as the Second Company Law Directive). The definition of PLC is also taken from section 2(1) C(A)A 1983, but the public company limited by guarantee is no longer provided for here. It is now found in *Part 18* of the Act which deals with the company limited by guarantee (CLG).

*Subsection (2)* gives the Minister the power to make orders to increase the amount of the authorised minimum for the purposes of this Part. This re-enacts section 19(2) C(A)A 1983, with amended monetary amounts.

*Section 1001* clarifies that an investment company is to be regarded as a PLC but that the law in relation to investment companies is to be found in *Part 24* of the Act rather than this *Part 17*.

*Section 1002* provides that the law in *Parts 1* to *14* of the Act applies to PLCs as it does to the new model private company limited by shares (LTD), subject to the exceptions set out in the Table of disapplications contained in this section and any modifications contained in any provision of this Part. Public companies are prohibited from giving financial assistance. It provides that while *section 82* applies to PLCs, the summary approval procedure does not apply to PLCs. *Section 161(7)* is disapplied for PLCs. This section allows directors of private limited companies to vote in respect of any contract, appointment or arrangement in which she or he is interested and she or he will be counted in the quorum present at the meeting. It is not appropriate for Public Limited Companies to have such a default provision applied to them. It is a matter that the public limited company must address in its constitution that shall take the form of a memorandum of association and articles of association.

*Section 1003* is new and clarifies that a Societas Europaea (SE), which is a type of European company, is to be regarded in Ireland as a PLC under this Part.

## **Chapter 2**

### **Incorporation and consequential matters**

*Section 1004* derives from section 5(2)(a) of the Companies Act 1963. It provides that a PLC may be formed as such, but may otherwise be registered as such by reason of a re-registration of another body corporate or a Societas Europae (under *Part 20* or *22* of the Act), a merger under *Chapter 16* of this Part or a division under *Chapter 17*. It is provided that a PLC may have just one member (compared to a minimum of 7 members under the previous law) and the liability of a member of a PLC is limited to the amount unpaid on the shares registered in that member's name. This liability is without prejudice to any other liability to which a member may be subject under the Act. Finally, this section provides that the certificate of incorporation must state that the company is a PLC.

*Section 1005* clarifies that a PLC must carry on an activity in the State, that activity being mentioned in its memorandum. This adapts *section 18* of the Act (in relation to the LTD) to the context of a PLC.

*Section 1006* regulates the content of a PLCs constitution, requiring it to state its name, the fact that it is a PLC, its objects and its share capital. This is necessitated by the provisions of the Second Company Law Directive (77/91/EEC) and is drawn from section 6(1)(a) & (c) and section 6(4)(a) of the Companies Act 1963, as amended by paragraph (2) of Schedule 1 to the Companies (Amendment) Act 1983.

*Subsection (3)* is new and states that the constitution of a PLC should state the number of shares taken by each subscriber, be in the form set out in *Schedule 9* to this Act, be printed in an entire format and must be signed either by each subscriber in the presence of one witness attesting that signature, or authenticated in the manner set out in *section 888* of the Act.

*Subsection (4)* provides that where an amendment of the constitution is made affecting the matter of share capital, or another matter, subsequent to its registration, it shall be read as requiring the constitution to state the matter as it stands in consequence of that amendment.

*Section 1007* is new and contains supplemental provisions in relation to the constitution of a PLC and the continuation in force of any existing memorandum and articles of a PLC registered under companies acts prior to this Act. In relation to the content of the articles of a PLC, it is provided that they may contain regulations in relation to that company. Alternatively, instead of containing regulations, the articles may consist solely of a statement to the effect that the provisions of the Act are adopted in relation to the company. Where the articles of the PLC do not exclude or modify an optional provision of the Act, that optional provision will be deemed to apply to the company.

The memorandum and articles of association of a PLC registered under prior Companies Acts shall continue in force so long as they are not inconsistent with a mandatory provision of this Act. Those memorandum and articles may be altered or added to as permitted by the Act. Where a PLC registered before the commencement of this section was governed by regulations in Part I of Table A in the First Schedule to the Companies Act 1963, or regulations in any Table referred to in section 3(9)(b), (c) or (d) of that Act, then that PLC will continue to be governed by those regulations after the commencement of this section, unless those regulations are inconsistent with a mandatory provision of this Act. In addition, it is provided that those regulations may be altered or added to as permitted by this Act and references to any provision of the prior Companies Acts in those regulations will be read as references to the corresponding provision of this Act.

*Section 1008* provides that the name of a PLC shall end with the words “public limited company”, or the Irish language equivalent “cuideachta phoiblí theoranta”, or the abbreviations of those terms - “p.l.c.”, “plc”, “c.p.t.” or “cpt”. This replaces section 4(1) of the Companies (Amendment) Act 1983. *Subsection (4)* states that a PLC carrying on business under a name other than its corporate name must register that other name in the register of business names in the CRO. This derives from section 22 of the Companies Act 1963.

*Section 1009* contains the category 3 offence of trading under a misleading name, as derived from sections 56(1), (2) and (4) of the Companies (Amendment) Act 1983. A body that is not a PLC is not permitted to carry on business under a name which includes, at the end of its name, the words “public limited company” or “cuideachta phoiblí theoranta”, or any abbreviation of those words. Furthermore, a PLC must not use a name which could give the impression that it is any type of company other than a PLC, where the use of a name in this way would be likely to be material to any person. The provisions of this section will not apply to external companies which would be entitled to rank as a PLC if registered as a company in the State.

*Section 1010* deals with the requirement for a PLC to have a trading certificate and is adapted from section 6 of the Companies (Amendment) Act 1983. A PLC is forbidden from doing business or exercising any borrowing powers unless it has received a certificate under this section from the Registrar, and it is a category 3 offence to breach this requirement. The Registrar will issue that certificate where the PLC applying for it shows that the nominal value of its allotted share capital is not less than the authorised minimum (which is €25,000 under *section 1000(1)*). The PLC must also deliver to the Registrar a declaration in the prescribed form and signed by a director or secretary of the company. *Subsection (3)* lays down what must be included in this declaration. Where a PLC enters into a transaction in contravention of the provisions of this section and fails to comply with its

obligations within 21 days of being notified of the contravention, the directors of that PLC shall be liable to indemnify the other party to the transaction in respect of any loss or damage suffered. A certificate issued under this section will be conclusive evidence that the PLC is entitled to do business and exercise borrowing powers.

*Section 1011* states that a PLC has capacity to do any act or thing set out in its objects as contained in its constitution. The provisions in relation to a LTD that provide for unlimited capacity are disapplied here.

*Section 1012* provides that the corporate capacity of a PLC is not limited by its constitution. The mitigation of the doctrine of *ultra vires* contained in section 8 of the Companies Act 1963 has been revised in favour of the new formulation found here. Persons dealing with a PLC that is acting *ultra vires* will not be prejudiced by this new formulation, but the directors of the PLC may be held to account for causing a PLC to take such *ultra vires* action. This will be in the form of an *in personam* action against the directors and not an *in rem* action that would set aside the validity of the *ultra vires* transaction. The doctrine of constructive notice has been removed by providing in *subsection (5)* that a person is not bound to enquire as to whether an activity is *intra vires*.

Provision is also made in this section for the ratification of an act beyond the capacity of the company by special resolution. This reverses the common law position stated in *Ashbury Railway & Iron Co. v Riche* (1875) LR 7 HLC 653 where not even a unanimous agreement of the shareholders would suffice to achieve ratification in this regard. Such ratification offers greater assurance to the other party dealing with the company. A special resolution regarding ratification validates the transaction whilst a separate special resolution is required to absolve the directors or any other person from any liability arising.

*Section 1013* is newly inserted but draws on the provisions of sections 9 and 10 of the Companies Act 1963. It permits a PLC to alter its objects clause by special resolution. However, an application can be made to the court for the alteration to be cancelled and in such a case the alteration will not have effect except in so far as it is confirmed by the court. The application may be made by the holders of not less than 15 per cent in nominal value of the issued share capital of the PLC (or any class thereof), or by the holders of not less than 15% of the PLC's debentures entitling the holders to object to alterations of that company's objects. Any person who has consented to or voted in favour of the alteration may not make an application under this section. Any application must be made within 21 days of the passing of the resolution altering the PLC's objects. On foot of an application under this section, the court may make an order cancelling or confirming the alteration either in whole or in part and on such conditions as it sees fit. The court may also adjourn the proceedings in order to facilitate the making of an arrangement for the purchase of the interests of the dissenting members. If the court sees fit, it may make an order providing for the purchase by the PLC of the shares of any members of the company and for the reduction of the PLC's capital.

*Section 1014* contains further provisions in relation to the alteration of an objects clause by special resolution and sets out procedural requirements in this regard.

*Section 1015* provides that a PLC may, by special resolution, alter or add to its articles, subject to the provisions of this Act and the conditions contained in the memorandum of the PLC. This re-enacts section 15 of the Companies Act 1963.

*Section 1016* contains the power to alter provisions in the memorandum of association which could have been contained in the articles. This applies to provisions which could have been contained

in the articles but which the members have seen fit to include in the memorandum instead. Such provisions may be altered by the PLC by special resolution. This is based on section 28 of the Companies Act 1963, with subsection (5) of that section being omitted as it was a transitional provision in 1963 and is accordingly no longer relevant.

*Section 1017* deals with the official seal for sealing securities and purports to re-enact existing law. It provides for a PLC to have an official seal which is a facsimile of the common seal and which has on its face the word “Securities” or the word “Urrúis”. This seal can be used only for sealing securities and other documents of that nature; in other words, it could not be used, for example, for sealing a contract entered into by the company. *Subsection (2)* applies only to companies formed before the commencement date of the Companies (Amendment) Act 1977, and allows such companies to use their official seal in respect of such securities and documents.

*Section 1018* deals with the status of an existing PLC incorporated under the prior Companies Acts, which includes an old public company within the meaning of the Companies (Amendment) Act 1983.

### Chapter 3 Share capital

*Section 1019* sets out provisions as to shares transferrable by delivery. A PLC shall not have power to issue any bearer instrument. There is a limited power for PLCs to issue certain “permissible letters of allotment” that might otherwise be treated as bearer instruments. Shares comprised in a permissible letter of allotment shall, until its expiry date, be transferable by renunciation and delivery of the letter, but subject to compliance with such conditions (if any) as may be specified in the letter. An expiry date is no longer than 30 days after the date of the instrument was issued. The amendment also contains an 18 month transitional provision from the commencement of the section, allowing for persons who are in possession of a bearer instrument, to have their names included in the registry of members. Failure to adhere to the provisions will result in the entitlement to the bearer instrument to be transferred to the Minister for Finance.

*Section 1020* confirms that a PLC has the capacity to make public offers of securities, subject to compliance with the provisions of *Part 23* of this Act.

*Section 1021* deals with the allotment of shares and other securities and derives from section 20 of the Companies (Amendment) Act 1983. It is first of all provided that relevant securities may not be allotted by a PLC unless the allotment is authorised by ordinary resolution or by the constitution of the PLC. Shares that are to be allotted must be comprised in the authorised but unissued share capital of the PLC. The authority to allot referred to in *subsection (1)* must state the maximum amount of relevant securities that may be allotted and the date on which the authority will expire. This date must not be more than 5 years after the date of incorporation of the PLC (where the authority is contained in the constitution of the PLC) or 5 years after the date on which the resolution granting the authority is passed (in any other case). The authority may be renewed for a further period of up to 5 years subject to the conditions laid down in *subsection (4)*. If the authority is expired, the directors of a PLC may still allot shares in the circumstances outlined in *subsection (5)* in pursuance of an offer or agreement previously made by the PLC. A resolution to give, vary, revoke or renew such an authority may be an ordinary resolution, even if it alters the articles of association of a PLC.

Under *subsection (7)*, shares will be taken to be allotted when a person acquires the unconditional right to be included in the register of members of the PLC in respect of those shares. Where shares are



allotted, particulars of the allotment must be delivered in the prescribed form to the Registrar within 30 days of the allotment.

Following the move to self-assessment by the Revenue Commissioners there is no longer routine adjudication in advance of stamping, therefore provision for such is no longer required.

*Subsection (8)* provides for a new category 3 offence. Such an offence arises in circumstances where any director of a public limited company knowingly permits or authorises a contravention of a preceding provision of this section.

Under *subsection (9)*, shares will be taken to be allotted when a person acquires the unconditional right to be included in the register of members of the PLC in respect of those shares. Where shares are allotted, particulars of the allotment must be delivered in the prescribed form to the Registrar within 30 days of the allotment. If a PLC fails to comply with *subsection (9)*, the PLC and any officer of it who is in default shall be guilty of a category 4 offence.

*Subsection (11)* provides that the validity of the allotment of any “relevant securities” will not be called into question as a result of any of the provisions of this section. Relevant securities are defined in *subsection (12)* as shares in the PLC other than shares shown in the memorandum.

*Section 1022* contains provisions in relation to pre-emption rights and derives from section 23 of the Companies (Amendment) Act 1983. This section contains a statement of the general principle of pre-emption as laid down by Article 29 of the Second Company Law Directive (77/91/EEC), to the effect that a PLC may not allot any equity securities to any third party without first offering them on the same or more favourable terms to existing holders of the company’s relevant shares or relevant employee shares. The pre-emption rights provided for here are confined to equity securities (as defined in *section 1023(1)*) which are to be paid-up in cash (as provided for in *subsection (5)*).

*Subsections (3) and (4)* are inter-connected and deal with a situation where a PLC’s constitution contains a provision which requires that the PLC, when proposing to allot equity securities of a particular class, does not allot those securities until they have first been offered to each person who holds relevant shares or relevant employee shares of that class. In such a case, the obligation in *subsection (1)* to issue shares on a pre-emptive rights basis to shareholders in the company generally will not apply where the company has made the appropriate offer in accordance with the provision in its constitution, and the offeree or anyone in whose favour he or she has renounced his or her right accepts the offer. Should there be some shares of this particular class or classes not taken up, they must then be offered to the holders of relevant shares or relevant employee shares in accordance with *subsection (1)* - this is the effect of the phrase in *subsection (4)* “this subsection is without prejudice to the application of *subsection (1)* in any other case”.

Under *subsection (6)*, where a company has made a pre-emptive offer to a holder of relevant shares or relevant employee shares, and the holder or any person in whose favour he or she has renounced the offer accepts the offer at any time during the offer period, the company may proceed to allot those shares without delay even though the 14 day period (as laid down in *subsection (9)*) has not expired.

*Subsection (7)* excludes from the pre-emptive provisions shares allotted in connection with an employees’ share scheme by providing that *subsection (1)* does not apply in relation to the allotment of any securities which would, apart from a renunciation or assignment of the right to their allotment, be held under an employees’ share scheme.

*Subsection (8)* makes provision for the procedures to be followed when a pre-emption offer is made to any person whether by the general pre-emption requirements of *subsection (1)*, or as required by the company’s memorandum or articles.

Under *subsection (9)*, a pre-emptive offer must remain open for at least 14 days and it cannot be withdrawn before the end of that period. This period is reduced from 21 days under existing law. This is in line with EU requirements, specifically Article 29.3 of the Second Directive on Company Law. This 14 day time limit also corresponds with the offer period for the Company Limited by Shares, Designated Activity Companies and Unlimited Companies. The amendment therefore purports to ensure consistency in relation to time limits across the Act.

*Subsection (10)* stipulates that, as regards situations provided for in *subsection (4)* (namely where a provision of the constitution of the PLC requires the allotment of relevant securities), any class rights of pre-emption set down in the memorandum or articles of a company which provide for the making of a pre-emptive offer in a manner different from that laid down by *subsection (8)*, or for the termination or withdrawal of such an offer in a period shorter than the 14 days specified in *subsection (9)*, shall not be invalidated for the reason that they contravene those subsections.

*Subsection (11)* interprets references in the section to the holder of shares in relation to pre-emptive offers of any equity securities or of relevant shares of a particular class. It provides that such references (howsoever expressed) are to be read as including any person who held the shares on any day within the 28 days immediately preceding the date of the offer.

*Subsection (12)* provides for the joint and several liability of the company and any of its officers in default for the compensation of anyone to whom a pre-emptive offer should have been made for loss or expense resulting from the failure to receive an offer. *Subsection (13)* places a time limit of 2 years on the bringing of such actions.

*Section 1023* lays down additional provisions in relation to pre-emption rights and is taken from section 23(13) and section 24 of the Companies (Amendment) Act 1983. *Subsection (1)* provides a definition for the terms “equity security”, “relevant employee shares” and “relevant shares” for the purposes of this section and *section 1022* above.

*Subsection (3)* provides that, where the directors have been given a general authority to allot relevant shares under *section 1021*, they may also be given a general power to exclude pre-emption rights or to modify them, notwithstanding the requirements of *section 1022* above.

*Subsection (4)* enables the company by a special resolution to empower the directors to either exclude or restrict the application of the pre-emption provisions of *section 1022(1)* in the case of a specified allotment of equity securities made in accordance with an authority given under *section 1021*. Therefore, whereas *subsection (3)* contemplates a situation where there are compelling reasons to restrict or withdraw all pre-emption rights, this *subsection (4)* caters for the withdrawal or modification of pre-emption rights relating to a specified allotment.

Under *subsection (5)*, the directors’ power to restrict or withdraw pre-emption rights shall cease to have effect when the directors’ authority to allot shares under *section 1021* is revoked, or expires without being renewed. However, if the authority is renewed, the power or the resolution may also be renewed for a similar period by a special resolution. This ensures that the directors’ power to restrict or withdraw pre-emption rights, whether generally or specifically, is subject to review at intervals not exceeding five years, as is the authority to allot shares under *section 1021*.

*Subsection (6)* sets out to ensure that the procedures for the control of the directors’ power to restrict or withdraw pre-emption rights contained in this section do not jeopardise the directors’ ability to conclude an equity security contract commenced in line with that power but not concluded by the expiration of the directors’ power or the special resolution to remove or modify pre-emption rights.

*Subsection (7)* specifies the procedures to be followed in the making or renewal of a special resolution to empower the directors to restrict or withdraw pre-emption rights in relation to a specified allotment

of equity securities under *subsection (4)* above. It provides that such a resolution may only be proposed when it is recommended by the directors and they duly circulate, with the notice of the general meeting at which it is to be considered, a written statement setting out the reasons why a specific restriction or withdrawal of pre-emption rights is recommended; the amount to be paid to the company in respect of the equity securities to be allotted; and the directors' justification of that amount.

*Subsection (8)* makes it a category 3 offence for any person (specifically a director) to knowingly or recklessly authorise or permit the inclusion in the statement circulated under *subsection (7)* above of any matter which is false or misleading in a material way.

*Section 1024* deals with any authority of the directors to allot shares under *section 69* of the Act conferred by special resolution passed by a company prior to its re-registration as a PLC. Such an authority will lapse at the end of its first AGM held after its re-registration as a PLC. This newly inserted provision replaces section 25 of the Companies (Amendment) Act 1983.

*Section 1025* is concerned with the subscription of share capital and states that the provision of work or services cannot be accepted by a PLC as payment for shares. This section re-states section 26(2) to (4) and (6) of the Companies (Amendment) Act 1983. If a PLC does accept an undertaking to perform work or services as payment for shares, the holder of the shares will be liable to pay the PLC in respect of those shares and will be liable to pay interest at the appropriate rate thereon. *Subsection (3)* deals with the case where a person becomes a holder of any shares in respect of which there has been a contravention of this section and by virtue of that contravention, another person is liable to pay to the company an amount under this section. In such circumstances, the person who has become the holder of the shares will also be liable to pay the amount to the company unless they are a purchaser for value and did not know about the contravention of this section. An offence provision has been inserted at *subsection (5)* which lays down a category 3 offence for any contravention of this section.

*Section 1026* deals with the payment for allotted shares and re-enacts section 28 of the Companies (Amendment) Act 1983. As regards each issued share, the whole of any premium and not less than one-quarter of the nominal value must be paid up, with employees' shares being excluded from this requirement. *Subsection (2)* deals with the allotment of shares in contravention of this requirement – where there is such a contravention, the share shall be treated as if one-quarter of its nominal value together with the whole of any premium had been received, but the allottee will be liable to pay to the PLC the minimum amount which should have been received in respect of the share less the value of any consideration actually applied in payment for the share and any premium on it, in addition to interest at the appropriate rate.

An allottee in receipt of a bonus share which is not paid up as required by this section shall not be liable in respect of the minimum payment of one-quarter (and the full premium if any) unless he or she knew, or ought to have known, that the share was allotted in contravention of this section.

*Subsection (5)*, by applying the provisions of *section 1025(3)* to this section, makes provision for the joint and several liability of subsequent holders after the original allottee of shares allotted in contravention of this section.

Under *subsection (6)*, a PLC and any officer of it in default of the requirements of this section will be guilty of a category 3 offence.

*Section 1027* deals with payment of non-cash consideration and is taken from section 29 of the Companies (Amendment) Act 1983. Under *subsection (1)*, a PLC is prohibited from allotting

shares either as fully or partly paid-up for a non-cash consideration, where the consideration consists of or includes an undertaking which is to be or may be performed more than 5 years after the date of allotment. This prohibition also applies to the payment, in full or in part, of any premium on the shares. An allotment made in contravention of this prohibition will not be void, but it will, however, impose certain liabilities on the allottee – namely that the allottee will be liable to pay the full nominal value of the shares allotted and any premium thereon. Interest at the appropriate rate will also be payable.

If an allotment does not contravene *subsection (1)*, any variation of the terms of the allotment, which, had that variation been included in the original terms would have caused the allotment to contravene *subsection (1)*, will be void. This also applies to a variation of an allotment contract which was entered into by a PLC prior to its registration or re-registration as a PLC.

Under *subsections (5) and (6)*, where an allottee, who has been allotted shares in full or part consideration of an undertaking to be performed within the 5 year period, fails to perform the undertaking within that period of time, he or she will, at the end of that period, be liable to pay the company an amount equal to the amount which would have been treated as paid up by the unperformed part of the undertaking. Interest at the appropriate rate shall also be payable.

*Subsection (7)* provides that *section 1025(3)* of the Act (liability of subsequent holder after the original allottee) will apply in relation to a contravention of this section and to a failure to carry out a term of a contract mentioned in *subsection (5)*. This means that if a holder of shares, other than the allottee, was aware at the time of purchase that they had been illegally allotted or that the undertaking had not been completed by the allottee within the contract period, or if he or she acquired them directly or indirectly from someone who was liable to the company as a result of the contravention of *subsection (1)* or a failure under *subsection (5)*, that holder will be liable, jointly and severally, with any other person liable to the company, to pay to the company any amount due in respect of the shares and any premium on them, as well as interest at the appropriate rate.

*Subsection (8)* seeks to prevent a company avoiding the prohibition in *subsection (1)* by entering into a contract for the allotment of shares and another (ancillary) contract for payment of those shares.

*Subsection (9)* is a newly inserted offence provision and states that it is a category 3 offence for a PLC or any officer of it to contravene any of the provisions of this section.

*Section 1028* makes provision for the experts' report that must be prepared before allotment of shares for non-cash consideration can take place. It re-enacts subsections (1) to (8) of section 30 of the Companies (Amendment) Act 1983.

This section prohibits a PLC from allotting shares as fully or partly paid-up as to their nominal value or any premium on them in return for non-cash consideration, unless the consideration is valued in accordance with the provisions of the section. In addition, a report must be made to the company with respect to its value by a person appointed by the company during the six months preceding the allotment. A copy of the report must be sent to the allottee of the shares.

The obligation to value the non-cash consideration does not apply to an arrangement or a proposed merger between companies. However, where such an arrangement is open to all the shareholders, or all the shareholders of a particular class, of the offeree company, the obligation to value the non-cash consideration will not arise. The valuation and report on the non-cash consideration must be made by an independent person, that is, someone who is qualified at the time of the report to be appointed, or continue to be, auditor of the company. Where it appears reasonable to the independent person, he or she may arrange for the valuation to be made by another person who has the requisite knowledge and experience to carry it out and is not an officer or employee of the company or of another company in the same group nor a partner or employee of such an officer or employee. A person otherwise

“connected” is also precluded – ensuring that a civil partner or child of an officer or employee of the PLC is precluded from being such an independent person. The principle of “connected person” has been extended to recognise civil partnership legislation.

The section goes on to specify the contents of the expert’s report and the contents of the note which must accompany it.

*Section 1029* contains provisions supplemental to *section 1028* above and derives from subsections (9) to (14) of section 30 of the Companies (Amendment) Act 1983.

*Subsections (1) and (2)* deal with circumstances where a PLC allots shares in contravention of *section 1028* above and either the allottee has not received a report under that section or there has been some other contravention of that section. In such a case, the allottee will be liable, as from the date of allotment, to pay the company in cash an amount equal to that which was to be treated as paid up on the shares by the non-cash consideration. This provision ensures that the shares allotted will be paid for in full. Interest will be payable on the amount due from the date of allotment.

*Subsection (3)*, by applying the provisions of *section 1025(3)* to *section 1028* above, makes provision for the joint and several liability of subsequent holders after the original allottee of shares allotted in contravention of that *section 1025*.

*Subsection (4)* applies where a person agrees to transfer non-cash consideration to a PLC partly in return for the allotment of shares and partly in return for some other consideration (e.g. the issue of debentures). In these circumstances, the provisions of *section 1028* will apply to that portion of the non-cash consideration which applies to the allotment of shares by the PLC in the situation where it is giving other consideration in addition to shares. The expert must, therefore, carry out or arrange to have carried out whatever valuations are necessary to determine the proportion of the consideration which applies to the payment for the shares. Where valuations are made under this subsection, the expert’s report must state what valuations have been made under the subsection and the reason for and method and date of such valuation, in addition to any other relevant matters.

*Subsection (5)* is clarificatory and in effect provides that shares allotted to members in a capitalisation or bonus issue will not need to be the subject of an experts’ report under *section 1028* above.

*Subsection (6)* is a definition provision dealing with the meaning of the term “arrangement” and references to the terms “company” and “officer or employee” under this section and *section 1028* above.

*Subsection (7)* is new. It is linked to *section 1028(6)(b)(iii)* which prohibits “connected persons” that are family members or employees of the public limited company from being an “independent person.

*Subsection (8)* lays down the offence provision (category 3) for contravention of this section or *section 1028*.

*Section 1030* contains supplemental provisions in relation to experts’ reports and derives from section 31 of the Companies (Amendment) Act 1983. It is provided that any person carrying out a valuation or making a report under *section 1028* in regard to a non-cash consideration for shares will be entitled to require from the officers of the company whatever information or explanation he or she deems necessary to carry out his or her duties.

A company to which a report has been made under *section 1028* above must file a copy of the report along with the return of the allotment to which it refers with the Registrar. Failure to do so will result in a category 4 offence.

A person who makes a statement to the expert under this section (whether orally or in writing) which is false or misleading in a material way will be guilty of a category 2 offence where that person knew that the information was false or misleading or was reckless as to whether it was so.

*Section 1031* provides a dispensation from the requirement for a PLC to produce a valuation report under *section 1028* above. This derives from the new Article 10a(1) of Directive 2006/68/EC (amending the Second Company Law Directive 77/91/EEC) and is being included here following the recommendation of the CLRG in its 2009 Report that this Member State option be adopted.

Where the non-cash consideration consists of either transferable securities, money-market instruments, or both, there will be no requirement for a valuation report, provided that the value of this securities-based consideration is not less than the value of the relevant assets (i.e. the actual securities or instruments that make up the securities based consideration). In addition, the conditions under *subsection (4)* with regard to the price and value of the relevant assets must be satisfied. If the price is affected by exceptional circumstances that would significantly change the value of the assets, then the dispensation from the requirement to produce a valuation report cannot be availed of.

Where a PLC is relying on the dispensation under this section, it must deliver notice of the proposed allotment to the Registrar. Once the shares have been allotted, a notice must be delivered to the Registrar under *section 1021(9)*, which must contain a description of the consideration and its value, and a statement as to whether the value arrived at corresponds at least to the number and nominal value of, and to the premium on, the shares issued for that consideration. The notice must also state that no exceptional circumstances as mentioned in *subsection (4)(b)* have arisen.

*Section 1032* offers a similar dispensation from the requirement to provide a valuation report as that found in *section 1029* above, but in this instance it applies where the consideration for the allotment is made up of assets other than securities and money-market instruments. It derives from the new Article 10a(2) of Directive 2006/68/EC (amending the Second Company Law Directive 77/91/EEC) and is being included here following the recommendation of the CLRG in its 2009 Report that this Member State option be adopted.

The value of the non-securities based consideration must be not less than the value of the relevant assets which make up the non-securities based consideration. In addition, the conditions under *subsection (4)* with regard to the price and value of the relevant assets must be satisfied. Specifically, the fair value of the relevant assets must be determined by an expert for a date not more than 6 months before the allotment and the assets must be valued in accordance with generally accepted valuation standards and principles. The giving of the consideration must have been approved by ordinary resolution of the PLC or by a resolution of the board of the company and this approval must have been granted not more than 30 days before the date on which the agreement to allot the shares in question has been entered into.

As with *section 1031* above, if an exceptional circumstance arises that would significantly change the fair value of the asset, then the dispensation from the requirement to produce a valuation report cannot be availed of.

Under *subsection (6)* of this section, one or more members holding, or together holding, not less than 5 per cent of the issued shares of the PLC may request a valuation under *section 1028* to be carried out. In such a case, the dispensation from the requirement to produce a valuation report cannot be availed of.

Where the PLC proposes to allot shares under this section without the need for the report of an independent expert, the PLC must deliver notice of the proposed allotment to the Registrar. Once the shares are allotted, a notice of allotment must be sent to the Registrar in accordance with *section*

1021(9) of the Act which must contain a description of the consideration and its value, and a statement as to whether the value arrived at corresponds at least to the number and nominal value of, and to the premium on, the shares issued for that consideration. The notice must also state that no exceptional circumstances as mentioned in *subsection (4)(e)* have arisen.

*Section 1033* addresses the situation where the consideration for the allotment consists of both securities based consideration and non-securities based consideration, that is to say, the allotment falls within the terms of both *sections 1031* and *1032* above. In such an instance, the provisions of *sections 1031* and *1032* will apply, respectively, to the securities based consideration and the non-securities based consideration, but with the modification that the notice of the proposed allotment that must be sent to the Registrar may be combined in the one document.

*Section 1034* represents a re-statement of section 32 of the Companies (Amendment) Act 1983 and requires that, where a PLC proposes to acquire any non-cash assets from a subscriber to its memorandum for a consideration equal to 10 per cent or more of its subscribed capital, the acquisition must be the subject of an expert's valuation and report which must be published and submitted for approval by the members in general meeting. These requirements apply where it is proposed to make such an acquisition within at least two years from the time the company is incorporated or is authorised to commence business.

Provision is made to allow the members to decide unanimously to waive the requirement for 21 days' notice of the resolution and report. Where the unanimous written resolution procedure for passing resolution is used, such circulation should occur 21 days before the date of the signing of the resolution by the last member to sign. It is appropriate to allow the members to decide unanimously to waive the requirement for 21 days' notice of the resolution and report. Otherwise, there is little benefit in the written resolution procedure being available from a timing perspective.

There are two exceptions to this requirement. Firstly, where it is part of the ordinary course of a company's business to acquire, or arrange for other persons to acquire assets of a particular description, then an agreement for the transfer of such an asset to the company will not be prohibited. The aim of this exception is to prevent *bona fide* business transactions from being subject to the rigours of this section. Secondly, where the agreement for the transfer of the asset is entered into by a PLC under the supervision of the court, it will not be prohibited by *subsection (1)* of this section.

If a PLC enters into an agreement of the type described in *subsection (1)* without first providing the contracting party with a copy of the independent person's report, or if the agreement is otherwise entered into in circumstances where there has been a breach of this section or *section 1028(5), (6)* or *(10)* of which the other contracting party knew or ought to have known, the agreement will be void in so far as not already carried out. In addition, the PLC will be entitled to recover any consideration which has actually been paid by it, notwithstanding the fact that the non-cash asset may already have been transferred by the other party. However, if and to the extent that the consideration payable by the PLC would have involved the allotment of shares, the civil consequences will be those laid down by *sections 1025(3)* and *1029(2)* of the Act.

Contravention of the provisions of this section will result in a category 3 offence.

*Section 1035* contains provisions supplemental to *section 1034* above and derives from section 33 of the Companies (Amendment) Act 1983. The section strengthens the independent expert's position in obtaining whatever information he or she requires to make the valuation and prepare the report. It makes it an offence for any person knowingly or recklessly to make a statement to the expert which is misleading, false or deceptive in a material particular. It provides for the filing with the Registrar of the resolution required under *section 1034* and of the expert's report. Failure to

file these documents is a category 4 offence for which the PLC and any officer of it in default will be liable. This section clarifies the position where only part of the consideration transferred by a company under a *section 1034* agreement refers to the transfer of a non-cash asset.

*Section 1036* re-enacts section 34 of the Companies (Amendment) Act 1983 and provides that a person who comes within the rules of liability set out in sections *1025*, *1027*, *1028*, *1029* or *1034* is allowed to apply to the court for relief from that liability. The applicant's liability must be in respect of any payment or undertaking in relation to payment for shares in the PLC. This section empowers the court to exempt the applicant from his or her liability, if and to the extent that it appears to the court just and equitable to do so. While the court is given a general discretion to grant relief, it must have regard to certain factors when making its decision, and these factors are laid out in *subsection (2)*.

Where an applicant's liability arises as a result of an undertaking given in respect of the payment for shares, the court is empowered under *subsection (3)* to exempt the applicant in whole or in part from any such liability. As with the preceding subsection, the court must have regard to certain factors in making its decision and these factors are set out in *subsection (3)*.

In order to protect the interests of the PLC, the court, when considering an application under *subsection (1)*, must have regard to two overriding principles. The fundamental principle to guide the court is that a company should receive in money or money's worth an amount equal to the amount which is regarded as paid up on the shares in question. The second principle to which the court must have regard is to consider whether, if the court did not grant that exemption, the PLC would have more than one remedy against the applicant, and that in such a case, the PLC should be free itself to choose the remedy it wishes to pursue. This principle will be of particular importance where an application for relief is made by a person who is liable to the company as a result of a contravention of the provisions of the Act and also by reason of an undertaking given by him or her to the company.

*Subsection (5)* applies where one person brings contribution proceedings against another person in respect of a liability arising under *sections 1025* to *1029* and *1034*. Where a person is jointly and severally liable with a third party, the defendant may claim contribution from the third party by way of a third party notice. A third party notice arises where a defendant claims to be entitled to a contribution or an indemnity against any person, or where some question or issue between the plaintiff and the defendant should properly be determined between the plaintiff, the defendant and the third party. The court, when making an order under *subsection (5)*, must have regard to the respective culpability of the contributor and the person bringing the proceedings. The court may grant relief only to the extent that it is just and equitable to do so. Where an order is made by the court under this subsection, the contributor may be exempted wholly or partly from his or her liability to make a contribution. Alternatively, the contributor may be ordered to make a larger contribution than he or she might otherwise have been obliged to make.

*Subsection (6)* allows the court to exempt a person from liability under *section 1034(7)(a)*. The court may grant an exemption to the extent that it is just and equitable to do so. In making its decision, the court must have regard to any benefit which the company obtains as a result of the agreement in question.

*Section 1037* contains special provisions as to the issue of shares to subscribers and is taken from section 35 and section 36(1) of the Companies (Amendment) Act 1983. Where a subscriber to the constitution of a PLC undertakes (in the constitution) to take up shares, those shares must be paid for in cash, including any premium thereon. If payment otherwise than in cash were permitted, an expert's valuation report and the cumbersome procedure attendant thereon would be needed. The section applies only to shares taken in pursuance of an undertaking in the constitution of the PLC and not to



any subsequent taking of shares by a subscriber. A breach of this section will result in a category 3 offence.

*Section 1038* applies where a person in or in connection with payment for shares in a PLC gives an undertaking to do work or perform services or do any other thing. It clarifies the position regarding contractual liability where there has been a contravention of *sections 1025, 1027, 1028 or 1029* in relation to such an undertaking. The statutory liability of the allottee under those sections will be in addition to his or her liability under the contract to do work or perform services. To whatever extent the contract is enforceable by the company outside the Act, it will remain enforceable notwithstanding the contravention of those sections. This means that the allottee, in addition to his or her liability to repay the amount regarded as paid up, will also be liable to carry out his or her side of the contract to do work or perform services. This provision acts as a deterrent to those contemplating entering into a prohibited allotment agreement. It is an amended version of section 36 of the Companies (Amendment) Act 1983, with the criminal offence provision contained in subsection (1) of that section being moved to *section 1037* above.

*Section 1039* provides for an adaptation of *sections 102(1) and (2)* of the Act in relation to a PLC.

*Section 1040* makes provision for the treatment of shares held by or on behalf of a PLC and re-states section 43(1) to (8) of the Companies (Amendment) Act 1983. The requirements of this section apply in the following circumstances in relation to PLCs:-

- (a) Where shares are forfeited or are surrendered by the PLC in lieu of forfeiture for failure to pay any sum in respect of the shares;
- (b) Where shares in the PLC are acquired by the PLC and the company has a beneficial interest in those shares;
- (c) Where the nominee of the PLC acquires shares in the PLC from a third party without financial assistance by the PLC and the PLC has a beneficial interest in the shares;
- (d) Where a person acquires shares in the PLC with financial assistance by the PLC and the PLC has a beneficial interest in those shares.

Under this section, unless the PLC disposes of the shares referred to in *subsection (1)* or its interest in them, it must, not later than the end of the 'relevant period' (as defined in *section 1041* below) from the date of forfeiture, surrender or acquisition (as appropriate), cancel those shares and reduce the amount of the share capital by the nominal value of the shares. Where the cancellation of the shares reduces the company's allotted share capital below the authorised minimum, the company is required to apply for re-registration as another form of company. In carrying out the PLC's obligations as regards cancelling the shares and reducing the capital or re-registering as another form of company under this section, the directors of the PLC are not required to comply with *sections 84 and 85* of the Act. This means that, in effect, for the purposes of cancelling and disposing of the shares to which this section applies, the directors need not carry out the various steps set out in those sections. Indeed, for the purposes of ensuring that the cancellation and disposal of shares envisaged by this section is carried out smoothly, the directors may pass a resolution altering the company's constitution so that it no longer states that the company is a PLC (see *subsection (5)*).

Under *subsection (4)*, any exercise or purported exercise of voting rights in relation to the shares mentioned in *subsection (1)* above will be void.

A PLC which is required to apply for re-registration as another form of company under this section but fails to do so before the end of the relevant period cannot offer its shares to the public, but it will still be treated as a public limited company for the purposes of the Companies Acts generally until it re-registers.

Failure to apply for re-registration or to cancel shares under *subsection (3)* is a category 3 offence for which the company and any officer of it in default will be guilty.

*Section 1041* contains provisions supplemental to *section 1040* above and re-states section 43(9) to (14) of the Companies (Amendment) Act 1983. Subsection (15) of that old section 43 has been deleted, as old public limited companies no longer exist.

The provisions of this section deal with the formalities and procedures concerning the re-registration of a PLC for the purposes of compliance with *section 1040* above. If the Registrar is satisfied that the PLC should be re-registered, he or she will retain the application delivered to him or her under *section 1040(7)* above and issue an appropriate certificate of incorporation to the company. Upon the issue of the new certificate, the alterations in the constitution of the company set out in the relevant resolution will take effect. The new certificate will be conclusive evidence that the re-registration requirements have been complied with and that the company is the form of company stated therein.

*Subsection (5)* extends the provisions of this section and *section 1040* above to companies which re-register as PLCs. The effect of this is to make compliance with the terms of this section and *section 1040* a pre-requisite for a company becoming a PLC. Thus, if a company re-registers as a PLC and has previously acquired shares in the circumstances covered by *section 1040(1)*, it must cancel or otherwise dispose of them within three years or one year, as the case may be, of re-registration, and suitably reduce the capital of the company. In addition, if the reduction of capital results in a reduction below the authorised minimum capital, the provisions dealing with the directors' resolution, re-registration, etc., will apply.

*Subsection (6)* is a re-enactment of section 42(5) of the Companies (Amendment) Act 1983 and provides that *section 104(1)* of the Act (where shares issued to or acquired by a nominee will be treated as held by the nominee on his or her own account) will not apply to shares acquired otherwise than by subscription by a nominee of a PLC in a case falling within *section 1040(1)(d)* (person acquiring shares in a PLC with financial assistance and the PLC has a beneficial interest in those shares).

The term "relevant period" is defined for the purposes of *section 1040* above as being three years in the case of *section 1040(1)(b)* or *(c)* and one year in the case of *section 1040(1)(d)*.

*Section 1042* provides that a mortgage, charge, lien or pledge of a PLC on its own shares is void. This derives from section 44 of the Companies (Amendment) Act 1983, with the terms 'pledge' and 'mortgage' being specifically referred to in the new *subsection (1)*. There are two exceptions to this principle - first, a charge on shares for any outstanding amount payable in respect of those shares remains valid. Second, in the case of a PLC whose ordinary business includes the lending of money or consists of the provision of credit, bailment or the hiring of goods under a hire-purchase agreement (or both), the acceptance of own shares as security for outstanding debt will be permissible so long as it arises from a transaction entered into by the company in the ordinary course of its business. In addition, there are transitional measures for charges in existence prior to the re-registration of a company as a PLC.

Subsection (2)(d) of section 44 C(A)A 1983 has not been carried over as it contains a transitional provision in relation to old PLCs that is now irrelevant.

*Section 1043* is concerned with the application of certain provisions of *section 82(6)* of the Act (financial assistance) to PLCs, and an adaptation of the words of *section 82(6)* is required to cover PLCs. In addition, section 60(13) of the Companies Act 1963, as inserted by the Investments Funds,

Companies and Miscellaneous Provisions Act 2005 has been imported here with the result that a PLC may give financial assistance (in accordance with *section 82(6)(e), (f) or (g)* of the Act) to any person, only if the PLC's net assets are not reduced by the giving of the assistance or, to the extent that those assets are reduced, if the financial assistance is provided out of profits which are available for distribution. *Subsection (3)* gives a definition of "net assets".

*Section 1044* deals with the variation of rights attached to special classes of shares and applies *section 982* of the Act (on DACs) to PLCs. This derives from *section 38* of the Companies (Amendment) Act 1983.

*Section 1045* is newly inserted and it removes the discretion of directors to decline recognition of transfer instruments, on certain conditions, where those shares are governed by regulations under *section 1086* of the Act.

## **Chapter 4**

### Interests in shares: disclosure of individual and group acquisitions

*Section 1046* is an introductory provision which states that the purpose of this Chapter is to require the disclosure to a PLC of a variety of facts and associated particulars in certain circumstances. This *Chapter 4* largely replicates the provisions of Chapter 2 of Part IV of the Companies Act 1990 in relation to disclosure of individual and group acquisitions.

*Section 1047* provides interpretation for a number of terms found in this Chapter. The definition of "relevant share capital" is taken from *section 67(2)* of the Companies Act 1990 and is taken to mean the PLC's issued share capital of a class carrying rights to vote in all circumstances at general meetings of the PLC.

*Section 1048* derives from *section 67(1)* of the Companies Act 1990 and sets out the first class of case where the duty to disclose arises. It refers to circumstances where a person to his or her knowledge acquires an interest in shares comprised in a PLC's relevant share capital, or ceases to be interested in shares so comprised, or becomes aware that he or she has acquired an interest in, or ceased to be interested in, such shares. In these circumstances, where the interest represents a notifiable interest as defined in *section 1049(2)* and where the case falls within *section 1049(4) or (5)*, the person must notify the PLC of the interests which he or she has, or had, in the shares of the PLC.

*Section 1049* essentially sets out when the obligation to notify arises and is drawn from *section 68* of the Companies Act 1990. The obligation arises at any time when a person holds equal to or more than the notifiable percentage for the time being in force and at any subsequent time when the extent of that person's shareholding varies. The notifiable percentage is stated in *section 1052* of the Act to be three per cent, or such other percentage as may be prescribed by the Minister. *Section 1059* has effect for the purpose of determining whether a particular interest in shares is an interest in shares that is to be reckoned in determining whether a person has a notifiable interest under this section.

*Section 1050* lays down a second class of case in which the duty of disclosure arises and, in doing so, places *section 67(3)* of the Companies Act 1990 in a stand-alone section in this Act. It deals with cases other than those in *section 1048* above and where a person is aware of any change of circumstances, or otherwise becomes aware of any facts affecting the existence of a notifiable interest. In such cases, that person will be under a duty to notify the PLC of those circumstances or facts, but

only where that person has a notifiable interest immediately after the time of the change in circumstances or facts and did not have the interest immediately before that time.

*Section 1051* gives a meaning to the term “percentage level” and is taken from section 69 of the Companies Act 1990. The method by which the percentage level a person holds is to be calculated is set out. The calculation is a simple one - essentially, a person's interest is to be calculated as a percentage of the relevant share capital of the company. This section also contains rules concerning the rounding up or down of the person's holding to the nearest whole percentage point, and concerning how calculations are to be made if the company's share capital is altered.

*Section 1052* provides that the percentage holding in respect of which an obligation to notify arises is set at at least three per cent of the share capital of the company carrying unrestricted voting rights. This is known as the “notifiable percentage”. Thus, three per cent will be the basic "disclosure threshold", and an obligation of disclosure will arise whenever a shareholder crosses this threshold, and if that person alters his or her stake thereafter. This section also allows the Minister to change the figure of three per cent by regulation. In the special case where an obligation to notify arises because of a reduction in the notifiable percentage as a result of regulations made by the Minister, the obligation must be fulfilled within 10 days of its arising. This section is drawn from section 70 of the Companies Act 1990, with the percentage level being dropped from five per cent to three per cent.

*Section 1053* lays out the particulars that must be contained in the notification and derives from section 71 of the Companies Act 1990. Firstly, the obligation to notify a company of an interest in shares must be in writing and performed within five days of the date on which the obligation arises. The notification must specify the number of shares and the identity of each registered shareholder to which the notification relates. The identity of the registered shareholder is only required to be given where that information is known to the person making the notification. The obligation to notify in relation to the registered holder of shares continues after the general obligation to give details of a person's interest in shares has been fulfilled. In other words, where a person has an interest in shares but is not at that time aware of who the registered owner of the shares is, he or she will be obliged to supply that information whenever he or she becomes aware of it.

*Section 1054* covers interests in shares which are to be attributed to a person for the purposes of the disclosure requirements in *sections 1047 to 1053*, and aims to include, under these disclosure requirements, interests which arise indirectly. The provisions are taken from section 72 of the Companies Act 1990 and mean that a person will not be able to conceal his or her interests by way, for example, of a nominee holding through that person's spouse, or through another company which he or she controls. First of all, interests held by a person's spouse or civil partner or child will be taken to be that person's own interests for the purpose of notification. *Subsection (2)* aims at ensuring that interests held through a company (in other words a nominee holding) are also caught under the disclosure provisions. Therefore, a person will be taken to be interested in any shares in which a body corporate is interested where that body corporate or its directors are accustomed to act in accordance with that person's directions or instructions, or where that person is entitled to exercise, or to control the exercise of, one-third or more of the voting rights attaching to that body corporates' shares at general meetings.

*Subsection (3)* explains that the interest held through a single nominee company will catch interests held through a chain of companies, since, provided the one-third shareholding link subsists between any two companies in the chain, interests will be attributed backwards along the chain to the person with the "real" interest. *Subsection (4)* brings persons with options on shares and with any future entitlement to vote on shares within the scope of what is to be regarded as a corporate interest.

*Subsection (5)* is new and has been added as a consequence of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. It provides that reference in this section to a child of a person will include reference to a child of the person's civil partner who is ordinarily resident with that person and their civil partner.

*Section 1055* gives a meaning to the term "share acquisition agreement" for the purposes of this Chapter and is taken from section 73 of the Companies Act 1990. Such an agreement must be between two or more persons and must provide for the acquisition of interests in shares comprised in the relevant share capital of a PLC. Two further conditions must be met before the agreement will be classed as a "share acquisition agreement". Firstly, the agreement must contain some understanding as to the way in which the interest acquired under it is to be dealt with or used. The intention might be to hold the interest and so block some other shareholders or bidder, or to use it in (for example) the exercise of voting rights or other influence. Secondly, before the agreement becomes an effective share acquisition agreement with the consequence of each party's interests having to be attributed to the others, there must actually be an acquisition under it.

*Subsection (4)* explains that the reference in *subsection (2)(a)* to the use of interests in shares is a reference to the exercise of any rights or of any control or influence arising from those interests. *Subsection (5)* provides that the general provisions of this section, once activated, will continue to apply for as long as the essential elements set out in *subsections (1)* and *(2)* continue to operate, regardless of any further acquisition, or changes in the parties, or even attempts to vary or discharge it.

*Subsections (7)* and *(8)* make it clear that the kind of agreement which is addressed here does not need to be legally binding. It includes any "meeting of minds", any mutual understandings, expectations or undertakings, whether expressed or implied and whether absolute or not.

*Section 1056* outlines the duties of disclosure arising in consequence of *section 1055* above and is taken from section 74 of the Companies Act 1990.

*Subsection (1)* provides that all the parties to a share acquisition agreement are to be regarded as having the interests of the others in the share capital of the PLC concerned - as well, of course, as their own. *Subsection (2)* attempts to clarify the term used in *subsection (1)*, "interest apart from the agreement". It is provided that this term means an interest which another party has otherwise than by virtue of the share acquisition agreement. *Subsection (3)* goes on to explain this further by saying that an interest of a party's spouse, civil partner or child will be attributable to all the parties to the agreement. Similarly, an interest which is attributed to a person under another share acquisition agreement will, in turn, be attributed to the other parties of the particular agreement in question.

Under *subsection (4)*, the notification must state that the person making the notification is a party to an agreement and must give the names and, so far as known to him or her, the addresses of the other parties to the agreement, and must also distinguish the number of shares which are the subject of the agreement.

*Subsection (5)* deals with cessation of interests under share acquisition agreements and provides for additional information to be given where the notification obligation arises by virtue of someone ceasing to be a party to an agreement. The notification must state that either that person or another person has ceased to be a party to the agreement, and (in the latter case), the name, and, if known to him or her, the address of that other person.

*Section 1057* reproduces section 75 of the Companies Act 1990 and imposes an obligation on parties to share acquisition agreements to keep one another informed of all relevant facts. Because the

reporting obligation depends upon each of the parties knowing of the interests of the others, this is an essential supplementary provision. A person's obligation to report will depend upon his or her knowledge of the relevant facts. Because the incidence of the reporting obligation will depend upon the agreement being "activated" - i.e., an acquisition having taken place under it - and on the aggregation of all the interests of the parties to it, it is essential that once the agreement is activated the parties should inform one another of their existing interests, acquisitions and disposals. Once a person has information which he or she ought to communicate under the section, he or she must do so within 5 days.

*Section 1058* derives from section 76 of the Companies Act 1990. It deals with cases where a person acquires an interest in shares or ceases to have an interest in shares by virtue of another person's interest under *section 1054* (family and corporate interests) or *section 1056* (share acquisition agreement).

*Section 1059* is taken, in part, from section 78 of the Companies Act 1990 and provides that *sections 257 to 260* of the Act (in relation to disclosable interests in the context of a private company limited by shares) will apply, with the modifications mentioned in this section, for the purposes of determining whether a particular interest in shares is notifiable under this Chapter. The term "reckonable interest" will apply in relation to PLCs instead of "disclosable interest", and any references to debentures in *sections 257 to 260* of the Act will be disregarded for the purposes of this Chapter. *Subsection (3)* lays down a number of adaptations that are to apply to *section 260* of the Act.

*Section 1060* derives from section 79 of the Companies Act 1990. The primary purpose of this section is to create a number of sanctions, both civil and criminal, where the disclosure requirements of this Chapter have not been complied with. The "civil" elements are contained in *subsections (3) to (5)*, and essentially provide that a person who fails to notify a company as required will be prevented from taking any legal proceedings to enforce any rights which he or she may have in respect of the shares. In other words, that person could not vote his or her shares, they could not force the company to pay him or her a dividend, and that person could be prevented from attending the AGM of the company. *Subsections (6) and (7)* lay down criminal offences for failure to comply with the notification requirements, although a special defence to a prosecution is available in the circumstances specified in *subsection (8)* where a person proves that it was not possible for him or her to give the notice required under *section 1057*.

*Section 1061* is taken from section 80 of the Companies Act 1990. It requires a PLC to create and maintain a register for the purposes of this Chapter, in which it must enter all the information it receives from persons with interests in its shares, whether the interest is held directly or indirectly, by an individual or a group, and so on. The section sets out a series of rules as to how this register must be kept. For example, a company must enter information notified to it within three days of receipt; the register must be kept in chronological order; and unless the register itself is in the form of an index, the company must keep an index of the names entered in the register. Finally, if a company ceases to be a PLC it must keep the register of individual and group acquisitions and any associated index for six years following its change of status. If a PLC fails to comply with the provisions of this section, a category three offence will result for the PLC and any officer of it in default.

*Section 1062* derives from section 81 of the Companies Act 1990 and gives a PLC the power to investigate the ownership of its shares by requiring information from any person whom the company knows or has reasonable cause to believe to be, or to have been within the previous three years, interested in the shares of the company. *Subsections (2) and (3)* specify the information that the company may require of a person who is or has been interested in shares. Any notices issued under

this section must specify a time within which the information should be provided, and the response must be given in writing. *Subsection (5)* applies certain rules for determining, for the purposes of investigations under this section, whether a person is "interested" in shares. The effect of the subsection is that a person may be regarded as "interested" in shares for the purposes of the section if he or she would be regarded as having an "interest" by virtue of *sections 257 to 259*. Finally, under *subsection (6)*, a company is enabled to make enquiries of persons who have or had a right to subscribe for shares which would be part of the relevant share capital.

*Section 1063* is drawn from section 82 of the Companies Act 1990 and obliges a company to register information which it has received in response to enquiries it has made under the previous *section 1062*. The information involved must be entered in the register of interests in shares which will be maintained by virtue of *section 1061*; - however, the information must be entered in a separate part of that register. The detailed rules set out in *section 1061* relating to the maintenance of the register of interests in shares will apply also to the information received and registered by virtue of this section.

*Section 1064* re-enacts section 83 of the Companies Act 1990. It contains the basic provision which enables shareholders representing at least 10 per cent of a PLC's paid up voting share capital to require the company to exercise its powers of investigation under *section 1062*. *Subsections (2) and (3)* provide for the content and form of the requisition and *subsection (4)* states that a PLC must exercise its powers under *section 1062* if it is presented with a requisition complying with the provisions of this section. If a PLC fails to do so, the persons presenting the requisition may apply to the court for an order compelling the PLC to act.

*Section 1065* is taken from section 84 of the Companies Act 1990. When a company has completed an investigation required by the shareholders, it must prepare a report of the information that it has received as a result of that investigation. It must make such a report available at the company's registered office within three days of the making of the report. In any case where an investigation requisitioned by a company's shareholders is not completed within three months of the requisition being deposited at the company's registered office, the company must prepare an interim report of the information that it has received as a result of its investigation during that period. *Subsection (4)* defines when an investigation is to be regarded as concluded and *subsection (5)* provides for a category 3 offence for default of the provisions of this section.

*Section 1066* derives from section 85 of the Companies Act 1990 and sets out a civil remedy and a criminal penalty where a person fails to give information to a company about his or her interests in its shares when required by the company to do so under *section 1062*. On the civil side, where the person concerned fails to give the information required, the company may apply to the court for an order applying the restrictions set out in *section 768* of the Act to the shares concerned. Shares subject to such restrictions cannot be sold, voted, or be the subject of dividends. However, under *subsection (5)*, any aggrieved party may apply to the court for relief from any such restrictions imposed by the court. On the criminal side, any person who fails to give information to a company about his or her interests in its shares when required by the company to do so will be guilty of a category 3 offence. Such a person can avoid conviction if he or she can show that the company's demand for information was frivolous or vexatious.

*Section 1067* derives from section 86 of the Companies Act 1990 and deals with removal of entries from the register kept under *section 1061*. A company may remove an entry which is more than six years old if that entry either records that a person has ceased to be interested in shares, or has been completely superseded by a later entry. *Subsection (2)* obliges a company which has been

notified that a person other than the person giving the notice is a party to a share acquisition agreement to inform the person in question that he or she has been named as a party. Under *subsection (3)*, that person may then apply to the company to have his or her name removed from the register as being a party to a share acquisition agreement and the company is obliged to remove it if it is satisfied that this information is incorrect. If that person has simply ceased to be a party to the share acquisition agreement, he or she may apply to the company to have that fact recorded under *subsection (4)*. If a company refuses to remove a person's name from the register under *subsections (3) or (4)*, that person may apply to the court for an order directing the PLC to do so. A category 3 offence is laid down for failure to comply with the provisions of this section.

*Section 1068* re-enacts section 87 of the Companies Act 1990. It provides that entries in the register kept by a PLC under *section 1061* must not be deleted except in accordance with *section 1067*. If the company does wrongly remove an entry in the register, it must quickly restore it. Contravention of either of these two provisions will be a category 3 offence.

*Section 1069* makes provision for the application of *Chapter 10 of Part 4* of the Act (containing the provisions on inspection of registers etc.) to registers of interests (*section 1061*) and investigation reports (*section 1065*). This is in line with the philosophy set forth in the Company Law Review Group 2007 Annual Report that there should be harmonised provisions as regards registers, amounts that can be charged for inspecting them or taking copies, etc. The section contains some adaptations to the relevant sections of *Chapter 10 of Part 4* in the context of a PLC here.

*Section 1070* derives from section 65 of the Companies Act 1990. It places a duty on a PLC to notify the market operator of any matter notified to it by a director or secretary as a result of a duty imposed by *Chapter 5 of Part 5* and where that matter relates to shares or debentures for which dealing facilities are provided. The PLC must make the notification by the end of the day after that on which the duty to notify arises and the market operator is permitted (but not required) to publish the information so provided to it. Failure to provide the information will result in a category 3 offence for the PLC or any officer of it who is in default.

## **Chapter 5**

### **Acquisition of own shares and certain acquisitions by subsidiaries**

*Section 1071* contains general provisions relating to the acquisition by a PLC of its own shares, which are additional to the requirements set out in *sections 105 and 106* of the Act. It is stated that a PLC will be in compliance with the restriction on the distribution of assets specified in *section 1082* if the consideration for the purchase of its own shares comes solely from profits available for distribution. It is also stated that a PLC is not permitted to purchase any of its own shares if the result of such a purchase would be that the nominal value of its issued share capital which is not redeemable would be less than one-tenth of the nominal value of the total issued share capital of the PLC. This derives from section 211 of the Companies Act 1990.

*Section 1072* gives definitions for the terms “market purchase”, “overseas market purchase” and “off-market purchase” for the purposes of the following *sections 1073 to 1081*. These definitions are taken from section 212 of the Companies Act 1990.

*Section 1073* states that *section 105(4), paragraph (a) or (b)* will not confer an authority on a PLC to purchase its own shares and accordingly such a purchase must have the authority of an



ordinary resolution (in cases falling within *section 1074* of the Act) or a special resolution (in cases falling within *section 1075*).

*Section 1074* derives from section 215 of the Companies Act 1990 and provides that an ordinary resolution will suffice in order to authorise a market purchase of the PLC's own shares. Even though it is an ordinary resolution, it must be filed with the Registrar under *subsection (3)*. The authority granted must specify the maximum number of shares authorised to be acquired and must determine both the maximum and minimum prices which may be paid for the shares. It must also specify the date on which the authority is to expire – this date cannot be later than five years after the date on which the ordinary resolution granting the authority is passed. *Subsection (5)* outlines the circumstances under which a PLC may make a purchase of its own shares after the expiry of any time limit imposed by virtue of *subsection (4)(c)*.

*Section 1075* provides that a PLC may not make an off-market purchase of its own shares unless the contract for purchase has been authorised in advance by a special resolution of the company. This amends section 213 of the Companies Act 1990. *Subsections (5), (7), (8) and (10) to (12)* of *section 105* of the Act (acquisition of own shares) are said to apply to a special resolution under this section. The authority for the off-market purchase must specify the date on which the authority is to expire. This date must not be more than 18 months after the date on which the special resolution granting the authority is passed. A PLC may still purchase its own shares after the expiry of the time limit, but only in the circumstances laid down in *subsection (5)*. These provisions regarding the time limit are taken from section 216 of the Companies Act 1990.

*Section 1076* provides that once a purchase has been authorised, whether on-market or off-market, only the company itself may acquire the shares. It cannot assign the right to acquire the shares to any third party. However, a PLC may release its rights under a contract for purchase of own shares where the release has been authorised by the company by ordinary or special resolution, as appropriate. This derives from section 217 of the Companies Act 1990. *Subsections (5), (7) and (8)* of *section 105* of the Act (acquisition of own shares) apply to resolutions under this section.

*Section 1077* is a technical section that clarifies that any provisions in *Part 3* of the Act that refer to a contract authorised under *section 105* will also apply to an acquisition by a PLC of its own shares referred to in *sections 1071 to 1076*, unless a contrary intention is shown in any of those sections.

*Section 1078* provides for the off-market re-allotment of treasury shares by a PLC and deals with how a PLC should determine the maximum and minimum prices at which such shares may be re-allotted off-market. Where the shares to be re-allotted are derived from shares purchased by the PLC in accordance with *Part 3* of the Act, the price range must be determined by special resolution of the PLC passed at the meeting at which the resolution authorising the purchase of the shares has been passed. Alternatively, where the shares to be re-allotted are derived from shares redeemed by the PLC in accordance with *Part 3* of the Act, the price range must be determined by special resolution of the PLC passed before any contract for the re-allotment of those shares is entered into. In both these cases, the price range that has been determined will remain effective with respect to the relevant shares for a period of 18 months after the passing of the special resolution setting that price range.

*Section 1079* provides for the return to be made to the Registrar under *section 116(1)* of the Act in the case of an overseas market purchase of shares by a PLC. The return must be made within three days after the date of delivery to the company of those shares – this alters the deadline of 30

days under *section 116*. In addition to the requirements under *section 116*, the return must state the aggregate amount paid by the PLC for the shares and the maximum and minimum prices paid in respect of each class purchased. *Subsection (3)* provides for a situation where shares are delivered to the company on different dates and under different contracts. These provisions derive from section 226 of the Companies Act 1990, as amended by section 3(e) of the Companies (Miscellaneous Provisions) Act 2009.

*Section 1080* places a duty on a PLC to publish certain particulars on its website or in any other prescribed manner where it conducts an overseas market purchase of its own shares, or where the shares are purchased by a subsidiary of the PLC. The information that must be provided includes the date of the overseas market purchase, the number of shares purchased and their purchase price, and the market on which those shares were purchased. These particulars must remain published for a continuous period of not less than 28 days after the market purchase concerned. Failure to comply with these requirements results in a category 3 offence. This derives from section 226A of the Companies Act 1990, as inserted by the Companies (Miscellaneous Provisions) Act 2009.

*Section 1081* obliges a PLC to notify the relevant authorised market operator when it (or its subsidiary) purchases its own shares on a regulated market. The section clarifies that the obligation to notify the stock exchange only applies where shares have been purchased either by the company which issued the shares or by a company which is that company's subsidiary. The notification must be made before the end of the day after that on which the purchase has occurred, and the obligation to notify under this section does not arise when it is an overseas market purchase. Following the notification, the authorised market operator may publish the information received by it under this section. Failure by the PLC to fulfil its duty under this section will result in a category 3 offence. This section is taken from section 229 of the Companies Act 1990, as amended by section 3(h) of the Companies (Miscellaneous Provisions) Act 2009.

## **Chapter 6** Distribution by a PLC

*Section 1082* places a restriction on the distribution by a PLC of its assets and re-states section 46 of the Companies (Amendment) Act 1983. A PLC may only make a distribution where the amount of its net assets is not less than the aggregate of its called-up share capital and its undistributable reserves and the distribution will not have the effect of reducing the net assets below this aggregated figure. *Subsection (2)* defines "undistributable reserves" and lists, in relation to PLCs, the precise reserves which may not be distributed.

*Subsection (3)* applies *subsections (4) to (8)* of *section 117* of the Act for the purposes of this section. These subsections essentially deal with matters of definition and it is necessary to apply them in this section also.

*Subsection (4)* provides that uncalled share capital shall not be regarded as an asset in any financial statement relevant for the purposes of this section. The effect of this is to exclude uncalled share capital from the computation of net assets in *subsection (1)(a)* of this section.

*Section 1083* states that *section 121* of the Act (on the relevant financial statements) will apply for the purpose of determining whether a distribution may be made by a PLC without contravening *section 1082* above and for determining the amount of any distribution which may be so made.

*Subsections (5) and (6)* re-enact subsections (5) and (6) of section 49 of the Companies (Amendment) Act 1983. *Subsection (5)* specifies the requirements which must be met where interim financial statements are being used by a PLC as the relevant financial statements for the purposes of a proposed distribution. These requirements are that the financial statements have been properly prepared; that a copy of the financial statements has been delivered to the Registrar; and that a translation of the statements has been sent to the Registrar if the original financial statements are in a language other than English or Irish.

*Subsection (6)* sets out the requirements to apply to the initial financial statements being used as the basis for a distribution of a PLC. Initial financial statements, for this purpose, are any financial statements of a PLC drawn up for the purposes of assessing the validity of a distribution proposed during its first financial year or before any statutory financial statements are laid in respect of that financial year.

The definition of reserves in *subsection (7)* is taken from subsection (9) of section 49 of the Companies (Amendment) Act 1983.

*Subsection (8)* is new and clarifies the definition of a properly prepared financial statement.

*Section 1084* states that a PLC may not reduce its company capital below the authorised minimum and that *section 84* of the Act (reduction in company capital) which now expresses the ability to reduce share capital as a positive entitlement rather than as an exception to a prohibition on reduction of share capital of the company, shall be read accordingly. This derives from section 17(1) of the Companies (Amendment) Act 1983.

## **Chapter 7** Uncertificated securities

*Section 1085* deals with transfers of uncertificated securities and re-enacts Regulation 5 of the Companies Act 1990 (Uncertificated Securities) Regulations 1996 (S.I. No. 68 of 1996). It is stated that certain provisions of the law (as it was) requiring the execution, under hand or seal, of a document in writing for the transfer of property will not apply to the transfer of title to securities pursuant to section 12 of the Electronic Commerce Act 2000 or regulations made by the Minister under the following *section 1086*.

*Section 1086* also deals with uncertificated securities and gives a power to the Minister to make regulations to enable or require title to securities to be evidenced and transferred without a written instrument. This re-enacts section 239(1) to (5) of the Companies Act 1990, as amended by the Investment Funds, Companies and Miscellaneous Provisions Act 2006. The regulations under this section can be made in respect of securities of PLCs admitted to trading on a regulated market or on a market other than a regulated market, or securities of PLCs of a specified class. *Subsection (4)* sets out what the regulations may make provision for and *subsection (5)* states that the regulations must contain safeguards for the protection of investors and for ensuring that competition is not restricted, distorted or prevented.

*Section 1087* contains provisions supplemental to *section 1086* above and derives from section 239(5A) to (8) of the Companies Act 1990, as amended by the Investment Funds, Companies and Miscellaneous Provisions Act 2006. Regulations made under *section 1086* must not contain provisions that would result in a person who, but for the regulations, would be entitled to have his or her name entered in the register of members or to give instructions in respect of any securities, ceasing to be so entitled. It is provided that the regulations may contain such supplementary,

incidental and transitional provisions as appear to the Minister to be necessary or expedient. *Subsections (3) and (4)* lay down what the regulations may make provision for.

## **Chapter 8** Corporate governance

*Section 1088* provides that a PLC must have at least two directors. This is in contrast to the private company limited by shares, which under the Act is now entitled to have a single director.

*Section 1089* clarifies that a PLC with 2 or more members may not dispense with the holding of an AGM. It is only multi-member LTDs which can dispense with holding and AGM: all other types of company must hold an AGM where they have more than one member.

*Section 1090* deals with the rotation of directors. The default position (unless the constitution provides otherwise) is that all directors of the PLC must retire from office at the first AGM of the company. At every subsequent AGM, one-third of the directors must retire, or, if their number is not 3 or a multiple of 3, then the nearest one-third must retire. The constitution of the PLC may make alternative arrangements for the retirement of directors.

*Section 1091* modifies the operation of *section 149(8)* of the Act (requirement to notify Registrar of change in directors or secretary of the company) where public or local offers coincide with a change among the directors of the PLC. In such a circumstance, the PLC must send the notification to the Registrar no later than the time of issue of the prospectus or offer document. This derives from section 179 of the Companies Act 1963.

*Section 1092* lays down the default position regarding the remuneration of directors, so that the remuneration will be determined by the PLC in general meeting. This position may be altered by the constitution of the PLC.

*Section 1093* provides that *section 193* (unanimous written resolutions) shall apply to a PLC. This position may be altered by the constitution of the PLC.

*Section 1094* contains provisions consequent on the participation by a PLC in a system for the uncertificated transfer of securities. It deals with the application of *sections 1095* and *1096* where the PLC is a “participating issuer” within the meaning given to that term by the Companies Act 1990 (Uncertificated Securities) Regulations 1996 (S.I. No. 68 of 1996) or by regulations made under *section 1063*.

*Section 1095* contains provisions in relation to voting and attendance at meetings and re-enacts Regulation 14 of the Companies Act 1990 (Uncertificated Securities) Regulations 1996 (S.I. No. 68 of 1996). It states that a PLC that is a participating issuer may specify in the notice of the meeting a time (not more than 48 hours before the meeting) by which a person must be entered on the relevant register of securities in order to have the right to vote and attend at the meeting.

*Section 1096* deals with the giving of notice of meetings and re-enacts Regulation 15 of the Companies Act 1990 (Uncertificated Securities) Regulations 1996 (S.I. No. 68 of 1996). A PLC that is a participating issuer may determine that persons entitled to receive notice of meetings are those

persons entered on the register of securities at the close of business on a particular day determined by the PLC. This day cannot be more than seven days before the day on which notices of the meeting are sent.

*Section 1097* derives from the provisions of the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 (S.I. No. 220 of 2010) and applies *section 167* of the Act (which deals with the option of establishing an audit committee) to a PLC that is not a public interest entity - i.e. a PLC that does not have transferable securities admitted to trading on a regulated market. The effect of this is that all PLCs that are not public interest entities will be equated with a large private company as regards *section 167* and its operation, meaning that all PLCs that are not public interest entities will have to decide whether to establish an audit committee.

*Section 1098* adapts *section 181(1)* of the Act to provide that, in the case of a PLC, the required notice for an EGM is not less than 14 days.

*Section 1099* gives additional rights to shareholders in PLCs whose shares are admitted to trading on a regulated market in any Member State (a “traded PLC”). This implements provisions in the Shareholders’ Rights (Directive 2007/36/EC) Regulations 2009 (S.I. 316/2009).

*Section 1100* provides that a traded PLC must ensure equal treatment for all members who are in the same position with regard to the exercise of voting rights and participation in a general meeting of the company. This is taken from Regulation 5 of the Shareholders’ Rights (Directive 2007/36/EC) Regulations 2009 (S.I. 316/2009).

*Section 1101* modifies *section 178(3)* of the Act in its application to a traded PLC and makes provision for the requisitioning of general meetings by its members. In the case of a traded PLC, one or more members holding (or together holding) not less than five per cent of the paid up share capital of the company which carries the right of voting at general meetings of the company may requisition a general meeting. This derives from Regulation 4 of the Shareholders’ Rights (Directive 2007/36/EC) Regulations 2009 (S.I. 316/2009).

*Section 1102* deals with the application of *section 181* of the Act to traded PLCs (length of notice of general meetings). It is stated that not less than 21 days’ notice is required for a general meeting of a traded PLC. However, 14 days’ notice will be sufficient where the meeting is not an AGM or an EGM (for the passing of a special resolution) and where the members are offered the facility to vote by electronic means. In addition, a special resolution reducing the notice period to 14 days must have been passed at the immediately preceding AGM or at a general meeting held since then. This re-enacts Regulation 6 of the Shareholders’ Rights (Directive 2007/36/EC) Regulations 2009 (S.I. 316/2009).

*Section 1103* contains additional provisions concerning notice of a general meeting of a traded PLC and is taken from Regulation 7 of the Shareholders’ Rights (Directive 2007/36/EC) Regulations 2009 (S.I. 316/2009). Such a notice must be issued free of charge in a manner ensuring fast access to the notice using any media as may reasonably be relied upon. *Subsection (2)* sets out what the notice must include and *subsection (3)* states that a traded PLC must post the notice and other documents relating to the meeting on its website for a continuous period in the 21 days leading up to the meeting.

*Section 1104* lays down the right of members of a PLC to put an item on the agenda of an AGM and to table a draft resolution, provided that the member or members in question hold three per cent of the issued share capital of the PLC, representing at least three per cent of the total voting rights of all the members who have a right to vote at the meeting. The request from the member or members must be received by the PLC at least 42 days before the date of the meeting to which it relates. This is taken from Regulation 7 of the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009 (S.I. 316/2009).

*Section 1105* provides that a person must be entered on the register of securities in the 48 hours preceding the general meeting in order to exercise the right of a member to participate and vote at that meeting. A member has the right to sell or otherwise transfer shares in the traded PLC in the 48 hours prior to the meeting unless that right is otherwise subject to a restriction. A traded PLC may require proof from a person as to their qualification as a member, but such a requirement must be necessary to ensure the identification of the person as a member and must be proportionate to the achievement of that objective. This derives from Regulation 8 of the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009 (S.I. 316/2009).

*Section 1106* also comes from Regulation 8 of the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009 (S.I. 316/2009) and states that a traded PLC may provide for participation in a general meeting by electronic means. The use of the electronic means may be made subject only to such requirements as are necessary to ensure the identification of those taking part in the meeting and the security of the electronic communication. Such requirements and restrictions must be proportionate to the achievement of these objectives. When providing for electronic means for participating in a meeting, the traded PLC must ensure (as far as practicable) that the security of any electronic communication by the member is guaranteed and that the risk of data corruption and unauthorised access is minimised. In addition, where there is a failure or disruption in the electronic means, the traded PLC must ensure that the failure or disruption is remedied as soon as possible.

*Section 1107* gives members of a traded PLC the right to ask questions relating to items on the agenda of a general meeting and to have these questions answered by the PLC. However, the PLC is not obliged to answer the question where it would interfere with the preparation for the meeting or the confidentiality and business interests of the PLC. In addition, if the answer has already been given on the PLCs website, or if it appears to the chairperson of the meeting that it is undesirable in the interests of good order of the meeting that the question be answered, then it will not be necessary to answer that question. This section is drawn from Regulation 8 of the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009 (S.I. 316/2009).

*Section 1108* applies *section 183* of the Act in relation to the appointment of proxies to traded PLCs, with some modifications. These modifications relate to the use of electronic means to appoint a proxy, the requirements necessary to ensure identification of a member or proxy and the possibility of verifying the content of the voting instructions. In addition, it is provided that no limitation may be placed on the right of a member to appoint more than one proxy to attend and vote at a meeting in respect of shares held in different securities accounts. This section captures the amendments in Regulation 9 of the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009 (S.I. 316/2009).

*Section 1109* states that a traded PLC can permit (by appropriate arrangements) a vote to be cast in advance of a general meeting by correspondence where that vote is for the purpose of a poll that is to be taken at that meeting. Votes that are not received before the date and time specified by the traded PLC are not obliged to be counted. The date and time specified by the PLC may not be more

than 24 hours before the time at which the vote is to be held. This provision is taken from Regulation 10 of the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009 (S.I. 316/2009).

*Section 1110* deals with the situation whereby a member requests a full account of a vote before or on the declaration of the result of the vote at a general meeting of a traded PLC. If the request is made, the PLC must establish, with respect to each resolution proposed at the general meeting, the number of shares for which votes have been cast, the proportion of the company's share capital represented by those votes, the total number of votes validly cast and the number of votes cast in favour of and against each resolution. If no member requests a full account of the voting, the traded PLC need only establish the voting results to the extent necessary to ensure that the required majority is reached for each resolution. A voting result established in accordance with this section must be published by the traded PLC on its website not later than 15 days after the date of the vote. This section derives from Regulation 12 of the Shareholders' Rights (Directive 2007/36/EC) Regulations 2009 (S.I. 316/2009).

## **Chapter 9**

### Duties of directors and other officers

*Section 1111* places an obligation on directors to convene an extraordinary general meeting when the net assets of the PLC drop to half or less than half of the amount of the PLCs called-up share capital. This obligation is taken from section 40 of the Companies (Amendment) Act 1983. The EGM must be convened not later than 56 days after the "relevant day" as defined in *subsection (1)* and the purpose of the meeting will be to consider whether any measures should be taken to deal with the loss of capital. Failure to convene a meeting under this section will result in a category 3 offence.

*Section 1112* lays down the qualification requirements necessary to be a secretary of a PLC and is taken from section 236 of the Companies Act 1990. The directors of the company are obliged to ensure that the person appointed as secretary has the necessary skills to discharge the statutory and legal duties associated with that post. In addition, the directors must ensure that the person to be appointed complies with one of the following conditions:-

- (a) the person to be appointed has, for at least three of the preceding five years, already held the office of secretary of a company; or
- (b) the person to be appointed is a member of a body recognised for the purposes of this section by the Minister; or
- (c) the person, by virtue of having held any other position or being a member of any other body, is a person that appears to the directors to be able to discharge the required duties.

*Section 1113* is new. The purpose of this section is to make provision for the restriction and exemptions for Directors in public limited companies. It makes it clear that a director of a public limited company may not vote in relation to contracts or arrangements that the director has an interest in. This rule can be altered by the public limited company's constitution. In addition, statutory provision is also made for certain exceptions where a director may vote in matters of interest.

## **Chapter 10**

### Financial statements, annual return and audit

*Section 1114* disapplies the provisions of *Part 6* of the Act in the case of PLCs that are credit institutions or insurance undertakings.

*Section 1115* applies the provisions of *Part 23* of the Act with regard to the requirement for a corporate governance statement to a PLC that has shares or debentures admitted to trading on a regulated market in an EEA state.

*Section 1116* is a new section that provides for the Modification of definition of “IAS Regulation” in the case of PLCs. The section 274(1) definition states that "a reference to Article 4 of that Regulation is, in the case of a private company limited by shares, a reference to Article 5 of that Regulation". However, if a company (usually a plc) to which Article 4 applies prepares IFRS entity financial statements; it does so under Article 5(a). Where a company to which Article 4 does not apply prepares entity financial statements, group financial statements or both using IFRS, it does so under Article 5(b). A company to which Article 4 does not apply would include a private company but would include a plc that has securities admitted to trading on a market other than a regulated market (i.e. with nothing admitted to trading on a regulated market).

*Section 1117* places an obligation on the directors of a PLC to arrange for the statutory financial statements of the company to be audited.

*Section 1118* applies *section 370* of the Act with a slight modification to PLCs. This deals with the statutory auditor’s report on revised financial statements and the revised report.

*Section 1119* is new. It allows directors of a PLC to prepare and circulate a summary financial statement for the company in relation to a particular financial year. This section is modelled on section 79 of the Building Societies Act 1989. Its purpose is to permit PLCs, particularly those with large shareholder bases, to send a summary financial statement to shareholders in place of the full annual accounts on grounds of the large size of the latter document. Shareholders who wish to receive the full accounts may still do so by making a request under *subsection 7(c)*.

*Section 1120* applies *sections 310* to *313* of the Act to PLCs with a series of adaptations to allow for the fact that a PLC will be able to hold a credit institution.

## **Chapter 11**

### **Debentures**

*Section 1121* lays down provisions relating to the register of debenture holders and derives from section 91 of the Companies Act 1963.

A PLC is obliged to keep a register of debenture holders containing the names and addresses of the debenture holders and the amount of debentures currently held by each of them. This obligation only applies to series of debenture stock and not to individual loan instruments.

It is provided that *Chapter 10* of *Part 4* of the Act (inspection of registers, provisions of copies of information in them and service of notices) applies to PLCs with the relevant adaptations laid down in *subsection (4)* here.



*Subsections (7) to (9)* derive from section 92(3) to (5) of the Companies Act 1963 and provide for the right of debenture holders to copies of any trust deed for securing any issue of debentures.

## **Chapter 12**

### Examinerships

*Section 1122* adapts *section 510* of the Act to a PLC. This deals with petitions for examinership presented to the Court.

## **Chapter 13**

### Reorganisations

*Section 1123* makes provision for circumstances where an offeror has become bound to acquire the shares or securities of a dissenting shareholder or security holder under either *Chapter 2* of *Part 9* of the Act (dealing with acquisitions) or *Part 5* of the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006. In such circumstances, the offeree must enter the offeror in its register of securities as the holder of the uncertificated units of the securities concerned. This section is new and reformulates Regulation 36 of the Companies Act 1990 (Uncertificated Securities) Regulations 1996 (S.I. 68 of 1996) and section 204 of the Companies Act 1963.

## **Chapter 14**

### Strike-off and restoration

*Section 1124* expands on section 8 of the Companies (Amendment) Act 1983 and lays down the power of the Registrar to strike a PLC off the register. The power of the Registrar under this section is in addition to the power mentioned in *section 725* of the Act - the circumstances of strike off provided for in that section also apply in the case of a PLC.

Where a PLC has not been issued with a trading certificate within one year of its registration as a PLC, the Registrar may start the process to have the company struck off under this section.

*Section 1125* is a newly inserted provision which states that where a company has been dissolved under this Act or any of the prior Companies Acts, it may not be restored to the register as a PLC unless it was a PLC immediately before the dissolution.

## **Chapter 15**

### Investigations

*Section 1126* adapts *section 747(2)* of the Act to apply in the case of a PLC. This is in relation to the minimum number of members of the company that may apply for the appointment of an inspector.

## **Chapter 16**

### Mergers

*Section 1127* contains definitions for the purposes of this Chapter. It is stated that the term “company” includes “body corporate” which is broader than the definition of “company” in *section 2(1)* of the Act and includes here unregistered companies. This reflects the definition of company in

Regulation 2 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987).

*Section 1128* provides that this Chapter only applies if each of the merging companies, or at least one of them, is a PLC. This is a corollary to the provision found in *Chapter 3 of Part 9* of the Act confining mergers under that Chapter to circumstances where none of the merging companies is a PLC and where at least one of the merging companies is a private company limited by shares.

*Section 1129* sets out the types of mergers to which this Chapter applies – namely mergers by acquisition, mergers by absorption and mergers by formation of a new company. These definitions are brought in line with the definitions in *Chapter 3 of Part 9* of the Act and derive, in part, from Regulation 5 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987). The separate concept of merger by absorption is not set out in S.I. 137/1987, however, Regulation 13(8) of those Regulations recognised that a merger by absorption is encompassed by the merger concept. *Subsection (2)* of this *section 1129* has been inserted to clarify the meaning of a merger by absorption.

*Subsection (5)* provides that where a company is being wound up, it may become a party to a merger, provided that the distribution of its assets has not begun at the date of the common draft terms of merger. Alternatively, the company may choose to avail itself of the provisions on schemes of arrangement or acquisitions in *Part 9* or may arrange for the liquidator to accept shares as consideration for the sale of company property under *section 601* of the Act.

*Section 1130* is for clarification and states that a merger cannot be effected save in accordance with the provisions of this Chapter and also provides that any approval, authorisation or other consent that may be required by any other enactment or Community act must be given before the merger can take effect.

*Section 1131* deals with the common draft terms of merger and derives from Regulation 6 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987). It also caters for Article 19(2) of Directive 2011/35/EU on the mergers of public limited liability companies.

It provides that, where a merger is proposed, the directors of the merging companies must draw up common draft terms of merger in writing. *Subsection (2)* specifies the elements which the draft terms of merger must contain. Where the merger is one by absorption, there are certain elements which are exempted from these requirements. Where the merger is one by formation of a new company, the draft terms must include the proposed constitution of the new company.

Under *subsection (3)*, shares in the successor company cannot, under the draft terms of merger, be exchanged for shares that are held by the successor company itself (or its nominee) or by the company being acquired itself (or its nominee).

*Subsections (5)* and *(6)* make provision for the signing and dating of the common draft terms of merger.

*Section 1132* lays down the provisions regarding the directors' explanatory report, which is a separate written report that must be prepared in respect of each of the merging companies by the directors of each such company. The provisions derive from Regulation 7 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987), as

amended by Regulation 5 of the European Communities (Mergers and Division of Companies) (Amendment) Regulations 2011 (S.I. No. 306 of 2011).

The explanatory report must give details of the common draft terms of merger and must state the legal and economic grounds for and implications of the merger. In addition, the methods used to arrive at the proposed share exchange ratio must be given and any particular valuation difficulties which may have arisen must be mentioned. The report must be signed, on the same date, on behalf of each of the merging companies by two directors of each company.

By virtue of *subsection (4)*, the provisions of this section will not apply to a merger by acquisition carried out by a company which holds 90 per cent or more, but not all, of the shares conferring the right to vote of the company being acquired. This calculation excludes shares held as treasury shares. This disapplication only operates in the circumstances laid down in *section 1137(11)*.

*Subsection (5)* allows for the requirement to produce an explanatory report to be waived in two circumstances. Firstly, where all of the holders of shares conferring the right to vote at general meetings have agreed that a report is not necessary. The second circumstance relates to situations where, in order for a vote by holders of shares in any of the merging companies to take effect, holders of securities of the companies must first consent to that vote taking effect. In such a situation, the requirement to produce an explanatory report can be dispensed with only where all the holders of shares conferring the right to vote at general meetings together with all the holders of securities of the company so agree.

*Section 1133* provides that, except in the case of a merger by absorption, an expert must be appointed to examine the draft terms of merger and to make a report on those terms to the shareholders of the merging companies. The appointment of the expert must be approved by the court and the person holding the post of expert must be a statutory auditor and must not be precluded from being an expert by virtue of the provisions of *subsection (6)(b)*.

*Subsection (7)* lays down what must be included in the report and specifies the issues on which the expert is required to give an opinion. The expert has the power to demand information and explanations from the merging companies and their officers in order to assist him or her in the making of the report. Failure to assist the expert in this manner will result in a category 2 offence on the part of the company and any officer of it in default, as will the giving of false or misleading information to the expert.

*Subsection (11)* lays down what happens when a person appointed as an expert ceases to be a qualified person. In such circumstances, where an expert continues to act, they will be guilty of a category 2 offence.

By virtue of *subsection (13)*, the provisions of this section will not apply to a merger by acquisition carried out by a company which holds 90 per cent or more, but not all, of the shares conferring the right to vote of the company being acquired. This calculation excludes shares held as treasury shares. This disapplication only operates in the circumstances laid down in *section 1137(11)*.

*Subsection (14)* allows for the requirement to produce an expert's report to be waived in two circumstances. Firstly, where all of the holders of shares conferring the right to vote at general meetings have agreed that a report is not necessary. The second circumstance relates to situations where, in order for a vote by holders of shares in any of the merging companies to take effect, holders of securities of the companies must first consent to that vote taking effect. In such a situation, the requirement to produce an explanatory report can be dispensed with only where all the holders of shares conferring the right to vote at general meetings together with all the holders of securities of the company so agree.

The provisions of this section derive from Regulation 8 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987).

*Section 1134* contains the provisions in relation to the merger financial statement and derives from Regulation 9 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987), as amended by Regulation 5 of the European Communities (Mergers and Division of Companies) (Amendment) Regulations 2011 (S.I. No. 306 of 2011).

Where the latest statutory financial statements of any of the merging companies relate to a financial year ended more than six months prior to the date of the common draft terms of merger, then a merger financial statement must be prepared in accordance with this section. It must be drawn up not earlier than the first day of the third month preceding the date of the common draft terms of merger and it must be in the format of the last annual balance sheet of the company.

Interim depreciation and provisions, together with material changes in actual value not shown in the accounting records must be taken into account in preparing the merger financial statement. Finally, the provisions of *Part 6* with regard to the statutory auditor's report on the last statutory financial statements of the company will apply to the merger financial statement.

*Subsections (6) to (8)* make certain exemptions from the requirement to prepare a merger financial statement. There will be no requirement in relation to a merging company which makes public a half-yearly financial report covering the first six months of its financial year if that company makes the report available for inspection pursuant to *section 1136*.

*Subsection (8)* allows for the requirement to produce an explanatory report to be waived in two circumstances. Firstly, where all of the holders of shares conferring the right to vote at general meetings have agreed that a report is not necessary. The second circumstance relates to situations where, in order for a vote by holders of shares in any of the merging companies to take effect, holders of securities of the companies must first consent to that vote taking effect. In such a situation, the requirement to produce an explanatory report can be dispensed with only where all the holders of shares conferring the right to vote at general meetings together with all the holders of securities of the company so agree.

*Section 1135* contains provisions on the registration and publication of documents and derives from Regulation 11 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987), as amended by Regulation 5 of the European Communities (Mergers and Division of Companies) (Amendment) Regulations 2011 (S.I. No. 306 of 2011).

Each of the merging companies is obliged to deliver a copy of the common draft terms of merger to the Registrar and notice of this delivery must be published in the CRO Gazette. Both of these requirements must be carried out at least 30 days before the date of the general meeting which is held by each company to consider the draft terms of merger.

A merging company need not comply with the provisions of this section if it publishes, free of charge on its website for a continuous period of two months, a copy of the common draft terms of merger. It must also publish the common draft terms of merger in the CRO Gazette and in two daily local newspapers. If access to the company's website is disrupted for at least 24 hours or for separate periods totalling not less than 72 hours, the two month period referred to above will be extended.

*Section 1136* makes provision for the inspection of merger documents and is taken from Regulation 12 of the European Communities (Mergers and Division of Companies) Regulations 1987

(S.I. No. 137 of 1987), as amended by Regulation 5 of the European Communities (Mergers and Division of Companies) (Amendment) Regulations 2011 (S.I. No. 306 of 2011).

The documents which a merging company must make available for inspection (free of charge) at its registered office during business hours are; the common draft terms of merger, the statutory financial statements of the company for the preceding three years, the directors explanatory report (where prepared), the expert's report (where prepared) and the merger financial statement (where prepared). These documents must be open for inspection for a period of 30 days before the meeting of each merging company held to consider the common draft terms of merger.

Under *subsection (5)*, a company is exempted from the obligation to make available the documents for inspection at its registered office if it publishes those documents on its website (free of charge) for a period of at least two months, starting at least 30 days prior to the general meeting and ending at least 30 days after that date. If access to the company's website is disrupted for at least 24 hours or for separate periods totalling not less than 72 hours, the two month period referred to above will be extended.

However, this *subsection (5)* will not apply where a shareholder is not entitled to obtain, free of charge, copies of the merger documents by virtue of the fact that those documents have been available to download and print, free of charge, from the company's website for a period of 2 months commencing 30 days prior to the date of the general meeting held to consider the draft terms of merger.

By virtue of *subsection (9)*, the provisions of this section will not apply to a merger by acquisition carried out by a company which holds 90 per cent or more, but not all, of the shares conferring the right to vote of the company being acquired. This calculation excludes shares held as treasury shares. This disapplication only operates in the circumstances laid down in *section 1137(11)*.

*Section 1137* makes provision for the general meetings of the merging companies and derives from Regulation 13 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987), as amended by Regulation 5 of the European Communities (Mergers and Division of Companies) (Amendment) Regulations 2011 (S.I. No. 306 of 2011).

It is stated that a merger cannot go ahead unless the common draft terms of merger have been approved by a special resolution passed at a general meeting of each of the merging companies. If the merger is one involving the formation of a new company, a constitution or draft constitution of the new company must also be approved by special resolution of each of the companies being acquired.

The notice convening the general meetings of the merging companies must state that every shareholder is entitled to obtain on request and free of charge, copies of the merger documents. In addition, the directors of each of the merging companies must inform the general meeting of their own company and the directors of each of the other companies of any material change in the assets and liabilities of that company that may occur between the date of the common draft terms of merger and the holding of the general meeting.

Approval of the common draft terms of merger by means of a special resolution is not needed where the merger is one by acquisition; or by acquisition carried out by a company which holds 90 per cent or more (but not all) of the shares conferring the right to vote at general meetings of the companies being acquired; or by absorption. In addition, the provisions relating to the registration and publication of documents (*section 1135*) and the inspection of documents (*section 1136*) must be complied with at least 30 days before the date of the general meeting and the right to requisition a meeting conferred later in this section must not have been exercised during that 30 day period.

*Subsection (9)* deals with that right to requisition a meeting. One or more members of the successor company holding not less than five per cent of the paid-up capital of the company which carries the right to vote at general meetings (excluding treasury shares) can require a general meeting to be convened to consider the common draft terms of merger.

*Subsection (11)* disapplies *sections 1132* (director's explanatory report), *1133* (expert's report) and *1136* (inspection of documents) where a merger by acquisition is carried out by a company which holds 90 per cent or more (but not all) of the shares conferring the right to vote at general meetings of the companies being acquired and in certain circumstances. Those circumstances are where any shareholder in any of the merging companies indicates to the successor company that he or she will not vote in favour of the common draft terms of merger and requests the company to purchase his or her shares and the company does so purchase those shares at the market sale price within 15 days of the request

*Section 1138* allows for a company to use electronic means to make available to its shareholders the documents referred to in *section 1136* (i.e. the merger documents). These provisions were introduced by Regulation 5(g) of the European Communities (Mergers and Division of Companies) (Amendment) Regulations 2011 (S.I. No. 306 of 2011).

For the purposes of the preceding section on general meetings of merging companies, and where a shareholder has consented to the use by the company of electronic means for conveying information, copies of the merger documents may be sent to that shareholder by email and the notice convening the general meeting for considering the common draft terms of merger will contain a statement to that effect.

Where the documents are made available on the company's website (free to download) for a continuous period of at least two months, commencing at least 30 days prior to the date of the general meeting and ending at least 30 days after that date, then the shareholders will not be entitled to request copies of the documents from the company under *section 1137(4)*.

*Section 1139* provides that where the share capital of any of the merging companies is divided into shares of different classes, certain provisions (*subsection (2)*) and exclusions (*subsection (3)*) will apply with respect to the variation of the rights attached to any of those classes.

This derives from Regulation 14 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987).

*Section 1140* deals with the purchase of minority shares and comes from Regulation 15 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987). A person who is a shareholder in any of the merging companies who voted against the special resolution relating to the common draft terms of merger may, not later than 15 days after the latest general meeting of the company to consider the terms of merger, request the successor company to acquire his or her shares for cash. Alternatively, in the circumstances laid down in *section 1137(7)(b)* of the Act, any shareholder other than the successor company may request the purchase of his or her shares in the manner described above.

The price of the shares will be determined in accordance with the share exchange ratio set out in the common draft terms of merger and the shares will be treated as treasury shares under *section 106* of the Act. *Subsection (4)* makes it clear that the power of the court to make an order for the protection of the interests of a dissenting minority will not be prejudiced by any of the provisions of this section.

*Section 1141* provides that an application to the court for the confirmation of a merger must be made jointly by all the merging companies and must be accompanied by a statement of the size of the shareholding of any shareholder who has requested the purchase of his or her shares under the preceding *section 1140*. The statement must also refer to the measures which the successor company proposes to take to comply with that shareholder's request. This section is taken from Regulation 16 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987).

*Section 1142* gives creditors a right to object to the confirmation by the court of the merger where that creditor is entitled to any debt or claim against the company and can show that the proposed merger would be likely to put the satisfaction of that debt at risk. This is drawn from Regulation 17 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987).

Under *subsection (2)*, the court may determine a list of creditors entitled to object to the confirmation, detailing the nature and amount of their debts and claims, if it deems it necessary to do so in order to secure the adequate protection of creditors of any of the merging companies. Creditors not entered on the list may be permitted to claim that they should so be entered on the list. Alternatively, they may be excluded from the right of objecting to the confirmation. Where a creditor does not consent to the confirmation of the merger, the court may dispense with the consent of that creditor if the company, or the successor company (on behalf of the company liable) secures the payment of the creditors debt or claim.

The provisions in this *subsection (2)* may be disapplied as regards any class of creditor if the court thinks it proper to do so.

*Section 1143* operates to preserve the rights of holders of securities in any of the companies being acquired to which special rights are attached. Holders of such securities will be given rights in the successor company at least the same as the ones they possess in the company being acquired. However, this provision will not apply where an alteration of the rights in the successor company has been approved by the requisite majority or where the holders of the securities are entitled to have their securities purchased by the successor company. This section applies Regulation 18 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987).

*Section 1144* contains provisions relating to the order of the court confirming the merger and derives from Regulation 19 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987). Where the court is satisfied that the requirements of this Chapter have been complied with, that proper provision has been made for objecting shareholders and creditors, that the rights of holders of securities have been safeguarded and that any provisions on the variation of rights have been complied with, it may make the order confirming the merger with effect from such date as the court appoints.

*Subsection (3)* details the effects that will flow from the granting of the confirmation order.

It is provided that the registration requirements and other formalities required by law for the transfer of the assets and liabilities of the transferor company will be carried out by the successor company.

Provision is made to cater for the consequences of a merger of leasehold property (legally classified as 'chattels real') or immovable property.

When making the confirmation order, the court may make provision for such matters as it considers necessary to ensure that the merger will be properly carried out.

*Subsection (10)* allows the court to set a specific time for the taking effect of the merger if the original time would not be suitable for the parties.

*Section 1145* is partly new and allows the court to include in the confirmation order a provision permitting the giving of financial assistance or a reduction in company capital, which would otherwise be prohibited under *sections 82* and *84* of the Act respectively.

*Section 1146* is partly new and provides that, where a court makes an order confirming a merger, a certified copy of that order must be sent to the Registrar as soon as possible. On receiving a copy of the order, the Registrar must register that order and must register the dissolution of the transferor company. The Registrar must also publish a copy of the order in the CRO Gazette. This section derives from Regulation 21 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987).

*Section 1147* places a civil liability on directors and experts involved in a merger to make good any loss or damage suffered by a shareholder by reason of misconduct by those directors or experts in the preparation or implementation of the merger. The provisions of this section do not apply to mergers by absorption. This section is taken from Regulation 22 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987).

In the case of a merger document containing an untrue statement, a director will not be liable where he or she can prove that the document or report in question was issued without his or her knowledge or consent, in circumstances where, upon becoming aware of the issue of the document, they immediately informed the shareholders that it was issued without his or her consent. Alternatively, if the director had reasonable grounds for believing that the untrue statement was true, liability can be avoided.

Similarly, an expert who makes a report under *section 1133* will not be liable for any untrue statements in that report if he or she can prove that, on becoming aware of the statement, he or she straight away informed the company and the shareholders of the untruth, or alternatively, that the expert had reasonable grounds for believing that the statement was true.

*Section 1148* lays down a criminal liability for any untrue statements in merger documents and derives from Regulation 23 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987). Where an untrue statement is included in the common draft terms of merger, the director's explanatory report or the merger financial statement, then each of the persons who was a director at the time the document was prepared and any person who authorised the issue of the document will be guilty of a category 2 offence. If an untrue statement is included in the expert's report, the expert and any person who authorised the issue of the report will be guilty of a category 2 offence. It will be a defence to any proceedings under this section to prove that, having exercised all reasonable care and skill, the defendant had reasonable grounds for believing the statement was true.

## **Chapter 17**

### **Divisions**

*Section 1149* expands upon the interpretation provisions in Regulation 24 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987) and mirrors the provisions found in the corresponding section on mergers (*section 1127*) in this Part.



*Section 1150* provides that this Chapter only applies if each of the companies involved in the division, or at least one of them, is a PLC.

*Section 1151* lays out the types of divisions to which this Chapter applies and derives from Regulation 25 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987). A “division by acquisition” occurs where two or more companies (of which one or more but not all may be a new company) acquire between them all the assets and liabilities of another company that is dissolved without going into liquidation. The acquisition must be in exchange for the issue of shares in the successor company to shareholders of the transferor company and with a view to the dissolution of the transferor company. The issue of the shares may be with or without cash payment.

A “division by formation of new companies” is similar to a “division by acquisition” described above, except that, in this case, the successor companies have been formed for the purposes of the acquisition of the assets and liabilities of the transferor company.

Where a company is being wound up, it may become a party to a division, provided that the distribution of its assets has not begun at the date of the common draft terms of division. Alternatively, the company may choose to avail itself of the provisions on schemes of arrangement or acquisitions in *Part 9* or may arrange for the liquidator to accept shares as consideration for the sale of company property under *section 601* of the Act.

*Section 1152* makes it clear that a division may not be put into effect unless it complies with the provisions of this Chapter.

*Section 1153* provides for the common draft terms of division and reflects Regulation 26 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987).

*Subsection (2)* of this section is similar to *subsection (2)* of *section 490(2)* of the Act relating to divisions of private companies limited by shares, with some adaptations of the provisions for public limited companies

Article 17(2) of Directive 82/891/EEC concerning the division of public limited liability companies was not catered for in S.I. 137/1987, and has therefore been catered for in *subsection (4)* here. This subsection provides that the common draft terms of division must not provide for shares in any of the successor companies to be exchanged for shares in the transferor company held either by the successor company itself (or its nominees) or by the transferor company (or its nominees).

*Subsections (5)* and *(6)* deal with the allocation of assets of the transferor company where those assets have not been dealt with in the common draft terms of division.

*Section 1154* provides for the directors’ explanatory report which must be prepared by the directors of each company involved in a division. It derives from Regulation 27 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987), as amended by Regulation 5 of the European Communities (Mergers and Division of Companies) (Amendment) Regulations 2011 (S.I. No. 306 of 2011).

It is along the same lines as *section 1132* of the Act in relation to mergers, with the additional *subsection (3)*, which derives from S.I. 137/1987. This subsection states that where any of the successor companies proposes to allot shares for a consideration other than in cash, the explanatory report must also state whether a report in relation to that consideration has been made to the successor company in question under *section 1028* and if so, whether that report has been submitted to the Registrar.

*Section 1155* provides that an expert must be appointed to examine the common draft terms of division and to make a report on those terms to the shareholders of the companies involved. The appointment of the expert must be approved by the court and the person holding the post of expert must be a statutory auditor and must not be precluded from being an expert by virtue of the provisions of *subsection (5)(b)*.

*Subsection (6)* lays down what must be included in the report and specifies the issues on which the expert is required to give an opinion on. The expert has the power to demand information and explanations from the companies involved and their officers in order to assist him or her in the making of the report. Failure to assist the expert in this manner will result in a category 2 offence on the part of the company and any officer in default, as will the giving of false or misleading information to the expert.

*Subsection (10)* lays down what happens where a person appointed as an expert ceases to be a qualified person. In such circumstances, where an expert continues to act, they will be guilty of a category 2 offence.

*Subsection (12)* allows for the requirement to produce an expert's report to be waived in two circumstances. Firstly, where all of the holders of shares conferring the right to vote at general meetings have agreed that a report is not necessary. The second circumstance relates to situations where, in order for a vote by holders of shares in any of the companies involved in the division to take effect, holders of securities of the companies must consent to that vote taking effect. In such a situation, the requirement to produce an explanatory report can be dispensed with only where all the holders of shares conferring the right to vote at general meetings together with all the holders of securities of the company so agree.

The provisions of this subsection do not apply in relation to a company involved in a division by formation of new companies where the shares in each of the successor companies are allocated to the shareholders of the transferor company in proportion to their rights in the capital of that company.

This section derives from Regulation 28 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987), as amended by Regulation 5 of the European Communities (Mergers and Division of Companies) (Amendment) Regulations 2011 (S.I. No. 306 of 2011).

*Section 1156* contains the provisions relating to the division financial statement and derives from Regulation 29 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987), as amended by Regulation 5 of the European Communities (Mergers and Division of Companies) (Amendment) Regulations 2011 (S.I. No. 306 of 2011).

It is along the same lines as *section 1134* of this Part in relation to the merger financial statement.

*Section 1157* contains provisions on the registration and publication of documents and derives from Regulation 30 of the European Communities (Mergers and Division of Companies) Regulations

1987 (S.I. No. 137 of 1987), as amended by Regulation 5 of the European Communities (Mergers and Division of Companies) (Amendment) Regulations 2011 (S.I. No. 306 of 2011).

It mirrors the provisions in relation to mergers contained in *section 1135* of this Part.

*Section 1158* makes provision for the inspection of division documents and is taken from Regulation 31 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987), as amended by Regulation 5 of the European Communities (Mergers and Division of Companies) (Amendment) Regulations 2011 (S.I. No. 306 of 2011).

It closely follows the provisions in relation to the inspection of merger documents found at *section 1136* of this Part.

*Section 1159* makes provision for the general meetings of companies involved in a division and derives from Regulation 32 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987), as amended by Regulation 5 of the European Communities (Mergers and Division of Companies) (Amendment) Regulations 2011 (S.I. No. 306 of 2011). However, it has been noted that the amendment made by S.I. 306/2011 had erroneously left in place paragraph (7) of the original Regulation 32. Paragraphs (4A) and (6A) inserted by S.I. 306/2011 effectively cover the same ground as that covered in paragraph (7) and so *subsections (10) and (11)* of this *section 1159* take account of that consideration.

These subsections provide that approval of the common draft terms of division by way of special resolution is not required where the successor companies hold together all of the shares carrying the right to vote at general meetings of the transferor company, and also where the companies involved in the division comply with the requirements on registration, publication and inspection of documents at least 30 days before the earlier of the dates mentioned in *paragraphs (f) and (g)* of *section 1153(2)* of the Act. In addition, in order to dispense with the need for approval by special resolution of the common draft terms of division, the directors of the company must inform the members of that company and the directors of the successor companies of any material change in the assets and liabilities of the transferor company that has occurred since the date of the common draft terms of division.

This *section 1159* is similar to *section 1137* of this Part which provides for the general meetings of companies involved in a merger.

*Section 1160* allows for a company to use electronic means to make available to its shareholders the documents referred to in *section 1158* (i.e. the division documents). These provisions were introduced by Regulation 5(m) of the European Communities (Mergers and Division of Companies) (Amendment) Regulations 2011 (S.I. No. 306 of 2011).

The provisions reflect those at *section 1138* of this Part in relation to merging companies.

*Section 1161* provides that where the share capital of any of the companies involved in a division is divided into shares of different classes, certain provisions (*subsection (2)*) and exclusions (*subsection (3)*) will apply with respect to the variation of the rights attached to any of those classes. This derives from Regulation 33 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987) and mirrors the corresponding provision in relation to mergers at *section 1139* of this Part.

*Section 1162* makes provision for the purchase of minority shares and derives from Regulation 34 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987). It is similar to *section 1135* of the Act in relation to mergers. However, *subsection (5)* has been included to reflect the opening words of Article 5(2) of Directive 82/891/EEC concerning the division of public limited liability companies. It states that the provisions in relation to the purchase of minority shares will not apply where the shares in each of the successor companies are allocated to the shareholders of the transferor company in proportion to their rights in the capital of that company.

*Section 1163* deals with the application to the court for the confirmation of the division and derives from Regulation 35 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987). It is along the same lines as *section 1141* of this Part in relation to mergers.

*Section 1164* provides protection to creditors and deals with the allocation of liabilities in a division. It is taken from Regulation 36 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987).

It is similar to *section 1142* of this Part in relation to the protection of creditors in the case of a merger with the addition of *subsections (4) and (5)* concerning the allocation of liabilities. These subsections provide that, where a liability of the transferor company is not provided for in the common draft terms of division and it is not possible to determine how that liability should be allocated, it should become, jointly and severally, the liability of the successor companies. In relation to liabilities that are incurred by the transferor company after the date of the common draft terms of division and which are not provided for in those draft terms, then that liability shall also become, jointly and severally, the liability of the successor companies. This is however subject to any provision the court may make in relation to the liability in an order under *section 1166* of the Act. It is important that provision be made for liabilities of companies involved in a division so that such liabilities can be traced and creditors can be protected.

*Section 1165* deals with the preservation of rights of holders of securities and derives from Regulation 37 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987). It is identical to the corresponding provision in the Chapter on mergers in this Part.

*Section 1166* contains provisions relating to the order of the court confirming the division and derives from Regulation 38 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987). It is similar to the provisions in *section 1144* relating to the merger confirmation order, but with the addition of *subsection (3)* which explains the scope of the term “relevant successor company”. Provision is now made to cater for the consequences of a division of leasehold property (legally classified as ‘chattels real’) or immovable property.

*Section 1167* allows the court to include in the confirmation order a provision permitting the giving of financial assistance or a reduction in company capital, which would otherwise be prohibited under *sections 82 and 84* of the Act respectively.

*Section 1168* provides for the registration and publication of confirmation of division with the Registrar and derives from Regulation 40 of the European Communities (Mergers and Division of

Companies) Regulations 1987 (S.I. No. 137 of 1987). It mirrors *section 1146* of the Act in relation to mergers.

*Section 1169* places a civil liability on directors and experts involved in a division to make good any loss or damage suffered by a shareholder by reason of misconduct by those directors or experts in the preparation or implementation of the division. This section is taken from Regulation 41 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987) and corresponds to *section 1147* of this Part in relation to mergers.

*Section 1170* contains a criminal offence for untrue statements in division documents and is taken from Regulation 42 of the European Communities (Mergers and Division of Companies) Regulations 1987 (S.I. No. 137 of 1987). It is similar to *section 1148* of this Part on mergers.

### **Chapter 18**

Public Offers of Securities, Prevention of Market Abuse, Etc.

*Section 1171* applies *Chapters 1, 2 and 4 of Part 23* of the Act to PLCs.

## **Part 18 – Guarantee Companies**

### *Preliminary Note*

*Part 18* of the Act makes provision for companies limited by guarantee, not having a share capital (“CLG”). Guarantee companies with a share capital will be private companies and as such will be considered to be designated activity companies (DAC) under *Part 16* of the Act.

Being owned by non- shareholding members and not having share capital members makes the CLG ideal for non-for profits. Also, the fact that it has no limit on the number of members makes the CLG useful for management companies of apartment complexes where the owners of units frequently exceed the limit of 149 members now imposed on private companies limited by shares.

*Chapter 1* deals with preliminary matters and definitions for the purposes of *Part 18*. The provisions of *Parts 1* to *14* of the Act are applied to CLGs except to the extent they are disapplied or modified by the Table in *section 1173* or any other provision of *Part 18*.

*Chapter 2* contains provisions in relation to the incorporation of CLGs and other consequential matters. Key changes include that a CLG may now be formed with one member instead of seven, where it has only one member it may dispense with the holding of an AGM and its name must end in “company limited by guarantee” or “CLG” or their Irish equivalents.

*Chapter 3* concerns the limitation on offers by CLGs of securities to the public. A CLG is not permitted to apply or to have securities admitted to trading or listing on any market.

*Chapter 4* deals with corporate governance. *Section 1194* provides that a CLG, unlike a private company limited by shares (LTD), must have at least 2 directors.

*Chapter 5* contains provisions relating to financial statements, annual return and audit and adapts certain provisions of *Part 6* of the Act to CLGs. There is a limited audit exemption available to CLGs.

*Chapter 6* concerns liability of contributories in a winding up. In a winding up, there being no share capital, the liability of members is confined to the guarantee sum provided for in the constitution of the CLG and includes former members whose membership ceased within one year of the winding up.

*Chapter 7* deals with petitions for examinerships in the case of a CLG.

*Chapter 8* deals with investigations and provides that *section 747(2)* shall apply to a CLG with certain modification.

*Chapter 9* applies *Chapters 1, 2* and *4* of *Part 23* to CLGs.

### *Explanatory Memorandum*

#### **Chapter 1**

##### **Preliminary and Definitions**

*Section 1172* establishes the formal definition for a company limited by guarantee (CLG) and also for its constitution. This is derived from section 2 of the Companies Act 1963 and section 5(2)(b) of the Companies Act 1963. The term “constitution” has replaced “memorandum” and “articles”.

*Section 1173* applies the provisions of *Parts 1 to 14* of the Act (in relation to the private companies limited by shares) to a CLG, except to the extent they are disappplied or modified by the Table to this section, or any other provision of this Part. *Subsection (3)* provides that references to shareholders in *Parts 1 to 14* of the Act shall be read in the context of membership of a CLG. *Subsection (4)* sets out a number of provisions contained in *Parts 1 to 14* that concern governance which do not apply to CLGs.

## Chapter 2

### Incorporation and Consequential Matters

*Section 1174* is new and sets out the manner in which a CLG may be formed. A significant change is that a CLG may now be formed with one member instead of seven. *Subsection (2)* provides that a company other than a CLG may be registered as a CLG following re-registration, merger or division. *Subsection (3)* deals with the certificate of incorporation and re-enacts section 5(3) of the Companies (Amendment) Act 1983.

*Section 1175* states that a CLG shall not be formed and registered unless it appears to the Registrar that the CLG, when registered, will carry on an activity in the State, being an activity that is mentioned in its memorandum. This follows the text of *section 18* of the Act.

*Section 1176* sets out the form that the constitution of the CLG must take. *Subsection (1)* is new and provides that a CLG will still have a two document constitution, in the form of a memorandum and articles of association. The memorandum of association shall state that it is a company limited by guarantee and that each member undertakes that, if the company is wound up, he or she will contribute to the assets of the company as may be required, but not exceeding the amount specified in the memorandum. A model constitution is set out in *Schedule 10*. The signature requirements are as set out in *section 19* of the Act, in that the constitution must be signed by each subscriber in the presence of at least one witness to attest the signature or be authenticated in the manner referred to in *section 888* of the Act (authentication of documents other than by signing or sealing them). *Subsection (4)* provides that amendments to the memorandum of association affecting matters specified in *section 1176(2)* must be updated in the memorandum.

*Section 1177* is new and contains supplemental provisions in relation to the make-up and the continuation in force of existing memorandum and articles of association of a company limited by guarantee.

In relation to the content of the articles of the CLG, it is provided that they may contain regulations in relation to that company. As an alternative to containing regulations, the articles may consist solely of a statement to the effect that the provisions of the Act are adopted in relation to the company. Where the articles of the CLG do not exclude or modify an optional provision of the Act, that optional provision will be deemed to apply to the company.

Where a company limited by guarantee is already in existence and governed by regulations, those regulations will continue in force (save to the extent that they are inconsistent with a mandatory provision of the Act) and may be altered or added as permitted by the Act.

Subject to compliance with *section 1199(3)*( articles must state the number of members with which the company proposes to be registered) – the articles may consist of a statement to the effect that the provisions of the this Act are adopted and, if the articles consist solely of such a statement, *subsection (4)* shall apply.

*Section 1178* provides that the name of a CLG shall end with the words “company limited by guarantee” or the Irish language equivalent, “cuideacha faoi theorainn ráthaíochta”. The words limited by guarantee may be abbreviated to either “c.l.g.”, “clg”, “c.t.r.” or “ctr” in any usage after the company’s registration.

*Section 1179* contains the category 3 offence of trading under a misleading name as derived from section 56(1), (2) and (4) of the Companies (Amendment) Act 1983. A body that is not a CLG is not permitted to carry on business under a name which includes, at the end of its name, the words “company limited by guarantee” or “cuideacha faoi theorainn ráthaíochta” or any abbreviation of those words. Furthermore, a CLG must not use a name which could give the impression that it is any type of company other than a CLG, where the use of a name in this way would be likely to be material to any person.

*Section 1180* allows for the words “company limited by guarantee” or “cuideacha faoi theorainn ráthaíochta” to be dispensed with in the case of charities or other companies where all the profits of the company are applied to the promotion of that company’s objects (for example, the promotion of science, commerce, art, education or religion). This re-enacts section 24 of the Companies Act 1963, as substituted by section 88 of the Company Law Enforcement Act 2001. The exemption from the requirement to use the words “company limited by guarantee” is automatic where, on first registration, one of the directors or the secretary of the company delivers a statement in the prescribed form confirming the company’s compliance with the requirements of *subsection (1), paragraphs (a) and (b)*. A company benefiting from this exemption may not alter its constitution so that it no longer complies with *subsection (1)*. Any breach of the requirements of this section will result in a category 3 offence.

*Section 1181* derives from section 26(1) of the Companies Act 1963 and contains a prohibition on a provision in the constitution of a CLG that purports to give any person, other than a member of the company, a right to participate in the divisible profits of the company. *Subsection (4)* places a prohibition on a CLG purporting to issue shares and *subsection (5)* provides that if *subsection (4)* is contravened, the CLG and every other officer who is in default shall be guilty of a category 3 offence.

*Section 1182* is new and provides that a CLG shall have capacity to do any act or thing stated in its objects as set out in its constitution. Therefore, the provisions in the Act in relation to the LTD that provide for unlimited capacity are disapplied here.

*Section 1183* provides that the corporate capacity of a CLG is not limited by its constitution. The mitigation of the doctrine of *ultra vires* contained in section 8 of the Companies Act 1963 has been abandoned in favour of the new formulation found here. Persons dealing with a CLG that is acting *ultra vires* will not be prejudiced by this new formulation, but the directors of the CLG may be held to account for causing a CLG to take such *ultra vires* action. This will be in the form of an *in personam* action against the directors and not an *in rem* action that would set aside the validity of the *ultra vires* transaction. The doctrine of constructive notice has been removed by providing in *subsection (5)* that a person is not bound to enquire as to whether an activity is *intra vires*.

Provision is also made in this section for the ratification of an act beyond the capacity of the company by special resolution. This reverses the common law position stated in *Ashbury Railway & Iron Co. v Riche* (1875) LR 7 HLC 653 where not even a unanimous agreement of the shareholders would suffice to achieve ratification in this regard. Such ratification offers greater assurance to the other



party dealing with the company. A special resolution regarding ratification validates the transaction whilst a separate special resolution is required to absolve the directors or any other person from any liability arising.

*Section 1184* permits a CLG to alter its objects clause by special resolution, subject to the provisions of this section. This derives from section 10(1) to (6A) of the Companies Act 1963. An application can be made to the court for the alteration to be cancelled and in such a case the alteration will not have effect except in so far as it is confirmed by the court.

*Section 1185* contains further provisions in relation to the alteration of an objects clause by special resolution. Holders of the CLGs debentures that are entitled to object to alterations of the objects of the CLG shall be entitled to notice of the meeting at which the special resolution altering the objects is intended to be proposed, or alternatively, if the written resolution procedure is to be used to effect the alteration, notice of the proposed use of that procedure. That notice must be the same as that given to members of the CLG (i.e. not less than 10 days). In the case of a CLG permitted to omit the words “company limited by guarantee” or “cuideacha faoi theorainn ráthaíochta” from its name, notice must be given to the Registrar of any proposal to alter the CLGs objects. Where a CLG alters its objects, a copy of the amended memorandum and articles must be sent to the Registrar and if an application is made to the court for the alteration to be cancelled, the CLG shall give notice of that fact to the Registrar.

The provisions of this section are drawn from section 10(6B) to (10) of the Companies Act 1963, as amended by the Companies (Amendment) Act 1983. Section 10(11) has not been re-enacted as it contains now irrelevant transitional provisions.

*Section 1186* contains a restriction on the application of *section 32(1)* in relation to CLG’s, so that a CLG may amend its constitution by special resolution only where the amendment relates to the amount that each member undertakes to be liable for if the company is wound up.

*Section 1187* provides that a CLG may, by special resolution, alter or add to its articles, subject to the provisions of this Act and the conditions contained in the memorandum of the CLG. This re-enacts section 15 of the Companies Act 1963 in the context of a CLG.

*Section 1188* contains the power to alter provisions in the memorandum of association which could have been contained in the articles. This applies to provisions which could have been contained in the articles but which the members have seen fit to include in the memorandum instead. Such provisions may be altered by the CLG by special resolution. This is based on section 28 of the Companies Act 1963, with subsection (5) being omitted as it contains now irrelevant transitional provisions.

*Section 1189* is new and concerns the status of an guarantee companies in existence prior to the commencement of the Act. It provides that such a company shall on and from the commencement of this section, continue in existence and be deemed to be a CLG to which this Part applies.

*Section 1190* sets out transitional arrangements and provides that during the transition period, or if before the expiry of the transition period the company has changed its name to include either the “company limited by guarantee” or “cuideacha faoi theorainn ráthaíochta” the provisions of the prior

Companies Acts relating to the use of limited or *teoranta* shall apply as respects the name of an existing guarantee company in place of the new provisions.

### Chapter 3 Share Capital

*Section 1191* concerns the limitation on offers by CLGs of securities to the public. A CLG is not permitted to apply or to have securities admitted to trading or listing on any market. This section adapts the provisions of *section 68* of the Act (concerning the LTD) and *section 33* of the Companies Act 1963 to operate in the context of a CLG. In the case of a CLG, the prohibition on the making of offers to the public does not extend to debentures.

*Section 1192* applies *section 114* (holding by subsidiary of shares in its holding company) to CLGs and adapts the references in *section 114* to shares.

*Section 1193* deals with the uncertificated transfer of securities and applies *sections 1085* to *1087* to securities of a CLG as it applies to securities of a PLC. Uncertified transfer of securities relates to mutual fund shares that are recorded as being the property of the shareholder. However, no hard copy stock certificates are issued. In lieu of a stock certificate, the proof of ownership for the uncertified shares is maintained in the records of transfer agent that handled the purchase transaction.

### Chapter 4 Corporate Governance

*Section 1194* provides that a CLG shall have at least 2 directors. This provision is on foot of the recommendation of the CLRG that the minimum requirement of 2 directors should remain for all companies other than the new model private company (LTD). *Subsection (2)* sets out a clear definition for a 'sole-director company' or a 'company with a sole-director'. The rationale for this is to ensure that, if for example, an unforeseen eventuality results in a company having just one director, that company will be entitled to be considered as a sole-director company.

*Section 1195* places a limitation on the number of directorships a director of a CLG may hold. This applies *section 142* of the Act and allows a person to be a director of up to 25 CLGs or 25 companies, one (or more than one) of which is a CLG and one (or more than one) of which is any other company type.

*Section 1196* deals with the rotation of directors of a CLG. The default position is that all directors of the CLG must retire from office at the first AGM of the company. At every subsequent AGM, one-third of the directors must retire, or, if their number is not 3 or a multiple of 3, then the nearest one-third must retire. The constitution of the CLG may make alternative arrangements for the retirement of directors.

*Section 1197* concerns the remuneration of directors and states that, unless the constitution provides otherwise, the remuneration will be determined by the CLG in general meeting.

*Section 1198* concerns the removal of directors and applies *section 146* of the Act (removal of directors) with the omission of *subsection (2)* to a CLG in relation to a director holding office for life.

*Section 1199* sets out the basic principle that new members may not be admitted unless approved by the directors. The section also allows for a procedure for admission to membership to be determined by the company constitution. Membership ceases on resignation, death or bankruptcy. The CLG must notify the Registrar when the actual number of its members increases beyond the number provided for in its articles as presented on registration. The constitution may limit the number of members in the constitution; and regulates voting (one vote per member, in the absence of constitutional provision to the contrary). The offence under this section has been brought within the general scheme of offences under Part 14, and is now a category 4 offence. This section is based on Model Regulation 3 of Table C to the First Schedule to the Companies Act 1963.

*Section 1200* provides that it shall be a category 2 offence to personate a member of a CLG.

*Section 1201* applies *section 169* of the Act on the register of members to a CLG with some small modifications.

*Section 1202* provides that a CLG may not dispense with holding an AGM if it has more than one member. It disapplies *section 175(3)* and *(4)* of the Act to CLGs in this instance.

*Section 1203* modifies the normal provisions with regard to requisitioning a general meeting (*section 178* of the Act) by removing any references to share capital and instead inserting a requirement based on members holding not less than 10% of the total voting rights.

*Section 1204* concerns persons entitled to notice of general meetings and applies *section 180* of the Act with the omission of *subsection (1)(b)* and *(c)* and *subsections (2)* to *(4)* i.e. the provision in *section 180* that address Joint membership of CLG is omitted and it is clarified that personal representatives of deceased members do not have the right to receive notice of meetings. The reason for this is in accordance with *section 1199* the death of a member will terminate his or her membership.

*Section 1205* applies *section 183* of the Act on proxies and empowers members to appoint a proxy, save where the constitution of the CLG provides otherwise. This is a change from the previous laws under *section 136* of the Companies Act 1963 which provided that the default position is that members by guarantee do not have the right to attend by proxy but that the articles of the company may provide otherwise.

*Section 1206* deals with votes of members and applies *section 188* of the Act on votes of members with certain modifications appropriate to guarantee companies.

*Section 1207* applies *section 189* of the Act on the right to demand a poll, with the omission of *subsection (2)(d)*.

*Section 1208* concerns the application of *section 193* of the Act on unanimous written resolutions to CLGs.

*Section 1209* applies *section 198* of the Act regarding registration of, and obligations of a company to supply copies of, certain resolutions and agreements. Modifications to references to shares and share capital have been made.

*Section 1210* applies *Chapter 5* of *Part 5* relating to disclosure of interests in shares and debentures.

## **Chapter 5**

### Financial Statements, Annual Return and Audit

*Section 1211* concerns the non-application of *Part 6* to CLGs that are credit institutions or insurance undertakings

*Section 1212* provides that *Chapter 3* of *Part 23* has effect in relation to, amongst other companies, a CLG that has debentures admitted to trading on a regulated market in an EEA state.

*Section 1213* is a new section that provides for the modification of definition of “IAS Regulation” in the case of a CLG as it applies in the case of a PLC.

*Section 1214* applies *section 297* of the Act (exemption from consolidation: size of group) to CLGs.

*Section 1215* concerns disclosures by a CLG that is a credit institution and provides that *section 1115* of the Act shall have effect in relation to a CLG.

*Section 1216* provides that *section 318* of the Act in relation to certain information to be given in the notes to the financial statements will not apply to a CLG. However, where there are changes in the interests of members of a CLG in the financial year to which the financial statements of the CLG relate, then particulars of those changes must be given in the notes to those financial statements.

*Section 1217* disapplies, in the case of a CLG, *sections 325(1)(c)* of the Act on information on the acquisition or disposal of own shares and *section 329* of the Act on the directors report and the acquisition or disposal of shares.

*Section 1218* applies *sections 334, 359, and 362* of the Act on the right of members to require audit despite audit exemption otherwise being available to a CLG with certain modifications. Under prior law, the audit exemption was only available to a private company and was not available to a company limited by guarantee and not having a share capital. The Act broadens the accessibility of the audit exemption to a CLG, although it seeks to achieve a balance by providing that if any one member does not wish the audit exemption to be accessible to the company in that financial year the CLG will not be entitled to avail of the audit exemption in that financial year.

*Section 1219* provides a qualification of *section 338* of the Act on the circulation of statutory financial statements in the case of a CLG.

*Section 1220* disapplies *sections 347* and *348* (which require various documents to be annexed to the annual return) with respect to CLGs not trading for gain. The remainder of the section makes provision for audits to be prepared and filed by companies availing of this exception. It also contains transitional provisions. Sections 3 and 4 of the Companies (Miscellaneous Provisions) Act, 2013 into are also incorporated into this section. Sections 3 and 4 provide for electronic filing of documents with the Companies Registration Office. They provide that a "copy" can now include a document which is signed and dated using typeset signatures, that is, a director can now submit a fully typed document to the Registrar. This means that the entire document can be created electronically without the need for paper copies. In previous law, a certificate can be signed either manually or using an electronic signature which facilitates greater uptake of electronic filing. The terms "existing guarantee company" and "relevant authority" are defined. The definition of "relevant authority" allows for the transfer of the operations of the Commissioners for Charitable Donations and Requests to the new Charities Regulatory Authority.

*Section 1221* applies *section 392* of the Act on the report to the Registrar and the Director on accounting records to a CLG with the substitution, in *subsection (6)*, of "its members" for "its shareholders".

*Section 1222* applies *section 393* (Report to Registrar and Director: category 1 and 2 offences) of the Act to a CLG with the substitution, in *subsection (4)*, of "its members" for "its shareholders".

## **Chapter 6**

### Liability of Contributories in Winding Up

*Section 1223* concerns the liability as contributories of past and present members in the event of a CLG being wound up and derives from section 207 of the Companies Act 1963. Every present and past member shall be liable to contribute to the assets of the CLG to an amount sufficient for payment of its debts and liabilities, and the costs, charges and expenses of the winding up, and for the adjustment of the rights and contributories among themselves. *Subsection (2)* sets out a number of qualifications in relation to *subsection (1)*.

## **Chapter 7**

### Examinerships

*Section 1224* applies *section 510* of the Act (which relates to LTDs) to CLGs so that a petition may be presented to the court for the appointment of an examiner to the company. Provision is made for certain modifications in the case of a CLG. *Subsection (2)* will refer not only to a petition in relation to a holding company of an insurer, but also in relation to an insurer. *Subsection (3)* will refer not only to the holding company of a credit institution or the legacy company of a trustee savings bank, but also to a credit institution the legacy company of a building society.

## **Chapter 8**

### Investigations

*Section 1225* applies *section 747(2)* of the Act on investigations by court appointed inspectors to CLGs with the deletion of *paragraph (c)* therefrom.

## **Chapter 9**

### **Public Offers of Securities, Prevention of Market Abuse, Etc.**

*Section 1226* applies *Chapters 1, 2 and 4* of *Part 23* of the Act (in relation to Public Offer of Securities, Market Abuse and Transparency) to CLGs insofar as those provisions are applicable to companies other than public limited companies.

DELETED

## **Part 19 – Unlimited Companies**

### *Preliminary Note*

*Part 19* of the Act makes provision for unlimited companies and is structured in such a way that it covers both private unlimited companies and public unlimited companies. In this regard three different types of unlimited companies are being catered for – the private unlimited company with a share capital (ULC), the public unlimited company with a share capital (PUC) and the public unlimited company that has no share capital (PULC). All three types of unlimited company are existing types of company.

*Chapter 1* deals with preliminary matters and definitions for the purposes of *Part 19*. The provisions of *Parts 1* to *14* of the Act are applied to unlimited companies except to the extent they are disappplied or modified by the table in *section 1230* or any other provision of *Part 19*.

*Chapter 2* contains provisions in relation to the incorporation of unlimited companies and other consequential matters. It sets out the manner in which unlimited companies may be formed and registered and distinguishes between an unlimited company with or without share capital. In both instances the unlimited nature of the liability of the members is catered for. The Minister for Jobs, Enterprise and Innovation is given a statutory power to exempt certain companies from having the words “unlimited company” at the end of its name.

*Chapter 3* makes provision for the share capital of unlimited companies. One of the most significant changes in the law related to unlimited companies is that the rule requiring that distributions may only be made from distributable profits has been disappplied.

*Chapter 4* deals with corporate governance. *Section 1257* provides that an unlimited company, unlike a company limited by shares (LTD), must have at least 2 directors.

*Chapter 5* adapts, to the context of an unlimited company, the provisions of *Part 6* of the Act on financial statements, annual return and audit. Unlimited companies will, under this Act, prepare their financial statements pursuant to *Part 6* and *Schedules 3* and *4*, as opposed to the 6<sup>th</sup> Schedule to the Companies Act 1963 as that Schedule is not being carried over into the new law.

*Chapter 6* deals with winding up of an unlimited company.

*Chapter 7* applies *section 510* of the Act on petitions for examinerships to unlimited companies with certain modifications.

*Chapter 8* deals with investigations and provides that *section 747(2)* shall apply to PUCs and PULCs with certain modifications.

*Chapter 9* applies the provisions of *Part 23* of the Act (which deals with public offers of securities, financial reporting by traded companies, prevention of market abuse, etc.) to unlimited companies, in so far as those provisions are applicable to companies other than PLCs.

### *Explanatory Memorandum*

#### **Chapter 1** Preliminary and Definitions

*Section 1227* is new and provides interpretation of defined terms for *Part 19*. “Constitution” is defined as the memorandum and articles, in accordance with *sections 1233* and *1234*, and ULC, PUC and PULC (respectively private unlimited company with share capital, public unlimited company with share capital and public unlimited company without share capital) are defined in accordance with *section 1228*.

*Section 1228* provides that three different types of unlimited companies are being catered for and sets out the uniform words to be affixed to the name – the private unlimited company (ULC), the public unlimited company (PUC) and the public unlimited company that has no share capital (PULC). The name of any unlimited company, irrespective of the type of unlimited company shall be governed by *sections 1237* and *1247*.

*Section 1229* provides that a reference in this Part to an unlimited company, without specifying one of the three types of unlimited company, should be read as a reference to any of the three types referred to in *section 1228*.

*Section 1230* applies the provisions of *Parts 1* to *14* of the Act (in relation to the private company limited by shares) to an unlimited company, except to the extent they are disapplied or modified by this section, or by any other provision of this Part.

Requirements to show the name and legal form of the company, its place of registration, registered number and the address of its registered office on letters, order forms and websites of unlimited companies are disapplied. Also, the requirements of *sections 194* and *195* of the Act, relating to majority written resolutions and the supplemental provisions, are disapplied for Unlimited Companies. A similar disapplication applies to public unlimited companies with a share capital and public unlimited companies without a share capital.

The obligation to file a return of allotments is disapplied for unlimited companies. Public unlimited companies were not obliged to return allotments of shares under previous law and the Company Law Review Group recommended in the Heads of this Act that the obligation to file a return of allotments for unlimited companies be dis-applied to both private and public unlimited companies.

The obligation to file a return of allotments of shares for private limited companies means that a company must notify the Registrar within 30 days after the company has allotted shares.

## **Chapter 2** Incorporation and Consequential Matters

*Section 1231* is new. It provides that an unlimited company may be formed according to this Part, or created out of another company or other companies, whether by re-registration, merger or division.

*Section 1232* provides that an unlimited company shall not be formed and registered unless it carries on an activity in the State, that activity being mentioned in its memorandum. This follows the text of *section 18* of the Act, except that the activity must be mentioned in the memorandum.

*Section 1233* lays down the form that the constitution of a ULC or a PUC must take. It is a two document constitution containing a memorandum and articles of association which together are



referred to throughout this Part as a constitution. The memorandum of association of the ULC and PUC must state, as the case may be, that it is a private unlimited company or a public unlimited company. It must also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount and the fact that its members have unlimited liability. Model constitutions can be found at *Schedule 11* in the case of a ULC, and *Schedule 12* in the case of a PUC. The signature requirements are as set out in *section 19* of the Act, in that the constitution must be signed by each subscriber in the presence of at least one witness to attest the signature or be authenticated in the manner referred to in *section 888* of the Act (authentication of documents other than by signing or sealing them). Where an amendment of the constitution is made affecting the matter of share capital, or another matter, subsequent to its registration, it should be read as it stands in consequence of that amendment.

*Section 1234* lays down the form that the constitution of a PULC must take, it provides that the constitution of a PULC will not be assimilated to the new one document LTD constitution, but will retain the old two-part (memorandum and articles) structure. The memorandum of association must state that it is a public unlimited company that has no share capital. A model constitution for the PULC can be found at *Schedule 13*. The signature requirements are as set out in *section 19* of the Act, in that the constitution must be signed by each subscriber in the presence of at least one witness to attest the signature or be authenticated in the manner referred to in *section 888* of the Act (authentication of documents other than by signing or sealing them). Where an amendment of the constitution is made affecting the matter of share capital, or another matter, subsequent to its registration, it should be read as it stands in consequence of that amendment.

*Section 1235* is new and contains supplemental provisions in relation to the constitution referred to in *sections 1233* or *1234* of the Act and the continuation in force of existing memorandum and articles of association of an unlimited company.

The articles of an unlimited company may contain regulations in relation to that company. Alternatively, instead of containing regulations, the articles may consist solely of a statement to the effect that the provisions of the Act are adopted in relation to the company. Where the articles do not exclude or modify an optional provision of the Act, that optional provision will be deemed to apply to the company. The memorandum and articles of an existing unlimited company registered before the commencement of this section, will continue in force (save to the extent they are inconsistent with a mandatory provision of the Act) and may be altered or added to as permitted by the Act.

*Section 1236* concerns the effect of registration and mirrors *section 25* of the Act. It provides for the certification by the Registrar that an unlimited company has been incorporated. *Section 18(1)* of the Companies Act 1963 previously only provided for the Registrar to certify that “in the case of a limited company that the company is limited”. The other provisions of this section derive from *section 18* of the Companies Act 1963, *section 3(5)* of the Companies (Amendment) Act 1982 and *section 5(3)* of the Companies (Amendment) Act 1983.

*Section 1237* provides that the name of an unlimited company shall end with the words “unlimited company” or the Irish equivalent “cuideachta neamhtheoranta”, or the abbreviations of those terms - “u.c.”, “uc”, “c.n.” or “cn”. This is a change to the law as prior to this an unlimited company did not have to have the word “unlimited” after its name. *Subsection (5)* gives the Minister power to exempt certain companies from having the words “unlimited company” in its name. This is a safeguarding provision in case of unforeseen circumstances arising with established unlimited companies on commencement.

*Section 1238* contains the category 3 offence of trading under a misleading name, as derived from sections 56(1), (2) and (4) of the Companies (Amendment) Act 1983. A body that is not an unlimited company is not permitted to carry on business under a name which includes, at the end of its name, the words “unlimited company” or “cuideachta neamhtheoranta” or any abbreviation of those words. Furthermore, an unlimited company must not use a name which could give the impression that it is any type of company other than an unlimited company, where the use of a name in this way would be likely to be material to any person.

*Section 1239* provides that an unlimited company shall have the capacity to do any act or thing stated in its objects as set out in its memorandum. Therefore, the provisions in the Act in relation to the LTD that provide for unlimited capacity are disapplied here.

*Section 1240* provides that the validity of an act done by an unlimited company shall not be called into question on the ground of lack of capacity by reason of anything contained in the unlimited company’s objects. This section mirrors the wording in *sections 1012* and *1183* of the Act in relation to PLCs and CLGs. An act committed by a company outside its capacity can be ratified by special resolution – this is new and diverges from established law in that an act ultra vires the company cannot be ratified.

*Section 1241* permits an unlimited company to alter its objects clause by special resolution. This derives from section 10 of the Companies Act 1963. An application may be made by holders of not less than 15 per cent in nominal value of the ULCs or PUCs issued share capital or any class thereof, or in the case of any type of unlimited company, by not less than 15 per cent of the company’s members. Alternatively, in the case of an ULC, PUC or PULC the application may be made by not less than 15 per cent of the unlimited company’s debentures, entitling the holders to object to alteration of its objects. An application under this section shall be made within 21 days after the date on which the resolution altering the unlimited company’s objects was passed and may be made on behalf of the persons entitled to make the application by such one or more of their number as they may appoint in writing for the purpose. *Subsection (6)* provides that the court may make an order cancelling the alteration or confirming the alteration and if it thinks fit adjourn the proceedings in order that an arrangement may be made to the satisfaction of the court for the purchase of the interests of dissenting members. *Subsection (7)* is new and its purpose is clarificatory. It provides that a court order for the purchase by the ULC or a PUC of the shares of any members of the ULC or PUC and for the reduction accordingly of the ULCs or PUCs company capital may be so ordered notwithstanding anything in section 102.

*Section 1242* provides that holders of the unlimited company’s debentures that are entitled to object to alterations of the objects of the unlimited company shall be entitled to notice of the meeting at which the special resolution altering the objects is intended to be proposed or alternatively, if the written resolution procedure is to be used to effect the alteration, notice of the proposed use of that procedure. That notice must be the same as that given to members of the company (i.e. not less than 10 days). *Subsection (6)* provides that a copy of the memorandum of association as altered must be delivered to the Registrar within 15 days of the end of the period for making such an application if no application is made under *section 1241*. If such an application under *section 1241* is made, notice of that fact must be given to the Registrar and within 15 days after the date of any order must be delivered to the Registrar cancelling or confirming the alteration, deliver to the Registrar a certified copy of that order and in the case of an order confirming the alteration, a copy of the memorandum as altered. If an unlimited company makes default in giving notice or delivering any document to the Registrar as required by subsection (6), the unlimited company and any officer of it who is in default shall be guilty of a category 4 offence.

*Section 1243* re-enacts the existing law concerning the official seal of sealing securities. It provides for a PUC and PULC to have an official seal which is a facsimile of the common seal and which has on its face the word “Securities” or the word “Urrúis”. This seal can be used only for sealing securities and other documents of that nature; in other words, it could not be used, for example, for sealing a contract entered into by the company.

*Section 1244* provides that an unlimited company may, by special resolution alter or add to its articles, subject to the provisions of this Act and the conditions contained in the memorandum of the unlimited company. This re-enacts section 15 of the Companies Act 1963 in the context of an unlimited company.

*Section 1245* contains the power to alter provisions in the memorandum of association which could have been contained in the articles. This applies to provisions which could have been contained in the articles but which the members have seen fit to include in the memorandum instead. Such provisions may be altered by an unlimited company by special resolution. This is based on section 28 of the Companies Act 1963, with subsection (5) being omitted as it was a transitional provision in the 1963 Act.

*Section 1246* is new and provides that an existing unlimited company shall on and from the commencement of this section, continue in existence and be deemed to be an ULC, PUC or PULC as appropriate to which this Part applies.

*Section 1247* contains transitional provisions and provides that the words “unlimited company” or “cuideachta neamhtheoranta” may be omitted from the company’s name during the transition period or, if the company had changed its name before the expiry of that period to include the required set of words, during the period preceding the making of that change.

### **Chapter 3** Share Capital

*Section 1248* applies *section 68* of the Act (limitation on offers of securities to the public) to PUCs and PULC with certain modifications. PUCs and PULCs may have their debentures (or interests) in them listed or traded, but retains the prohibition in respect of other securities.

*Section 1249* concerns authority to allot and pre-emption rights in the case of a PUC and applies *sections 1021* to *1023* to a PUC.

*Section 1250* concerns variation of rights attached to special classes of shares. It applies *section 982* of the Act to a PUC and an ULC with minor modifications.

*Section 1251* applies *section 83* of the Act (variation of company capital) to an ULC and PUC with certain modifications.

*Section 1252* allows an ULC and a PUC to reduce their capital by special resolution. *Subsection (2)* provides that a resolution shall not be valid for the purposes of *subsection (1)* if it

would have the effect that the ULC or PUC no longer has any members. *Subsection (3)* clarifies that reserves resulting from a reduction of a private unlimited and a public unlimited company's capital will be treated as realised profits.

*Section 1253* applies *section 94* which governs transfer of shares and debentures to an ULC and a PUC.

*Section 1254* applies *section 114* of the Act (holding by subsidiary of shares in its holding company) in relation to PULCs.

*Section 1255* provides that neither the provisions of *Chapter 7* of *Part 3* of the Act nor any rule of law on the making of distributions out of a company's assets shall apply in relation to and unlimited company.

*Section 1256* deals with the uncertificated transfer of securities and applies *section 1085* to *1087* of the Act to securities of a PUC or a PULC as it applies to securities of a PLC. *Sections 1085* to *1087* deal with the transfer of uncertificated securities and re-enact Regulation 5 of the Companies Act 1990.

## **Chapter 4**

### Corporate Governance

*Section 1257* provides that an unlimited company must have at least 2 directors. This provision is on foot of the recommendation of the CLRG that the minimum requirement of 2 directors should remain for all companies other than the new model private company (LTD). *Subsection (2)* sets out a clear definition for a 'sole-director company' or a 'company with a sole-director'. The rationale for this is to ensure that, if for example, an unforeseen eventuality results in a company having just one director, that company will be entitled to be considered as a sole-director company.

*Section 1258* places a limitation on the number of directorships a director of an unlimited company may hold. This applies *section 142* of the Act and allows a person to be a director of up to 25 unlimited companies or 25 companies, one (or more than one) of which is an unlimited company and one (or more than one) of which is any other company type.

*Section 1259* concerns membership of a PULC. It sets out the basic principle that new members may not be admitted unless approved by the directors. The section also allows for a procedure for admission to membership to be determined by the company constitution. Membership ceases on resignation or death. The PULC must notify the Registrar when the actual number of its members increases beyond the number provided for in its articles as presented on registration. The constitution may limit the number of members in the constitution; and regulates voting (one vote per member, in the absence of constitutional provision to the contrary). The offence under this section has been brought within the general scheme of offences under Part 14, and is now a category 4 offence. This section is based on Model Regulation 3 of Table C to the First Schedule to the Companies Act 1963.

*Section 1260* provides that it shall be a category 2 offence to personate a member of a PULC.

*Section 1261* relates to the register of members and provides that *section 169* of the Act (register of members) shall apply to a PULC, with appropriate modifications to reflect the fact that a PULC has no share capital.

*Section 1262* disapplies *section 176(3)* and *(4)* of the Act to unlimited companies with two or members, meaning that an unlimited company with more than one member may not dispense with the holding of an annual general meeting.

*Section 1263* is new and applies *section 193* of the Act (unanimous written resolutions) to unlimited companies, subject to the constitution of the unlimited company not providing otherwise.

## **Chapter 5**

### **Financial Statements, Annual Returns and Audit**

*Section 1264* sets out definitions of both a designated and a non-designated ULC for the purposes of this Chapter.

*Section 1265* disapplies the provisions of *Part 6* of the Act in the case of unlimited companies that are credit institutions or insurance undertakings.

*Section 1266* applies the provisions of *Part 23* of the Act with regard to the requirement for a corporate governance statement to a PUC and a PULC that have debentures admitted to trading on a regulated market in an EEA state.

*Section 1267* is a new section that provides for the Modification of definition of “IAS Regulation” in the case of PUC and PULC as it applies in the case of a PLC.

*Section 1268* applies *section 297* of the Act (exemption from consolidation: size of group) to a PULC. It substitutes *paragraph (a)* of *subsection (8)* with a new *paragraph (a)* to reflect the fact that a PULC has no share capital.

*Section 1269* concerns disclosures by an unlimited company that is a credit institution and applies *section 1120* of the Act to an unlimited company.

*Section 1270* is new and it concerns disclosure of membership changes in a PULC’s financial statements and provides that *section 318* (details of authorised share capital, allotted share capital and movements) shall not apply to the financial statements of a PULC but, where there are changes in the interests of members of a PULC in the financial year to which the financial statements of the PULC relate, then particulars of those changes shall be given in the notes to those financial statements.

*Section 1271* provides that *section 325(1)(c)* of the Act (directors preparing a report for each financial year detailing with information on the acquisition or disposal of own shares) and *section 329* of the Act (directors’ report: acquisition or disposal of own shares) shall not apply to a PULC.

*Section 1272* applies *section 362* of the Act (audit exemption not available where company or subsidiary undertaking falls within a certain category) to an ULC and obliges the directors of both a PUC and a PULC to arrange for the statutory financial statements to be audited by statutory auditors.

*Section 1273* qualifies *section 338* of the Act (circulation of statutory financial statements) in the case of a PULC to circumstances where the person is entitled to receive notice of general meetings.

*Section 1274* provides that designated ULCs are required to deliver statutory financial statements and other related documents with their annual return.

*Section 1275* modifies the application of *section 392* of the Act (report to Registrar and Director: accounting records) to a PULC, to reflect the fact that a PULC has no share capital.

*Section 1276* applies *section 393* of the Act (report to Registrar and Director: category 1 and 2 offences) to a PULC, to reflect the fact that a PULC has no share capital.

*Section 1277* sets out the documents to be annexed to the annual return of a non-designated ULC and is based on *section 128(6)* and *(6C)* of the Companies Act 1963 as inserted by *section 47* of the Companies (Auditing and Accounting) Act 2003. A non-designated ULC has no obligation to file accounts with its annual return. However, a non-designated ULC is obliged to attach an auditor's report to its annual return when filing the latter with the CRO.

## **Chapter 6** Winding Up

*Section 1278* concerns the liability as contributories of past and present members in the event of an unlimited company being wound up. This derives from *section 207* of the Companies Act 1963. Every present and past member shall be liable to contribute to the assets of the unlimited company to an amount sufficient for payment of its debts and liabilities, and the costs, charges and expenses of the winding up, and for the adjustment of the rights of contributories among themselves. *Subsection (2)* sets out a number of qualifications in relation to *subsection (1)*.

*Section 1279* provides that the court may make an order requiring any contributory to pay any money due from him or her or from the estate of the person whom he or she represents to the unlimited company. The court may allow to the contributory by way of set-off any sum due to the contributory or to the estate which the contributory represents from the unlimited company on any independent contract with the company but not any money due to him or her as a member of the company in respect of any dividend or profit. This section derives from *section 237* of the Companies Act 1963.

## **Chapter 7** Examinerships

*Section 1280* applies *section 510* of the Act to CLGs so that a petition may be presented to the court for the appointment of an examiner to the company. Provision is made for certain modifications in the case of an unlimited company.

## **Chapter 8** Investigations

*Section 1281* is new and applies *section 747(2)* of the Act on investigations by court appointed inspectors to PUCs and PULCs with certain modifications. The number of members required to apply to the court to begin an investigation is increased from 10 to 100. This reflects the fact that public companies tend to have many more members than private companies, and is in accordance with *section 1126*, which makes a corresponding change in respect of PLCs. Furthermore, paragraph (c) is omitted in respect of PULCs, on account of the fact that PULCs do not have share capital; this is in accordance with *section 1225*, which makes a corresponding change in respect of CLGs.

## **Chapter 9** Public Offers of Securities, Market Abuse, Etc.

*Section 1282* applies the provisions of *Chapters 1, 2 and 4* of *Part 23* of the Act to a PUC and a PULC, in so far as those provisions are applicable to companies other than PLCs.

## **Part 20 – Re-registration**

### *Preliminary Note*

*Part 20* of the Act makes provision for re-registration of companies from one type to another company type under the Act. A new approach to re-registration of companies is set out, while also consolidating some of the existing provisions on re-registration. This Part is distinct from the provisions in *Part 2* regarding the conversion of existing private limited companies during the initial 18 month transition period.

*Chapter 1* sets out the interpretation of terms used throughout the Part.

*Chapter 2* contains the general provisions applicable to all re-registrations. The new approach permits a registered company to re-register as any other company type, the formation of which is provided for under the Act. Prior to the introduction of Companies Act 2014, a company was able to re-register as another company type only if there was an express provision in the Companies Acts authorising the re-registration of that particular company type as the other company type. This meant that certain company types (for instance, companies limited by guarantee without a share capital) were not able to re-register, as provision was not made for such company types to re-register as any other company type. Similarly, prior to the Companies Act 2014, any other company type could not re-register itself as a company limited by guarantee. This Part provides that a company is entitled to re-register as any other type by passing a special resolution to that effect.

A copy of the resolution, with an application in the prescribed form, must be delivered to the Registrar of Companies, together with a statement of compliance from a director or secretary of the company. Such company will also have to comply with the requirements in *Chapter 3* in relation to the company type to which it is converting. The focus will be on complying with the requirements which the Act sets out in respect of the other company type to which the company is seeking to convert.

*Chapter 3* sets out the special requirements for re-registration depending on the destination company type in question. A certificate of incorporation on re-registration issued by the Registrar to the applicant company will be conclusive evidence that the requirements of *Part 20* have been complied with. In addition to allowing any type of company to re-register as another type the Act eliminates the bar on private limited companies converting to unlimited where they had previously been re-registered as having been limited. *Section 1296* requires that a limited company that wishes to be re-registered as unlimited, must file its financial statements with the other re-registration documentation unless it has within 3 months from the application, delivered an annual return with financial statements annexed or it was incorporated within 3 months of the application. This avoids the scenario whereby a company could re-register from limited to unlimited, thereby evading the requirement to file annual statements while retaining limited liability. *Section 1297* introduces the ability for companies to re-register as a company limited by guarantee.

### *Explanatory Memorandum*

#### **Chapter 1** Interpretation

*Section 1283* is new and offers an interpretation of terms used throughout this Part. Resultant company” is defined as the company that a company re-registering becomes on the issue to the latter of a certificate of incorporation under *section 1285(6)*. “Resultant company type” means the type of company specified in the special resolution of a company under *section 1285(1)* as being the type of



company which it wishes to be re-registered as. “Statement of compliance” shall be read in accordance with *section 1285(4)(c)*.

*Subsection (2)* imports all definitions in preceding Parts, except to the extent that those definitions are expressly disappplied in this Part.

## Chapter 2

### General provisions as to Re-Registration

*Section 1284* provides that *Part 20* permits a company to change to another company type.

*Section 1285* derives from section 9 of the Companies (Amendment) Act 1983. It is amended to reflect the fact that a company may now re-register as any other company type. *Subsection (1)* provides that the first requirement to effect a re-registration is that a special resolution to that effect be passed by the members in general meeting. This resolution must not only approve the re-registration but must also make all the necessary consequential amendments to the company’s constitution to ensure that it will comply with the requirements in relation to the constitution of the resultant company type. This subsection also provides that an application in the prescribed form should be signed by a director or secretary and should be delivered to the Registrar along with the documents specified in *subsection (3)*.

*Subsection (4)* sets out the documents to be delivered to the Registrar. These are a copy of the special resolution, a copy of the new constitution of the company and a statement of compliance that the resolution has been passed and the requirements of *Part 20* have been complied with.

*Subsection (6)* provides that the Registrar will issue a new certificate of incorporation to acknowledge the change in company type once the Registrar is satisfied that a company is entitled to be so re-registered. *Subsection (7)* provides that the company becomes the new company type on issue of the certificate. “Incorporation” includes only initial incorporation and not re-registration.

*Subsection (9)* states that the re-registration of a company as another company type pursuant to this Part shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings which might have been continued or commenced against it in its former status may be continued or commenced against it in its new status.

*Section 1286* is new and is modelled on equivalent provisions in Part 7 of the UK Companies Act 2006. It provides, in addition to the requirements of *section 1285*, in the case of a company, which does not have a share capital, that proposes to re-register as a company which does have a share capital that there shall, as part of the application under that section, be delivered to the Registrar, a statement of initial shareholdings and a statement of share capital.

*Section 1287* provides that where a PLC wishes to re-register as a LTD or DAC, the resolution may be cancelled by the court. An application to the court for the cancellation of the resolution may be made (a) by the holders of not less than 5 per cent in nominal value of the PLC’s issued share capital or any class of the PLC’s issued share capital or (b) not less than 50 of the PLC’s members. Such an application cannot be made by any person who has consented to or voted in favour of the resolution to re-register the PLC. The application must be made within 28 days of the resolution.

*Subsection (4)* states that if the application is made, the PLC must give immediate notice of that fact to the Registrar; and then within 15 days after the date of the court making its order on the application, or such longer period as the court may at any time direct, the PLC or the resultant company shall deliver to the Registrar a certified copy of the order. This derives from section 15 of the Companies (Amendment) Act 1983 which applies to a PLC seeking to re-register as a private company. If a company (whether the PLC or the resultant company) fails to comply with subsection (4), the company and any officer of it who is in default shall be guilty of a category 3 offence

*Section 1288* states that if the court makes an order confirming a reduction of the capital of a PLC and that reduction has the effect of bringing the nominal value of the company's allotted share capital below the authorised minimum, the court may authorise the PLC to be re-registered as another type of company without its having passed a special resolution for that purpose. The court shall specify in the order the alterations in the PLC's constitution to be made in connection with that re-registration so as to fully give effect to the process of re-registration. This derives from section 17(4) and (5) of the Companies (Amendment) Act 1983.

### **Chapter 3**

#### **Special Requirements for Re-Registration**

*Section 1289* explains what *Chapter 3* does. It sets out the special requirements for re-registration depending on the destination company type in question.

*Section 1290* sets out the particular requirements for re-registration as a private company limited by shares. This section derives in part from section 14 of the Companies (Amendment) Act 1983. A company may be re-registered as a private company limited by shares if, in addition to the relevant *Chapter 2* requirements being complied with, the requirements set out in this section are complied with. Where the company is a PLC, the 28 day period during which an application under *section 1287* for the cancellation of the special resolution must have expired without any such application having been made, or where such an application has been made, the application must have been withdrawn. Alternatively, where either an order, not falling within *clause (II)* has been made under *section 1287* confirming the special resolution, or if an order has been made under that section confirming the resolution but providing that re-registration shall not take effect unless specified terms and conditions are satisfied, those terms and conditions must be satisfied and in either case, a certified copy of that order must have been delivered to the Registrar.

Where the company is an unlimited company, the special resolution required by section 1285(1)(a) must include a statement that the liability of the members is to be limited by shares and if the resultant company is to have an authorised share capital, specifying what is to be that authorised share capital and the fixed amount of the shares into which that share capital is to be divided; or if the resultant company is not to have an authorised share capital, specifying the fixed amount of the shares into which the company's share capital is to be divided.

*Section 1291* sets out the requirements for re-registration as a PLC. In addition to compliance with the relevant *Chapter 2* requirements and *section 1292*, the requirements as set out must be complied with. The company must deliver the following documents to the Registrar (i) a copy of the balance sheet of the company prepared at a date not more than 7 months before the date on which the application for re-registration is received by the Registrar, (ii) an unqualified report by the company's statutory auditors on that balance sheet, (iii) a copy of a written statement by the statutory auditors of the company that, in their opinion, at the balance sheet date, the amount of the company's net assets was not less than the aggregate of its called-up share capital and undistributable reserves and (iv) a

copy of any report prepared under *section 1292*. The statement of compliance must include an extra statement confirming that, between the balance sheet date and the date of the making by the company of the application for re-registration, there has been no change in the financial position of the company that has resulted in the amount of the company's net assets becoming less than the aggregate of its called-up share capital and undistributable reserves. *Subsection (1)(c)* provides that where the company is an unlimited company, the special resolution required by *section 1285(1)(a)* shall include a statement that the liability of the members of the resultant company is to be limited by shares, and specifying what is to be the authorised share capital of the resultant company and the fixed amount of the shares into which that share capital is to be divided.

*Subsection (2)* provides that the Registrar shall not, on foot of the application to re-register a company as a PLC, issue a certificate of incorporation if it appears to the Registrar that (a) by either of the means specified in *section 84(2)*, a reduction of the company's capital has taken place after the date of the passing of the special resolution that the company should be re-registered as a PLC and (b) the reduction has the effect of bringing the nominal value of the company's allotted share capital below the authorised minimum.

*Subsection (3)* states that a qualification shall be treated for the purposes of the definition in this section of an "unqualified report" as not being material in relation to any balance sheet if, but only if, the person making the report states in writing that the thing giving rise to the qualification is not material for the purposes of determining, by reference to that balance sheet, whether, at the balance sheet date, the amount of the company's net assets was not less than the aggregate of its called-up share capital and undistributable reserves.

This section is comprised in substance of those requirements in section 9 of the Companies (Amendment) Act 1983, which are particular to PLCs.

*Section 1292* sets out special requirements as to share capital for companies which are re-registering as a PLC. It provides that a company shall not be re-registered unless, at the time of the special resolution that the company should be re-registered as a PLC is passed –

- a) the nominal value of the company's allotted share capital is not less than the authorised minimum;
- b) each of its allotted shares is paid up at least as to one-quarter of the nominal value of that share and the whole of any premium on it;
- c) where any share in the company or any premium payable on it has been fully or partly paid up by an undertaking given by any person that that person or another should do work or perform services for the company or another, the undertaking has been performed or otherwise discharged; and
- d) where shares have been allotted but as fully or partly paid up to their nominal value or any premium payable on them otherwise than in cash and the consideration for the allotment consists of or includes an undertaking (other than one to which paragraph (c) applies) to the company either –

that undertaking has been performed or otherwise discharged; or there is a contract between the company and any person pursuant to which that undertaking must be performed within 5 years after that time.

This section derives from section 10 of the Companies (Amendment) Act 1983.

*Section 1293* derives from section 9(5) of the Companies (Amendment) Act 1983. It has been removed from the general provisions as to re-registration since it applies only to companies applying to register as a PLC. It provides that where shares are allotted by the company applying to re-register

as a PLC between the balance sheet date and the passing of the special resolution and those shares have been allotted as fully or partly paid up as to their nominal value, or any premium on them, otherwise than in cash, the company shall not make an application for registration under this Part unless, before making the application, the consideration for that allotment has been valued in accordance with the provisions of *Chapter 3 of Part 17* that are applied by this section, and a report with respect to the value of the consideration has been made to the company in accordance with those provisions during the 6 months immediately preceding the date of that allotment.

*Section 1294* concerns the application of certain other provisions of *Part 17* on allotments to a company that has passed a resolution for re-registration. This section derives from section 37 of the Companies (Amendment) Act 1983. The effect of this section is to extend to an existing private company, or an unlimited company which has duly resolved to re-register as a PLC, the restrictions that apply to PLCs regarding the payment of non-cash consideration for the allotment of shares (including the provisions for the independent valuation of such shares).

*Section 1295* reproduces section 71 of the Companies Act 1963 and provides that an unlimited company has the power to provide for reserve share capital on re-registration.

*Section 1296* sets out the particular requirements which need to be fulfilled in order that a limited company can re-register as an unlimited company. A limited company may be re-registered as an unlimited company if, in addition to the company complying with the relevant *Chapter 2* requirements, all of the members of it have assented to its being so re-registered and the following steps are complied with – (a) the company must deliver to the Registrar the prescribed form of assent together with the financial statements and report on them of the company’s statutory auditors on financial statements and (b) the statement of compliance includes confirmation by a director or secretary of the company that (i) the persons by whom, or on whose behalf, the form of assent referred to in paragraph (a) is subscribed constitute the whole membership of the company; and (ii) if any of the members have not, themselves, subscribed that form, that the directors have taken all reasonable steps to satisfy themselves that each person who subscribed it on behalf of a member was lawfully empowered to do so.

*Subsection (3)* provides that the financial statements referred to in *subsection (1)(a)(ii)* are financial statements of the company covering a period that (a) ends on a date that is not more than 3 months prior to the date of the application to re-register; and (b) subject to *subsection (4)*, is of at least 12 months duration.

This section is modelled on section 52 of the Companies (Amendment) Act 1983. The statutory declaration of the directors as to the completion of the assent by all members has been replaced by the inclusion of this confirmation in the statement of compliance in order to facilitate e-filing.

*Section 1297* sets out the particular requirements for re-registration of a company as a CLG. This section is new, as, prior to the introduction of the Companies Act 2014, the Companies Acts did not provide for conversion to a guarantee company. A company may be re-registered as a company limited by guarantee if, in addition to the company complying with the relevant *Chapter 2* requirements, the requirements as set out below are also complied with.

In the case of a company with a share capital, all the members must assent to its being re-registered as a company limited by guarantee and the conditions specified in *subsection (2)* must be satisfied. These conditions in *subsection (2)* are that the company delivers to the Registrar the form of assent to the company’s being re-registered as a company limited by guarantee subscribed to by, or on behalf of, all members of the company together with a statement of guarantee; the statement of compliance

must include confirmation that the persons by whom, or on whose behalf, the form of assent subscribed constitute the whole membership of the company; and if any of the members have not, themselves, subscribed that form, that the directors have taken all reasonable steps to satisfy themselves that each person who subscribed to it on behalf of a member was lawfully empowered to do so. *Subsection (2) (c)* adds a further condition that unless the position concerning the allotted share capital of the company, is as referred to in *subsection (3)* at the date of the application for re-registration, the court, on application to it by the company in that behalf, sanctions its re-registration as a company limited by guarantee and give directions as to how its company capital is to be treated in the framework of the resultant company.

*Subsection (3)* provides that the position concerning the company's allotted share capital in *subsection (2)(c)*, is that the following conditions are satisfied – no amount is paid up on it; and its nominal value does not exceed the aggregate maximum amount that the company's shareholders, who become members of the resultant company on the issue of the certificate of incorporation under *section 1285(6)*, would be liable to pay by virtue of the latter company's memorandum were the latter immediately then to be wound up.

Where the company is an unlimited company, the special resolution required by *section 1285(1)(a)* must include a statement that the liability of the members of the resultant company is to be limited as provided for in the relevant alterations of the constitution made by that resolution.

*Section 1298* deals with the particular requirements for re-registration of a company as a DAC limited by shares. A company may be re-registered as a DAC limited by shares if the requirements (in addition to the relevant *Chapter 2* requirements) set out are also complied with.

Where the company is a PLC these requirements are that, where the period during which an application under *section 1287* for the cancellation of the special resolution has expired without any such application having been made (28 days from date of passing), or where such an application has been made, the application has been withdrawn; or either an order, has been made confirming the resolution or if an order has been made under that section confirming the resolution but providing that re-registration shall not take effect unless specified terms and conditions are satisfied, those terms and conditions are satisfied, and in either case, a certified copy of that order has been delivered to the Registrar.

Where the company is an unlimited company, the special resolution required by *section 1285(1)(a)* must include a statement that the liability of the members of the resultant company is to be limited by shares and must specify what is to be the authorised share capital of the resultant company and the fixed amount of the shares into which that share capital is to be divided.

*Section 1299* deals with the particular requirements for re-registration of a company as a DAC limited by guarantee. A company may be re-registered as a DAC limited by guarantee if the requirements (in addition to the relevant *Chapter 2* requirements) set out are also complied with.

Where the company is a PLC these requirements are, where the period during which an application under *section 1287* for the cancellation of the special resolution has expired without any such application having been made (28 days from date of passing), or where such an application has been made, the application has been withdrawn; or either an order has been made confirming the resolution under *section 1287*, or if an order has been made under that section confirming the resolution but providing that re-registration shall not take effect unless specified terms and conditions are satisfied, those terms and conditions are satisfied, and in either case, a certified copy of that order has been delivered to the Registrar.

Where the company is an unlimited company, the special resolution required by *section 1285(1)(a)* must include a statement that the liability of the members of the resultant company is to be limited as provided for in the relevant alterations of its constitution made by that resolution. Where the company is a company with a share capital, all the members of it must assent to it being re-registered as a DAC limited by guarantee and the conditions specified in *subsection (2)* must be satisfied.

*Subsection (2)(c)* adds a further condition, that unless the position concerning the allotted share capital of the company, is as referred to in *subsection (3)* at the date of the application for re-registration, the court, on application to it by the company in that behalf, must sanction its re-registration as a DAC limited by guarantee and gives directions as to how its company capital is to be treated in the framework of the resultant company.

*Subsection (3)* provides that the position concerning the company's allotted share capital in *subsection (2)(c)*, is that the following conditions are satisfied – no amount is paid up on it; and its nominal value does not exceed the aggregate maximum amount that the company's shareholders, who become members of the resultant company on the issue of the certificate of incorporation under *section 1285(6)*, would be liable to pay by virtue of the latter company's memorandum were the latter immediately then to be wound up.

## **Part 21 – External Companies**

### *Preliminary Note*

*Part 21* of the Act makes provision for the registration and disclosure requirements of external companies (also referred to as foreign companies or overseas companies) which have been formed and registered outside the State but which have a connection with Ireland. The Company Law Review Group (CLRG) proposed that the law in relation to external companies be modified. Prior to the introduction of the Act, company law provided for both the concept of “place of business” and the concept of “branch”. This position has changed so that under the Companies Act 2014 the law provides only for the “branch” concept. Ireland is required to provide for the “branch” concept under EU law, but is not required by EU law to provide for a “place of business” – the latter arose only under the old Irish domestic law.

The concept of “place of business” was governed by Part XI of the Companies Act 1963. Place of business was not defined under that Act but is generally thought to mean an entity established outside Ireland which is performing (in Ireland) activities ancillary or incidental to the company’s business. Where an external limited liability company established a place of business within Ireland, it was required to register as such with the CRO and was obliged to provide a copy of its memorandum and articles of association. The CRO would then issue to that company an external company number. The main feature of a place of business was that it did not have to file accounts with the CRO.

The concept of “branch” is governed by the Branch Disclosure Regulations 1993 (S.I. 395 of 1993) which implements the EU Branch Disclosure Directive 1989 (the 11<sup>th</sup> Company Law Directive, 89/666). As with a place of business, the Directive does not provide a definition for branch. However, an indication of what a branch is can be found in the ECJ case of *Etablissements Somafer -v- Saar-Fermgas* [1978] E.C.R. 2183, which states that a branch has the appearance of permanency and is physically equipped to negotiate business with third parties directly. Where a branch is a limited liability external company, it must register with the CRO. It is given an external company number and it must file its accounts in Ireland.

By not retaining the concept of “place of business”, the Act aims to remove the uncertainty in the previous system whereby it could be unclear whether a particular company was a branch or a place of business. The consequences of this change are that now external companies will have to elect to register as a branch (and thus be required to file accounts) or will not register at all.

Another significant change is the abolishment of the Slavenburg file. Prior to the introduction of the Companies Act 2014, an external company which set up a branch in the State was obliged to file particulars of charges over property in the State. Under the Act where an external company establishes a branch, but does not register as an external company under *sections 1302 or 1304* any charge which it creates cannot be registered and the consequences of not registering a registrable charge, as set out in Part 7 of the Act, will apply to them under *section 1301(4)*.

### *Explanatory Memorandum*

#### **Chapter 1** Preliminary

*Section 1300* provides definitions for the purposes of this Part. “External company” is defined to mean either an EEA company or a non-EEA company. The term “accounting documents” is taken to mean the accounts for the financial year of an external company (or the consolidated accounts if it has one or more subsidiaries) together with any annual report of the directors of the company for that financial year. The documents will have been audited in accordance with the laws of the state in

which the external company is incorporated and therefore the definition “accounting documents” will include the report of the auditors on the company accounts and the directors’ annual report. However, if the external company’s home state has granted the external company an audit exemption then these auditors’ reports will not be required.

This section is taken in part from Regulation 2 of the Branch Disclosure Regulations 1993 (S.I. 395 of 1993), with some new additions.

*Section 1301* deals with the application of certain provisions of *Parts 1 to 14* of the Act to external companies. *Subsection (1)* explains the meaning of “relevant external company” as used in this section. This is a company that has established a branch in the State either before or after the commencement of this section and where that branch has not been subsequently closed. This derives from section 351 of the Companies Act 1963.

*Part 7* of the Act on the registration of charges will apply to external companies in the circumstances laid down in *subsection (4)*. These circumstances are: where charges on property in the State are created or acquired by an external company after the commencement of this section or where judgment mortgages are created after the commencement of this section that affect property of an external company in the State. This is taken from section 111 of the Companies Act 1963. Prior to the introduction of the Companies Act 2014, the law in relation to the registration of charges applied to all external companies, even companies that had not registered as such with the CRO. Due to the fact that unregistered foreign companies did not have a registration number, it was not possible for the CRO to register the charge in the normal way. Instead, the charge was entered on what was known as the “Slavenburg file”, which was a paper based file kept in the CRO and was available for public inspection. The CRO no longer accepts notices of charges from external companies that have not registered as such with the CRO. This is provided for in *section 1301(5)*.

*Subsection (3)* applies *section 133* of the Act to an external company in the same way as it applies to a private company limited by shares. *Section 133* contains the prohibition on an undischarged bankrupt being a director or secretary of a company.

*Subsection (6)* enumerates further provisions of the Act that are to apply to external companies. These include *Part 13* on investigations, certain provisions of *Part 14* relating to disclosure orders and restrictions, in addition to the offence provisions and evidential matters contained in that Part.

*Subsection (7)* contains adaptations to certain provisions contained in *Parts 13* and *14* of the Act as those provisions apply to external companies.

## **Chapter 2**

### **Filing Obligations of External Companies**

*Section 1302* lays down the filing obligations of EEA companies in a manner compatible with the 11<sup>th</sup> EU Company Law Directive (89/666/EC) and replaces Regulation 4 of the Branch Disclosure Regulations 1993 (S.I. 395 of 1993). An EEA company that establishes a branch in the State is obliged to deliver a copy of its constitutive documents to the Registrar within 30 days of so establishing that branch. The company must also deliver certain particulars to the Registrar, including the name and legal form of the company, a copy of its certificate of incorporation, the address of its branch and the activities carried out there, along with details of its directors and secretary. The company must also nominate a person entitled to accept service on its behalf and authorised to ensure compliance with the provisions of this Part. If there are any changes to the constitutive documents of the company or its registered address, or if the winding up of the company is commenced, these details must also be provided to the Registrar. The Registrar must also be informed if the branch is closed or otherwise ceases to be established in the State. Provision is also made in this section for the



transposition of Directive 2012/17/EU which concerns the interconnectedness of registers between EU member States (*subsections (6), (7) and (8)*). Failure to comply with the provisions of this section will result in a category 3 offence.

*Section 1303* makes provision for the filing of accounting documents by EEA companies. It amends Regulation 11 of the Branch Disclosure Regulations 1993 (S.I. 395 of 1993). It contains an obligation on EEA companies that establish a branch in Ireland to disclose their accounting documents (by registration with the Registrar) to the same extent to which they are so required to disclose their accounts to the public in their home state. It is proposed that the obligation to file in Ireland will be not later than 30 days following the date on which the obligation to file arises in the company's home state. It will be a category 3 offence to fail to comply with this section for the company and any officer of it in default. For the first time the Registrar will be able to bring summary proceedings to prosecute persons who commit the offence under this section.

*Section 1304* is substantially unchanged from the law prior to the CA 2014. It is derived from Regulation 7 of the 1993 Regulations, and also replaces sections 352 and 353 of the Companies Act 1963. It makes provision for companies registered in countries that do not comply with EU standards for company registration and filing of documents. The offence under this section has been brought within the general scheme of offences under Part 14, and is now a category 3 offence.

*Section 1305* contains the provisions in relation to the filing of accounting documents by non-EEA companies. If there is a requirement to file accounting documents in the home state, then the external company must also file those documents with the Registrar. As an alternative, the external company may opt to deliver to the Registrar accounts prepared in accordance with the EU Accounting Directives (Council Directive 78/660/EEC and where appropriate, Council Directive 83/349/EEC) or alternatively, IFRS accounts (international financial reporting standards). These accounts must be audited, unless audited accounts would not be required by the relevant EU Directive.

If there is no requirement to file accounting documents in the home state, then the external company must file accounts prepared in accordance with the EU Accounting Directives (Council Directive 78/660/EEC and where appropriate, Council Directive 83/349/EEC) or alternatively, prepare and file IFRS accounts. These accounts must be audited, unless audited accounts would not be required by the relevant EU Directive.

*Subsections (5) and (6)* deal with the date of delivery of the accounts and *subsection (8)* lays down a category 3 offence for failure to comply with the provisions of this section. This section will not apply to an external company that is a credit or financial institution as such companies will be subject to alternative requirements specific to those sectors.

*Section 1306* corresponds with Regulation 9 of the Branch Disclosure Regulations and deals with the return of capital by a non-EEA company. It obliges a non-EEA company to deliver to the Registrar a statement indicating the amount of the called up share capital of the company as of a date not earlier than two months before the delivery of the statement. The statement should be delivered at the same time as the relevant accounting documents. Such a statement will however not be required where the information in relation to the called up share capital is included in the relevant accounting documents.

### **Chapter 3**

#### **Disclosure in Certain Business Documents and Translation of Documents**

*Section 1307* lays down the particulars that external companies must disclose on their letters and order forms and derives from Regulations 4 and 7 of the Branch Disclosure Regulations 1993 (S.I. 395 of 1993), with some modifications. The requirements are slightly different for EEA and non-EEA companies.

EEA companies must, on every letter and order form, give particulars of their place of registration and registration number; the name of the company (if different from the name of the branch), its legal form and its registered address; if it is being wound up, the fact that it is so; and the fact that the branch is registered in the State and the number under which it is registered. If there is a reference to the share capital of the company on any letter or order form, the company must ensure that such a reference is to the paid-up share capital of the company and nothing else.

Regarding non-EEA companies, their letters and order forms must state the name of the company (if different from the branch); the place of registration of the company and its registration number (if entry on a register is required by law in its home state); and the fact that the branch is registered in the State and the number under which it is registered. Similarly to EEA companies, if there is a reference to the share capital of the company on any letter or order form, the company must ensure that such a reference is to the paid-up share capital of the company and nothing else.

Failure to comply with any of the provisions of this section will result in a category 3 offence for the company involved and any officer of it who is in default.

*Section 1308* provides that the Registrar shall publish in the CRO Gazette, within 21 days after the date of such delivery, notice of the delivery to the Registrar under this Chapter of any document. The purpose of the section is to provide for the requirement of notification of publication of filings in the Gazette for an external company who has a branch in the state. This is a requirement under Regulation 10 of the Branch Disclosure Regulations 1993 (S.I. 395 of 1993).

*Section 1309* provides that all documents required to be delivered or notified to the Registrar by an external company must have annexed to them a certified translation of the document in the Irish or English language. This requirement derives from Regulation 13 of the Branch Disclosure Regulations 1993 (S.I. 395 of 1993). *Subsections (2) and (3)* have been newly inserted and provide for circumstances where there is a discrepancy between the text, in its original language and the certified translation of it. In such circumstances, the certified translation may not be relied upon by the external company against a third party.

#### **Chapter 4** Service of Documents

*Section 1310* contains the provisions on service of documents and derives from section 356 of the Companies Act 1963 and Regulation 17 of the Branch Disclosure Regulations 1993 (S.I. 395 of 1993). Documents required to be served on an external company will be sufficiently served if they are sent to a person who has been notified to the Registrar as entitled to accept service on behalf of that external company in the State. If the external company has not notified the Registrar of a person who is authorised to accept service on the company's behalf in the State, then the document may be validly served by leaving it at or sending it by post to any branch established by that external company in the State. The document may be similarly validly served where the person who has been notified to the Registrar as entitled to accept service is deceased, or has ceased to reside at the address provided, or refuses to accept service, or for any other reason where the document cannot be served.

The provisions of this section will cease to apply to an external company two years after the date on which it gives notice that it has closed a branch in the State.

## **Chapter 5** **Compliance**

*Section 1311* re-enacts Regulation 18 of the Branch Disclosure Regulations 1993 (S.I. 395 of 1993) and states that the duty of securing compliance by an external company with the provisions of this Part will fall upon the persons authorised by the company in that regard.

DELETED

## **Part 22 - Unregistered Companies and Joint Stock Companies**

### *Preliminary Note*

*Part 22* deals with unregistered companies and joint stock companies and the application of the Act to companies formed or registered under previous Acts. It also provides a mechanism for an unregistered company to register as a PLC.

*Chapter 1* derives from section 377 of the Companies Act 1963 (as amended) and deals with the application of the Act to unregistered companies.

*Chapter 2* concerns the registration of certain bodies (other than joint stock companies) as companies.

*Chapter 3* deals with the winding up of an unregistered company. It largely re-enacts (with some minor modifications) sections 344 to 349 of the Companies Act 1963.

*Chapter 4* addresses the application of the Act to companies formed or registered under former acts. This largely re-states the provisions of Part VIII of the Companies Acts 1963.

*Chapter 5* broadly re-states the provisions of Part IX of the Companies Act 1963, but has been amended to apply primarily to joint stock companies.

### *Explanatory Memorandum*

#### **Chapter 1**

##### **Application of Act to Unregistered Companies**

*Section 1312* concerns the application of certain provisions of the Act (those set out in Schedule 14) to certain bodies corporate which are neither companies formed and registered under previous Acts nor statutory corporations. This section re-enacts section 377 of the Companies Act 1963 as amended by section 250 of the Companies Act 1990, section 15 of the Companies (Amendment) Act 1982 and section 57 and Schedule 2 of the Companies (Auditing and Accounting) Act 2003. Section 377 of the CA 1963 applied the provisions of the Companies Acts that are listed in the Ninth Schedule to the CA 1963, to “all bodies corporate incorporated in and having a principal place of business in the State” other than those set out in subsection (2) of section 377.

*Subsection (1)* derives from section 377 of the CA 1963 as amended by section 250(1) of the CA 1990. The cross-references have been updated in accordance with the structure of the Act. *Subsections (2), (3), (6) (7), (8) and (9)* derive from sections 377(2) to (6) of the CA 1963. *Subsection (10)* prescribes a category 3 offence for default in complying with *subsections (8) or (9)*. This derives from section 377(7) CA 1963 as amended by section 15 of the C(A) Act 1982 (which increased the penalty for the offence) and section 57 and Schedule 2 of the Companies (Auditing and Accounting) Act 2003.

*Section 1313* concerns the Minister’s power to make regulations to add or subtract from the list of provisions of this Act specified in Schedule 14. It derives from section 250 of the Companies Act 1990.

#### **Chapter 2**

##### **Registration of Certain Bodies (Other than Joint Stock Companies) as Companies**

*Section 1314* provides definitions for “registration date” and “registration resolution”.

*Section 1315* is new and concerns the registration as a company of a body to which *section 1312(1)* applies. It is based on the procedure in Schedule 9 to the Companies Act 1963, under which unregistered companies may register as limited companies. The purpose of this section is to make provision for an unregistered company to register as any of the company types, that is, a private limited company, unlimited company, etc. provided for under the Act. A society registered under the Industrial and Provident Societies Acts 1893 to 2014 may avail of this provision. This section derives in part from section 328 of the Companies Act 1963.

*Section 1316* lays down the requirements for registration under this Chapter as a company. *Subsection (1)* stems from section 328(6) of the Companies Act 1963. The requirement regarding assent now not only captures the members' deciding as to whether the body should register as a company but also the type of company that it should register as. *Subsection (2)* derives from section 238(9) of the CA 1963. *Subsections (3), (4) and (5)* are new. The requirements in *subsection (8)* are largely drawn from those in section 330 CA 1963. It requires that an application to the Registrar shall be accompanied by a copy of the statement required by *subsection (3)* and of the registration resolution, each certified by a director or other officer of the body corporate, a list showing the names and addresses of all persons who were members of the body corporate, the nominal share capital and the number of shares into which it is divided or the amount of stock of which it consists, the number of shares of the body corporate taken and the amount paid on each share and the memorandum of association and articles of the proposed company. The statement is to be sent 21 days prior to the moving of a registration resolution by the body corporate concerned, to every member of the body corporate entitled to notice of the meeting.

*Section 1317* sets out the particular requirements for registration of a body corporate as a PLC and is akin to the procedure set out in *section 1291* (particular requirements for re-registration of a company as a PLC) in *Part 20* of the Act.

*Section 1318* concerns the special requirements in respect of the share capital of a body corporate which must be complied with in order for a body corporate to register as a PLC. This follows the same method as set out in *section 1292* (requirements as to share capital of a company applying to re-register as a PLC) in *Part 20* of the Act.

*Section 1319* concerns shares allotted by a body corporate applying to register as a PLC between the balance sheet date and the passing of the registration resolution. This follows the approach set out in *section 1293* in *Part 20* of the Act.

*Section 1320* applies certain other provisions of *Part 17* on allotments to a body that passed a resolution for registration as a PLC.

*Section 1321* provides that the Minister may make regulations specifying requirements, additional to those contained in the preceding provisions of this Chapter that must be complied with before the application may be acceded to the Registrar.

*Section 1322* concerns the change of name for the purposes of registration and re-enacts section 334 of the Companies Act 1963.

*Section 1323* concerns registration and its effects. *Subsection (1)* provides that the Registrar shall certify in writing that the body applying for registration is incorporated, on a date specified by the Registrar, as the type of company specified in the application and shall issue to the company a certificate of incorporation in respect of it. This derives from section 336(1) of the Companies Act 1963.

*Subsection (3)* provides that a certificate issued under this section in respect of a company shall be conclusive evidence that the requirements of this Chapter have been complied with. This derives from section 336(2) of the Companies Act 1963, as amended by the Companies (Amendment) Act 1983, Schedule 1, paragraph 21.

*Subsection (4)(a)* derives from section 340 of the Companies Act 1963 and provides that the provisions of this Act relating to the numbering of shares shall not apply to stock that had been issued, or shares, not numbered, that had been issued, by the company in its former status before the registration date. *Subsection (4)(b)* is new and provides that the company shall not be obliged to deliver any document or return, which relates to the period prior to the registration date, if it would not have been required to deliver such document or return had it not registered as a company.

*Subsection (5)* concerns the vesting of property on registration and derives from section 337 of the Companies Act 1963.

*Subsection (6)* stems from section 338 of the Companies Act 1963 and provides a saving for existing liabilities of the company in its former status.

*Subsection (7)* provides for the continuation of existing actions. It derives from section 339 of the Companies Act 1963.

*Section 1324* contains supplemental provisions to *section 1323* in relation to transitional provisions applicable to legal instruments related to the body corporate prior to its registration as a company and is drawn from section 107 of the Building Societies Act 1989.

*Section 1325* is new and sets out the proposed mechanism that will synchronise repeals of the previous law with the registration of an unregistered company as a PLC under this Part.

### **Chapter 3** Winding Up of Unregistered Company

*Section 1326* derives from section 344 of the Companies Act 1963. This section is no longer labelled “meaning of unregistered company” - it is entitled “Chapter 3 - construction of expression “unregistered company””. It sets out what will be classed as an unregistered company for the purposes of this Chapter.

*Section 1327* provides that this Chapter is subject to Chapters I and III of the EU Insolvency Regulation (Council Regulation (EC) 1346/2000).

*Section 1328* concerns the winding up of unregistered companies and is derived from section 345 of the Companies Act 1963. *Subsection (6)* which re-enacts section 345(7) of the CA 1963, deals with the winding up of companies incorporated outside the State which have been carrying on business in the State.

*Section 1329* derives from section 345(5) of the Companies Act 1963 and sets out the 4 cases in which an unregistered company shall be deemed to be unable to pay its debts. This section has been modified as section 345(5) of the CA 1963 was considered to be too densely worded.

*Section 1330* concerns contributories in the winding up of unregistered companies and re-enacts section 346 of the Companies Act 1963.

*Section 1331* re-enacts section 347 of the Companies Act 1963. It provides the court with a power to stay or restrain proceedings.

*Section 1332* re-enacts section 348 of the Companies Act 1963. It provides that where an order has been made for the winding up of an unregistered company, no action or proceeding shall proceed or commence against any contributory of the company in respect of any debt of the company, except by leave of the court and subject to such terms as the court may impose.

*Section 1333* provides that the provisions of this Chapter are to be cumulative to those provisions contained in *Part 11* relating to winding up. This re-enacts section 349 of the Companies Act 1963.

#### **Chapter 4**

##### **Provisions Concerning Companies Registered, but not Formed, under Former Acts and Certain Other Existing Companies**

*Section 1334* deals with the application of the Act to companies registered but not formed under former Companies Acts. It derives from section 325 of the Companies Act 1963, the purpose of which was to apply the Companies Acts to companies formed before 1 April 1964 which, although registered under former Companies Acts, were formed in some other manner (e.g. by special Act of Parliament or by Charter).

*Section 1335* deals with the application of the Act to unlimited companies re-registered as limited companies under certain former enactments. It derives from section 326 of the Companies Act 1963.

*Section 1336* sets out provisions as to companies registered under Joint Stock Companies Acts. This derives from section 327 of the Companies Acts 1963.

#### **Chapter 5**

##### **Registration of Joint Stock Companies under this Act**

*Section 1337* contains interpretation provisions for the purposes of *Chapter 5*. The definition of “joint stock company” is taken from section 329 of the Companies Act 1963. Some of the wording in the previous definition has been modified slightly by the Act. A joint stock company means a company (a) having a permanent paid up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other; and (b) formed on the principle of having for its members, the holders of those

shares or that stock, and no other persons, and such a company when registered with limited liability under this Chapter shall be deemed to be a company limited by shares.

*Section 1338* deals with companies capable of being registered under this Chapter. This derives from section 328 of the Companies Act 1963. This section is primarily of relevance for companies formed otherwise than in pursuance of the former Companies Acts and that wish to register under the new Act as a CLS, DAC, CLG or unlimited company.

*Section 1339* re-enacts section 330 of the Companies Act 1963. It sets out the documents to be delivered to the Registrar for registration of a joint stock company as a company under this Chapter.

*Section 1340* re-enacts section 332 of the Companies Act 1963. It provides that the lists of members and directors and any other particulars relating to the company required to be delivered under this Chapter to the Registrar shall be verified by a declaration of any 2 or more directors or other principal officers of the company.

*Section 1341* states that the Registrar may require evidence as to the nature of the company which proposes to be registered under this Chapter. This re-enacts section 333 of the Companies Act 1963.

*Section 1342* provides that when a company registers under this Chapter with limited liability, the appropriate words, for example “limited” or “teoranta”, shall form and be registered as part of, its name. This replaces section 335 of the Companies Act 1963.

*Section 1343* provides that the Registrar shall issue to the company a certificate of incorporation. A certificate of incorporation shall be conclusive evidence that the requirements of this Chapter in respect of registration have been complied with and the company is duly registered under this Act. This section replaces section 336(2) of the Companies Act 1963, as amended by the Companies (Amendment) Act 1983, Schedule 1, paragraph 21.

*Section 1344* sets out the effects of registration under this Chapter and replaces section 340 of the Companies Act 1963.

*Section 1345* provides that power is given to substitute a memorandum and articles of association for the old deed of settlement where this was the governing constitutional document of the company. This re-enacts section 341 of the Companies Act 1963.

*Section 1346* re-states section 342 of the Companies Act 1963 and provides the court with a power to stay or restrain proceedings after the presentation of a petition for the winding up of a company and before the making of a winding up order.

*Section 1347* re-states section 343 of the Companies Act 1963. It provides that where an order for the winding up of a company registered under this Chapter has been made, no action or proceeding shall proceed or commence against the company or any contributory of the company in



respect of any debt of the company, except by leave of the court and subject to such terms as the court may impose.

DELETED

## **Part 23 - Public Offers of Securities, Financial reporting by Traded Companies, Prevention of Market Abuse, Etc.**

### *Preliminary Note*

This *Part 23* contains the provisions in the Act concerning prospectus law (*Chapter 1*), market abuse law (*Chapter 2*), and transparency (regulated markets) law (*Chapter 4*). It was decided, for the sake of clarity, to house these provisions in a stand-alone Part rather than in *Part 17* of the Act on PLCs, as originally envisaged in the General Scheme. References to “Minister” in this *Part 23* means the Minister for Finance.

*Chapter 1*, concerning public offers of securities, provides the statutory framework including the basis for the making by the Minister of regulations to transpose the Prospectus Directive (2003/71/EC). The provisions in this Chapter are taken from Part 5 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Chapter 2* on market abuse law provides the statutory framework including the basis for the making by the Minister of regulations to transpose the Market Abuse Directive (2003/6/EC). This Chapter re-enacts Part 4 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Chapter 3* lays down the requirement for a corporate governance statement to be included in the directors’ report of a traded company. It also deals with the application of certain provisions of *Parts 5* and *6* of the Act where the company is a traded company.

*Chapter 4* deals with the transparency obligations of publically quoted companies and provides the statutory framework including the basis for the making by the Minister of regulations to transpose the Transparency Directive (2004/109/EC). This Chapter derives from Part 3 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006.

This Part contains the only offences created by the Act which stand outside the four-fold categorisation are certain prospectus offences which attract a term of imprisonment of up to 5 years and a fine of up to €1,000,000 or both), market abuse offences (which attract a term of imprisonment of up to 10 years and a fine of up to €10,000,000 or both) and transparency offences (which attract a term of imprisonment of up to 5 years and a fine of up to €1,000,000 or both).

### *Explanatory Memorandum*

#### **Chapter 1** Public Offers of Securities

*Section 1348* contains definitions for the purposes of this Chapter and derives in part from section 38 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005, as amended by the Investment Funds, Companies and Miscellaneous Provisions Act 2006. The definitions are similar to those in Part III of the Companies Act 1963, amended and supplemented where necessary to take account of the Prospectus Directive (2003/71/EC). A number of the definitions are based on definitions used in the Directive with appropriate modifications including ‘issuer’, ‘offeror’ and ‘offer of securities to the public’. “Securities” is given the same meaning as in Irish prospectus law and includes shares and debentures of a company.

The definitions also include the definition of the ‘2003 Prospectus Directive’ and ‘Irish prospectus law’ which encompasses regulations made to transpose the Directive and the EU Prospectus Regulation which has direct application.

In this Chapter “Minister” means the Minister for Finance.

Also included is a definition of ‘local offer’ to deal with documents issued for certain transactions not regulated by the Directive. These will be required to contain a clear warning that such offers are not prepared pursuant to the Prospectus Directive and have not been reviewed prior to issue by any regulatory authority. The definition of “local offer” reflects the increase in the threshold from “€2,500,000” to “€5,000,000” made by the Prospectus (Directive 2003/71/ EC) (Amendment) Regulations 2012.

A number of other definitions are included in order to clarify terms used in this Chapter.

*Section 1349* imposes a civil liability for misstatements in a prospectus and re-states section 41 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005, as amended by the Investment Funds, Companies and Miscellaneous Provisions Act 2006. It provides that certain persons will be liable to pay compensation to persons who acquired securities on faith of the prospectus for any loss or damage sustained because of untrue statements or omissions in the prospectus.

*Section 1350* provides for exceptions and exemptions applying to the imposition of civil liability in *section 1339* above, and derives from section 42 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005, as amended by the Investment Funds, Companies and Miscellaneous Provisions Act 2006.

*Section 1351* restricts liability in cases where non-equity securities are solely involved and is taken from section 43 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005, as amended by the Investment Funds, Companies and Miscellaneous Provisions Act 2006.

*Section 1352* provides for indemnification of certain persons in cases where a director has withdrawn his or her consent, has not consented to become a director or has not consented to the issue of a prospectus and to an expert who has withdrawn his or her consent or has not given his or her consent to the issue of a prospectus. This derives from section 44 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005, as amended.

*Section 1353* provides that an expert must give his or her consent to the inclusion of statements made by him or her in a prospectus. This is taken from section 45 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005, as substituted by section 14 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006. *Subsection (3)* states that if any prospectus is issued in contravention of this section, the issuer and every person who is knowingly a party to the issue thereof shall be guilty of a category 3 offence.

*Section 1354* allows the Minister to make regulations for the purpose of implementing the Prospectus Directive and re-enacts section 46 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Section 1355* has been newly inserted and provides a saver for existing regulations made under section 46 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. It expands upon *Paragraph 5 of Schedule 6* to the Act which provides that the Prospectus (Directive

2003/71/EC) Regulations (S.I. No. 324 of 2005) and any regulations amending those regulations will continue in force and may be amended or revoked accordingly.

*Section 1356* provides for penalties for conviction on indictment for offences under Irish prospectus law. This would cover a situation where securities are offered to the public or are listed without issuing a prospectus. This is one of the few offences under the Act that does not fall into the 4-fold categorisation of offences adopted throughout the Act. A person found guilty of an offence under Irish prospectus law can be liable, for conviction on indictment, to a fine not exceeding €1,000,000 or imprisonment for a term not exceeding 5 years or both. This derives from section 47 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Section 1357* provides for criminal liability for untrue statements and material omissions in a prospectus and derives from section 48 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. The person who authorised the issue of the prospectus will be guilty of a category 2 offence unless he or she proves that the untrue statement was immaterial given the circumstances of the case, or if he or she believed that the statement was true up to the time of issue of the prospectus. Alternatively, the person may avoid liability if he or she proves the omission was immaterial given the circumstances of the case or that he or she did not know it or if he or she proves that the making of the statement or omission ought to be excused given the circumstances of the case.

*Section 1358* lays down requirements regarding minimum subscriptions and matters to be stated in the offer documentation. This section and the following *section 1359* reformulate section 53 of the Companies Act 1963 and section 22 of the Companies (Amendment) Act 1983. It should be noted that, prior to the introduction of the Act, section 53 CA 1963 was confined to a prospectus, whereas section 22 C(A)A 1983 covered every type of offer document and not just a prospectus.

*Subsection (1)* emanates from section 22 CA(A) 1983. It provides that an allotment of share capital of a PLC must not be offered for subscription unless that capital is subscribed for in full. Alternatively, if the offer so states, even if the capital is not subscribed for in full, the amount of the capital subscribed for may be allotted in any event or in the event of the conditions specified in the offer being satisfied.

*Subsection (2)* derives from section 53(1) CA 1963, as substituted by section 53 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. If a prospectus states the minimum amount which, in the opinion of the directors, must be raised from an issue of shares and also states that no allotment can be made unless that minimum amount has been subscribed and the sum payable for the amount has been paid up, then no such allotment can be made unless that minimum amount has been subscribed and the sum payable has been paid up.

*Subsection (3)* is taken from section 53(2) CA 1963 and deals with the minimum subscription amount. *Subsection (4)* reflects section 53(5) CA 1963 which provides that conditions requiring or binding applicants for shares to waive compliance with *subsections (1) to (3)* of this section, or *section 1359*, will be void.

*Subsection (5)* is drawn from section 53(6) CA 1963 and disapplies *subsections (2), (3) and (4)* in cases of allotments of shares subsequent to the first allotment of shares offered to the public for subscription. This is because it is not considered appropriate to require the minimum subscription where there has already been an allotment of shares to the public, as the business is at that stage a going concern.

*Section 1359* follows on from *section 1358* above in reformulating section 53 of the Companies Act 1963 and section 22 of the Companies (Amendment) Act 1983.

*Subsections (1) to (3)* derive from section 53(4) of the Companies Act 1963. They deal with circumstances where shares have been allotted in contravention of *section 1358(1)*, or where the conditions set down in *section 1358(2)* have not been satisfied within 40 days of the first issue of the prospectus. Provision is made for the repayment of monies received from applicants for shares in those circumstances. *Subsection (3)* gives a protection to directors from the liability laid down in *subsection (2)(b)* (where the money is not repaid) where the director can prove that the default in the repayment of the money was not due to any misconduct or negligence on his or her part.

*Subsections (4) and (5)* reflect section 22(3) of the Companies (Amendment) Act 1983 and make provision for circumstances where the relevant shares were offered as wholly or partly payable otherwise than in cash.

*Section 1360* re-enacts section 55 of the Companies Act 1963, as amended by Schedule 1, paragraph 9 to the Companies (Amendment) Act 1983. If a PLC makes an allotment in contravention of *section 1358*, that allotment will be voidable at the instance of the applicant within 30 days of the date of the allotment and will be voidable even if the PLC is in the course of being wound up. The remainder of the section lays down a liability for directors who have knowingly contravened *section 1358* with respect to allotment and places a 2 year time limit on proceedings to recover any loss, damage, costs or expenses in this regard.

*Section 1361* contains the provisions in relation to local offers and is taken from section 49 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. Local offers are defined in *section 1348* of this Chapter as offers of securities to the public in the State for less than €5,000,000, but the definition does not cover offers exempted or excluded from the Prospectus Directive. This section sets out requirements for offering documents prepared for such local offers and specifies statements which must be included in various places in those documents. If an offeror fails to comply with the requirements for offering documents set out in subsection (1), then the offeror shall be guilty of a category 3 offence.

*Section 1362* provides that a document prepared in accordance with EU prospectus law or an offering document prepared for a local offer does not constitute an investment advertisement within the meaning of the Investment Intermediaries Act 1995. This provision is carried over from section 50 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Section 1363* gives the Central Bank (as the competent authority for prospectus law in Ireland) the power to make supplementary rules to allow it to fulfil its role as competent authority. These rules must be consistent with Irish prospectus law. The Central Bank may also issue guidelines around the steps to be taken to comply with Irish prospectus law. This is taken from section 51 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Section 1364* derives from section 52 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 and it renders void any condition in an agreement which requires an applicant to waive compliance with this Chapter or EU prospectus law.

## **Chapter 2**

### **Market Abuse**

*Section 1365* lays down definitions for the purposes of this Chapter and is taken in part from section 29 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. In this Chapter “Minister” means the Minister for Finance.

*Section 1366* allows the Minister to make regulations under this Act for the purpose of implementing the EU Market Abuse Directive (2003/6/EC), Market Abuse Regulation (S.I. 342/2005) and supplemental Directives. This provision derives from section 30 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Section 1367* has been newly inserted and provides a saver for existing market abuse regulations, in a similar manner to *section 1366* above in the context of prospectus law.

*Section 1368* lays down the penalties for conviction on indictment under Irish market abuse law. This is one of the few offences that does not fall into the 4-fold categorisation of offences adopted throughout the Act. The sanction is a fine not exceeding €10,000,000 or up to 10 years imprisonment or both and is carried over from section 32 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Section 1369* provides for civil liability for breaches of Irish market abuse law and is taken from section 33 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Section 1370* gives the Central Bank (the competent authority for market abuse law in Ireland) the power to make supplementary rules to allow it to fulfil its role as the competent authority. These rules must be consistent with Irish market abuse law. The Central Bank may also issue guidelines around the steps to be taken to comply with Irish market abuse law. This carries over section 34 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

*Section 1371* allows the Minister to prescribe by provisional order any market to which market abuse law shall apply (for example, a secondary market). It is important that requirements under the Market Abuse Directive should be capable of being applied to any such new market. Any such provisional order made by the Minister has to be confirmed by an Act of the Oireachtas. This derives from section 37 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

### **Chapter 3**

#### **Requirement for Corporate Governance Statement and Application of Certain Provisions of Parts 5 and 6 where company is a traded company**

*Section 1372* defines the term ‘traded company’ for the purposes of *sections 1373-1377* as a public limited company, a designated activity company, a company limited by guarantee, a public unlimited company with share capital or a public unlimited company without share capital, that has securities admitted to trading on a regulated market in an EEA state.

*Section 1373* makes provision for a corporate governance statement to be included in the directors’ report (as dealt with in *section 325* of the Act) for a traded company. This corporate governance statement must include at least all of the information laid down in *subsection (2)* of this section. This information may be set out in a separate report published in conjunction with the

directors' report, or provided by a reference in the directors' report to where the separate report is publically available on the website of the company. If the corporate governance statement takes the form of a separate report, the report must be attached to every balance sheet laid before the AGM of the company as referred to in *section 341* of the Act. In addition, a copy of the report must either be published on the website of the company or be annexed to the annual return of the company.

*Subsection (7)* obliges the statutory auditors of the company to establish that the company has produced a corporate governance statement with all the information required by *subsection (2)* of this section. In addition, the auditors must provide an opinion concerning the consistency of the information given in the statement regarding the internal control and risk management systems of the company in relation to the financial reporting process. They must also provide an opinion as to whether the information given in the corporate governance statement flowing from requirements of the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006 (S.I. 255 of 2006) is consistent.

Certain requirements of *subsection (2)* will not apply to a traded company which has only issued securities other than shares admitted to trading on a regulated market, unless such company has issued shares which are traded in a multilateral trading facility.

The provisions of this section relating to the corporate governance statement re-enact section 158(6C) – (6J) of the Companies Act 1963, as inserted into that Act by regulation 13 of the European Communities (Directive 2006/46/EC) Regulations 2009.

The section provides for the electronic filing as per section 3 of the Companies (Miscellaneous Provisions) Act 2013.

*Section 1374* adapts *section 225* of the Act in relation to the directors' compliance statement to apply to a traded company which must also now address serious market abuse. Prospectus or transparency offences..

*Section 1375* excludes from the application of *section 279* (use of US accounting standards in transitional period) and *section 280* (regulations permitting use of internationally recognised accounting standards during transitional period) of the Act, holding companies which are traded companies.

*Section 1376* deals with the application of *sections 290(7)(b)*, *293* and *362* of the Act to a traded company.

*Section 1377* adapts *sections 299* and *300* of the Act so that certain exemptions from consolidation of financial statements will not be available to traded companies.

*Section 1378* provides that a DAC or a CLG that is a traded company may not file abridged financial statements. These companies cannot avail of the exclusion, exemptions and special arrangements with regard to public disclosure of financial information.

#### **Chapter 4**

Transparency Requirements regarding Issuers of Securities Admitted to Trading on Certain Markets

*Section 1379* contains interpretative provisions for the purposes of this Chapter and derives in part from section 19 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006. In this Chapter “Minister” means the Minister for Finance.

*Section 1380* gives the Minister the power to make regulations for the purposes of giving effect to the Transparency (Regulated Markets) Directive (2004/109/EC) or any EU Regulations or Decisions in consequence of that Directive. This re-enacts section 20 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006.

*Section 1381* is newly inserted and provides a saver for existing transparency regulations under the law as it stood prior to the introduction of the Act in a similar manner to *sections 1355* and *1367* above.

*Section 1382* contains the penalties for conviction on indictment of an offence under transparency (regulated markets) law. This is one of the few offences that does not fall into the 4-fold categorisation of offences adopted throughout the Act and is stipulated to be a fine not exceeding €1,000,000 or a term of imprisonment not exceeding 5 years or both. This is carried over from section 21 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006.

*Section 1383* gives the Central Bank (the competent authority for transparency law in Ireland) the power to make supplementary rules to allow it to fulfil its role as the competent authority and is drawn from section 22 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006. However a new subsection provides that rules made under section 22 and in force immediately before the commencement of this section and may be amended or revoked accordingly.

*Section 1384* allows the Minister to prescribe by provisional order any market to which transparency (regulated markets) law shall apply. This is taken from section 24 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006.



## **Part 24 – Investment Companies**

### *Preliminary Note*

*Part 24* of the Act makes provision for investment companies with variable capital, previously provided for under Part XIII of the Companies Act 1990 (“Part XIII companies”). These Part XIII companies are commonly referred to as non-UCITS investment companies, as distinct from those established under the EU UCITS Directives regime, which is transposed into Irish law through the Minister for Finance’s UCITS Regulations (S.I. 352 of 2011). In order to be permitted to operate, Part XIII Companies must be authorised by the Central Bank. Such companies are a key constituent of the set of legal structures under which the international collective investment funds industry operates in Ireland.

With a small number of exceptions, *Part 24* is a re-statement of the existing law as it applies to Part XIII Companies. An investment company is a type of PLC – this is provided for in *section 1001* of *Part 17* of the Act. That provision explains that *Part 17* only applies to PLCs that are not investment companies and that it is *Part 24* that contains the provisions in relation to investment companies. An investment company cannot be an SE, which is a type of European public company

*Chapter 1* contains definitions for the purposes of this Part and provides for the application and disapplication of certain provisions of *Parts 1* to *14* of the Act (the LTD) and *Part 17* (PLCs) to investment companies. It also applies some of the UCITS Regulations to these non-UCITS investment companies.

*Chapter 2* describes how an investment company can be incorporated and contains provisions in relation to its authorisation and supervision by the Central Bank.

*Chapter 3* contains provisions specific to the share capital of an investment company and deals with the purchase of own shares.

*Chapter 4* allows an investment company to opt to prepare its financial statements in accordance with an alternative body of accounting standards. These standards can be USA, Canadian or Japanese or authorised standards from any other state or territory prescribed by the Minister. It also applies *Chapter 3* of *Part 23* (corporate governance statement) to investment companies whose shares are admitted to trading on a regulated market in an EEA State.

*Chapter 5* provides for the winding up of an investment company by the court and lays down circumstances for winding up additional to those found in *section 569* of *Part 11* of the Act. These provisions take account of the roles of the trustee and the management company.

*Chapter 6* adapts *section 741* of the Act to the case of an investment company by providing that an investment company that has been struck off may apply to the court to be restored to the register within 2 years of the date of dissolution of the company. This contrasts to a period of 20 years for other company types under the Act.

*Chapter 7* applies certain provisions of *Part 23* of the Act (Prospectus, Market Abuse etc.) to investment companies, in so far as these provisions are applicable to companies other than PLCs that fall within *Part 17*.

*Chapter 8* provides a mechanism by which segregated liability will apply to umbrella funds, that is, that the assets of one sub-fund within an umbrella fund will be protected from claims arising against other sub-funds. Section 256A(2) to (5) and sections 256B to 256D of the Companies Act 1990, as inserted by section 25 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005,

in relation to applying segregated liability to sub-funds trading before 10 June 2005 are now housed in *Schedule 17* to the Act for the purposes of clarity.

*Chapter 9* contains provisions allowing investment companies to move their head office into or out of the jurisdiction without having firstly to wind up. The mechanism is subject to specified requirements and conditions.

## *Explanatory Memorandum*

### **Chapter 1**

#### Preliminary and interpretation

*Section 1385* gives the defined terms for the purposes of this Part. The definitions largely mirror those in section 252 of the Companies Act 1990, as amended by section 22 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. In this Part “Minister” means the Minister for Finance.

*Section 1386* derives from section 253 of the Companies Act 1990, as amended. It conveys what the essential constituents of an investment company are. It is a public company limited by shares, that, unlike the generality of companies, is permitted to have variable capital. The sole object of an investment company must be the collective investment of its funds in property with the aim of spreading investment risk and giving the members of the company the benefit of the results of the management of its funds. This sole object must be stated in the memorandum of association of the company. In addition, the articles or memorandum of the company must provide that the value of the paid up share capital of the company will at all times be the same as the value of the assets of the company (after the deduction of liabilities) and that the shares of the company will, at the request of any of the shareholders, be purchased by the company directly or indirectly out of the assets of the company. The Central Bank may approve as an investment company (subject to any conditions it sees fit) other companies that do not make provision for the purchase of shares in this manner.

*Section 1387* states that the provisions of *Parts 1 to 14* of the Act which are disappplied by *Part 17* of the Act to PLCs are also disappplied to investment companies. In addition to those disapplications, certain other provisions of *Parts 1 to 14* of the Act, as listed in the Table to this section, are disappplied to investment companies. These include provisions and requirements in relation to share capital which are not compatible with the workings of an investment company. The directors of investment companies to which *Part 24* applies will not be required to make compliance statements as *section 225* will not apply to these companies. Investment companies are subject to additional regulation from the financial sector in relation to compliance.

*Section 1388* provides that *Part 17* of the Act generally applies to investment companies as it applies to PLCs, but with a number of exceptions that are enumerated in the Table to this section. It is made clear that the definitions of “authorised minimum” and “authorised share capital” in *section 1000(1)* of the Act will not apply to an investment company.

*Section 1389* applies certain provisions of the UCITS Regulations to investment companies, with a number of modifications. This derives from section 258 of the Companies Act 1990 and references have been updated to the current UCITS Regulations (2011).

## Chapter 2 Incorporation and registration

*Section 1390* is a modified version of *section 1004* in *Part 17* of the Act dealing with PLCs. It provides that an investment company may be formed by any person or persons subscribing to a constitution and complying with the relevant provisions of *Chapter 2* of *Part 2* of the Act (incorporation of a LTD) and the provisions of this Part in relation to the registration of an investment company.

*Section 1391* is similar to *section 1005* of *Part 17* on PLCs and stipulates that an investment company must carry on an activity in the State. This general proposition is found in section 42 of the Companies (Amendment) (No.2) Act 1999 and is set out separately in relation to investment companies here.

*Section 1392* deals with the form of an investment company's constitution. These provisions are broadly similar to those in *section 1006* of *Part 17* on PLCs. The main difference between *sections 1006* and *1392* is in relation to the variable nature of an investment company's share capital. This is covered in *subsection 1392(2)(d)*, which re-enacts section 253(2)(d) of the Companies Act 1990, as amended by section 54 of the Companies (Amendment) (No.2) Act 1999 and section 80 of the Investment Intermediaries Act 1995.

The constitution will be in the form of a memorandum of association and articles of association and a sample constitution is provided at *Schedule 16* to the Act.

*Subsection (4)* is new and provides that where an amendment of the memorandum of association is made affecting the matter of share capital or other matter subsequent to its registration that *subsection (2)* shall be read as requiring the constitution to state the matter as it stands in consequence of that amendment.

*Section 1393* is similar to *section 1007* in *Part 17* on PLCs. It contains supplemental provisions in relation to the constitution and makes provision for the continuation in force of existing memorandum and articles.

*Section 1394* deals with the status of existing investment companies. Such companies, to which Part XIII of the Companies Act 1990 applies, will continue in existence after the commencement of this Act and will be deemed to be an investment company to which this Part applies.

*Section 1395* derives from section 256 of the Companies Act 1990, as amended by section 54 of the Companies (Amendment) (No.2) Act 1999 and section 35 and the First Schedule to the Central Bank and Financial Services Authority of Ireland Act 2003. It provides that an investment company will not be permitted to carry on business in the State unless it has been authorised to do so by the Central Bank. The section provides for matters in relation to the Central Bank's authorisation of investment companies including that the company must have sufficient paid up share capital to enable it to conduct its business effectively and meet its liabilities.

On authorisation, the Central Bank designates a company as a "specially designated company" and the company can then raise capital by providing facilities for the direct or indirect participation by the public in the profits and income of the company. If a company does not raise capital in this manner

within 6 months of being granted the authorisation, it will lose its status as a “specially designated company”. The same cessation of status applies to existing investment companies.

*Subsections (9) and (10)* contain offence provisions for contravention of this section.

*Section 1396* derives from section 257 of the Companies Act 1990, as amended by section 26 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. It gives the Central Bank the power to impose conditions for the granting of an authorisation to an investment company if it considers that such conditions are necessary for the purposes of the orderly and proper regulation of the business of investment companies. *Subsection (4)* lists a number of matters which may be addressed by the conditions imposed, such as supervisory and reporting requirements of the investment company and the prudential requirements of the investment policies of the company. The Bank may also make provision for the appointment of a trustee in which assets of the company will be vested. Failure by the company to comply with any conditions imposed by the Central Bank under this section will result in a category 2 offence. Trustees appointed under this section must also comply with any requirements or conditions imposed by the Central Bank and failure to do so will result in a category 2 offence for the person or body and any officer of it who is in default.

*Section 1397* re-enacts section 259 of the Companies Act 1990. It makes it clear that an authorisation of an investment company by the Central Bank will not in any way constitute a warranty by the Bank as to the creditworthiness or financial standing of that company. Furthermore, the Central Bank will not be liable for any default of an investment company which it has granted authorisation to, unless the Bank has acted in bad faith in performing its functions under this *Part 24*.

### **Chapter 3**

#### Share capital

*Section 1398* is taken from section 254 of the Companies Act 1990, as amended by section 23 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. It permits an investment company to purchase its own shares in accordance with any provisions in its articles governing this matter. In the case of *section 1386(1)(b)(ii)* (shares purchased by the company directly or indirectly out of the company’s assets at the request of the holders of those shares), an investment company is not permitted to purchase such shares unless they are fully paid.

*Section 1399* derives from section 255 of the Companies Act 1990, as amended by section 24 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 and deals with the treatment of own shares that are purchased by the company. Such shares will be cancelled and the amount of the issued share capital of the company will be reduced by the amount of consideration paid for those shares. *Subsection (2)* provides that an umbrella fund may, for the account of any of its sub-funds, acquire shares representing other sub-funds in the same umbrella fund, provided that the acquisition is not one provided for in *section 1386(1)(b)(ii)* (shares purchased by the company directly or indirectly out of the company’s assets at the request of the holders of those shares).

### **Chapter 4**

#### Financial statements

*Section 1400* concerns the statutory financial statements of an investment company and is drawn in part from section 28 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 which inserted a new section 260A in the Companies Act 1990. It provides that to the extent that

the use of any alternative body of accounting standards (ABAS) does not contravene any provision of Part 6 – a true and fair view of assets and liabilities, financial position and profit or loss of an investment company (and its subsidiary undertakings as a whole) may be given by the investment company of those standards in the preparation of its Companies Act entity financial statements. The section is updated and brought in line with the Accounting Directives (including the new Directive 2013/34/EU).

ABAS will be taken to mean accounting standards that must be complied with by companies in the USA, Canada, Japan, or any other state or territory prescribed by the Minister. For the first time the Minister must consult with IAASA (in addition to the Central Bank) before making regulations to include within the aegis of this section accounting standards from a state or territory other than one mentioned in *subsection (2)*. *Subsection (4)* is new and contains transitional provisions.

*Section 1401* states that an investment company will be required to provide a corporate governance statement where it has shares or debentures admitted to trading on a regulated market in the EEA. This applies the provisions of *Chapter 3 of Part 23* of the Act to investment companies that have shares or debentures admitted to trading on a regulated market in the EEA.

## **Chapter 5**

### Winding up

*Section 1402* derives from section 213, paragraph (fa) of the Companies Act 1963, as inserted by section 93(b) of the Company Law Enforcement Act 2001. It lays down the circumstances in which an investment company may be wound up by the court, if the court is of the opinion that it is just and equitable to do so. These circumstances are in addition to those covered in *section 569* in *Part 11* of the Act. It is provided that *section 569(1)(e)* of the Act will not apply to an investment company, but this section makes alternative provision for the winding up of an investment company on the grounds that it is just and equitable to do so.

As an initial step, a petition for the winding up must be presented by the trustee of the company and that trustee must have notified the company of its intention to resign and, with the passing of 6 months or more of this notification, no other trustee stands appointed. In considering the petition for winding up the court must have regard to any conditions imposed under *section 1396* of this Part on the resignation and replacement of trustees. The court must also consider whether a winding up would best serve the interests of the shareholders of the company. Finally, if there is a management company for the investment company, it too must be served with the petition for winding up.

## **Chapter 6**

### Restoration

*Section 1403* is new and adapts *section 741* of the Act to the case of an investment company by providing that an investment company that has been struck off may apply to the court to be restored to the register within 2 years of the date of dissolution of the company. This contrasts to a period of 20 years for other company types under the Act. The amendment is designed to improve the efficacy of the procedure for the dissolution of these regulated investment companies. It is expected that the amended provision will facilitate the dissolution of investment companies by way of voluntary strike off rather than by a members voluntary winding up, which should mean that the revocation of authorisation of an investment company can be completed by the Central Bank in a shorter period time than would be the case if a liquidator was appointed.

## **Chapter 7**

Public offers of securities, prevention of market abuse, etc.

*Section 1404* provides that *Chapters 1, 2 and 4 of Part 23* of the Act on public offers of securities, market abuse and transparency, will apply to investment companies in so far as those provisions are applicable to companies other than PLCs that fall within *Part 17*. *Sections 1358 to 1360* are excepted from this application of *Part 23* provisions as those sections contain requirements in relation to minimum subscriptions which are not relevant in the case of an investment company.

## **Chapter 8**

### **Umbrella funds and sub-funds**

*Section 1405* provides a mechanism by which segregated liability will apply to umbrella funds, that is, that the assets of one sub-fund will be protected from claims arising against other sub-funds. This mechanism was introduced in June 2005, though section 256A(1) of the Companies Act 1990, as inserted by section 25 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

The 2005 provisions also contained a mechanism allowing existing funds companies to convert to this umbrella mechanism. This was contained in subsections (2) to (5) of section 256A and sections 256B to 256D of the Companies Act (as amended in 2005) and for the purposes of clarity is now housed in *Schedule 17* to the Act.

*Section 1406* re-enacts section 256E(1) to (5) of the Companies Act 1990, as inserted by section 25 of the of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. It sets out the detailed requirements to be complied with by an umbrella fund seeking to avail of segregated liability under *section 1405* above.

*Subsection (6)* deals with situations where assets of one sub-fund are used to fulfil liabilities not attributable to that sub-fund and what action should be taken to regularise the situation (e.g. transfer of assets from sub-fund to which liability was attributable).

*Section 1407* contains further matters in relation to umbrella funds availing of segregated liability under this Chapter and re-enacts section 256E(6) to (9) of the Companies Act 1990, as inserted by section 25 of the of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

It is provided that a sub-fund is not a legal person separate from the umbrella fund, but that the umbrella fund may sue and be sued in respect of a particular sub-fund and sub-funds may be subject to orders of the court as though they were a separate legal person by virtue of being a sub-fund of the umbrella. Furthermore, assets of a sub-fund may be used to discharge liabilities of another sub-fund in the umbrella in cases of fraud or misrepresentation and in the application of certain provisions of the Act as specified. The winding up of a sub-fund is dealt with here and the confined duties and responsibilities of a liquidator to that sub-fund are provided for.

## **Chapter 9**

### **Migration of funds**

*Section 1408* gives definitions for the terms “migrating company” and “relevant jurisdiction” for the purposes of this Chapter. Due to its expansive nature, the definition of “registration documents” is now contained in a stand-alone section below. These definitions derive from section 256F(1) of the Companies Act 1990, as inserted by section 3(j) of the Companies (Miscellaneous

Provisions) Act 2009. It is provided that the Minister may, by regulation, prescribe places outside the State as a “relevant jurisdiction” in certain circumstances.

*Section 1409* gives a definition for “registration documents”, which was previously found in section 256F(1) of the Companies Act 1990, as inserted by section 3(j) of the Companies (Miscellaneous Provisions) Act 2009.

*Section 1410* replicates section 256F(2) to (10) of the Companies Act 1990, as inserted by section 3(j) of the Companies (Miscellaneous Provisions) Act 2009. These are the provisions allowing collective investment fund corporates registered in prescribed jurisdictions apply to migrate their head offices to Ireland without having to wind up in their existing jurisdiction. Specifically these provisions allow a migrating company to apply to the Registrar to be registered as an investment company in the State by way of continuation. Before a migrating company can be registered in the State, it must have satisfied all the requirements of this Act in relation to registration as an investment company. In addition, a migrating company must give the Registrar notice of the proposed address of its registered office in the State and must have been authorised by the Central Bank to carry on business as an investment company. Furthermore, an application from a migrating company to be registered in the State must be accompanied by a statutory declaration that states that all requirements mentioned in this section have been complied with. Notice of the application must be published in the CRO Gazette by the Registrar.

Where the Registrar gets notification from the Central Bank that it proposes to authorise the migrating company to carry on business in the State, the Registrar can issue a certificate of registration to the migrating company and, if he or she does so issue a certificate, particulars of the migrating company specified by *section 414* of the Act in relation to charges and security interests must be entered in the companies register. Once a migrating company is registered in the State, it must apply to be de-registered in the jurisdiction it migrated from. *Subsection (7)* gives a list of particulars in relation to the migrating company which must be published in the CRO Gazette once the company is registered in the State. *Subsection (8)* clarifies that this section does not operate to create a new legal entity and will not affect contracts made or rights and liabilities of the migrating company or other persons.

*Section 1411* contains further practical requirements in relation to the registration of migrating companies in the State. It derives from section 256F(11) to (16) of the Companies Act 1990, as inserted by section 3(j) of the Companies (Miscellaneous Provisions) Act 2009. For the first time. This section incorporates provisions of *Part 12* relating to strike –off of companies formed in the State) to the provisions relating to foreign investment companies.

*Section 1412* houses definitions for the purposes of the provisions (in *sections 1413* and *1414*) on de-registration of investment companies incorporated in the State that wish to migrate to another “relevant jurisdiction”. These definitions replicate those found in section 256G(1) of the Companies Act 1990, as inserted by section 3(j) of the Companies (Miscellaneous Provisions) Act 2009.

*Section 1413* contains the detailed provisions relating to the de-registration of companies in the State that wish to continue as a bodies corporate in prescribed jurisdictions. These provisions re-enact section 256G(2) to (9) of the Companies Act 1990, as inserted by section 3(j) of the Companies (Miscellaneous Provisions) Act 2009. Before granting de-registration, the Registrar must be satisfied that all the requirements of this Act in relation to de-registration have been complied with by the company and the Central Bank must have approved the migration out of the State. The application to de-register must be accompanied by a statutory declaration stating that these requirements have been met and notice of the application must be published in the CRO Gazette.

Creditors of the company or holders of not less than 5 per cent of its issued share capital may apply for an order preventing the proposed migration and de-registration of the company. The court may make such an order if it is satisfied that the proposed move would contravene the terms of an agreement between the company and any shareholder or creditor of the company. Alternatively, it may make the order if the proposed migration would be prejudicial to any shareholder or creditor of the company.

*Section 1414* contains further provisions in relation to the de-registration of an investment company under this Chapter and replicate section 256G(10) to (14) of the Companies Act 1990, as inserted by section 3(j) of the Companies (Miscellaneous Provisions) Act 2009. Where a company becomes registered in another jurisdiction, it must give notice of this fact to the Registrar within 3 days of it becoming so registered and it must give the Registrar notice of its new name (if any). The Registrar will then issue a certificate of de-registration to that company. Certain details relating to the de-registered company must be published in the CRO Gazette and these are outlined in *subsection (3)*.

*Subsection (4)* clarifies that de-registration does not operate to create a new legal entity and will not affect contracts made by or rights and liabilities of the company or other persons.

*Section 1415* derives from section 256H of the Companies Act 1990, as inserted by section 3(j) of the Companies (Miscellaneous Provisions) Act 2009. It states that, where an application is made either by a migrating company to be registered in the State, or by a company seeking to be migrate out of the State, a director of the company must make a statutory declaration that the entity is solvent at the time of the application, to pay its debts as they fall due. *Subsection (2)* sets out requirements in relation to the making of the declaration, which must include a statement as to the assets and liabilities of the company. In addition, the declaration must be accompanied by a report of an independent person giving an opinion as to the reasonableness of the opinion of the director and the statement of the assets and liabilities. It will be a category 2 offence for a director to make a declaration under this section if he or she does not have reasonable grounds for believing that the company can pay its debts as they fall due. A lack of reasonable grounds will be assumed if the company is wound up and is found to be insolvent within 1 year of the application to the Registrar.



## Part 25 – Miscellaneous

### *Preliminary Note*

The final Part of the Act, *Part 25*, contains miscellaneous provisions that do not naturally “fit” in any of the preceding Parts of the Act.

*Chapter 1* deals with foreign insolvency proceedings, including those covered by the EU Insolvency Regulation. The definition of this Insolvency Regulation is to be found in *section 2* of the Act and is taken to mean Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. The term “insolvency proceedings” refers to proceedings opened under Article 3 of the Insolvency Regulation in a Member State, other than the State and Denmark, where the proceedings relate to a body corporate. This definition is also to be found in *section 2* of the Act.

This Chapter allows for the recognition of winding up orders from non-EU states and Denmark by the High Court. It then goes on to re-enact the provisions that gave effect to the Insolvency Regulation (not including provisions already found in *Chapter 15* of *Part 11* of the Act). These provisions deal with, among other things, the registration of judgments given in insolvency proceedings, the enforcement of such judgments, the interest payable thereon and other procedural matters relating to costs, venue and language of claims.

*Chapter 2* re-enacts certain miscellaneous provisions from all the Companies Acts prior to CA 2014, dealing with a variety of matters, from a prohibition on partnerships with more than 20 members (*section 1435*) to the eligibility to act as public auditor to an Industrial and Provident Society or a Friendly Society (*section 1441*).

### *Explanatory Memorandum*

#### **Chapter 1**

Provisions concerning foreign insolvency proceedings (including those covered by the Insolvency Regulation)

*Section 1416* contains interpretative provisions for the purposes of this Chapter and explains that, in addition to their application to *Part 11*, *sections 1419* to *1428* (which re-enact the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002)) shall apply to insolvency proceedings in Part 10. The Regulations establish common rules regarding the court competent to open insolvency proceedings, the applicable law and the recognition of the court’s decisions for cases where a debtor, whether a company, a trader or an individual, becomes insolvent. It is aimed at dissuading the debtor from transferring his/her assets or the judicial proceedings from one country to another in order to improve his/her legal position.

The section also provides that all references to numbered Articles in those sections are references to the Articles so numbered in the Insolvency Regulation.

*Section 1417* allows for the recognition of winding up orders from non-EU states and Denmark by the High Court and such orders may be enforced by the High Court in the same manner and in all respects as if the order had been made by the High Court. It is a re-enactment of section 250 of the Companies 1963, as amended by Regulation 3(d) of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002).

*Section 1418* explains that the purpose of the following *sections 1419 to 1428* is to re-enact the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002), apart from their provisions insofar as they relate to insolvency proceedings.

*Section 1419* deals with the registration of judgments received in insolvency proceedings and derives from section 227A of the Companies Act 1963, as inserted by Regulation 3(c) of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002). It provides that a liquidator appointed in another Member State who wishes to have his or her appointment published in the State must deliver to the Registrar a certified copy of the judgment or decision pursuant to which he or she was appointed. The judgment or decision may also be registered even if the liquidator does not intend to take any action in the State under the Insolvency Regulation.

*Section 1420* makes provision for publication in relation to insolvency proceedings outside the State and applies the provisions of *section 711* of the Act in relation to insolvency proceedings in the State in that regard. This derives from section 227B of the Companies Act 1963, as inserted by Regulation 3(c) of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002).

*Section 1421* clarifies that where a liquidator wishes to request (under Article 22 of the Insolvency Regulation) that a judgment opening the insolvency proceedings be registered in a public register, such a request should be made to the Registrar. This is a re-enactment of Regulation 5 of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002).

*Section 1422* deals with the enforcement of insolvency judgments in the State and derives from Regulation 6 of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002). An insolvency judgment (within the meaning of Article 25 of the Insolvency Regulation) may be declared enforceable by the Master of the High Court on completion of the formalities contained in Article 53 of the Brussels 1 Regulation (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). The Master may grant any preservation measures that are contained in the judgement where the High Court would have jurisdiction to grant such relief. Where an enforcement order is made it shall be of the same force and effect as a judgment of the High Court and may be enforced by the High Court, and any proceedings taken on it, as if it were a judgment of that court.

*Section 1423* is concerned with interest on insolvency judgments and the payment of costs and is taken from Regulation 7 of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002). If a judgment makes provision for the payment of a sum of money and if interest would be recoverable on that sum under the law of the Member State in which the judgement was given, then the enforcement order under *section 1422* above will provide that the person liable to pay the sum shall also pay the interest in accordance with the particulars noted in the order. An enforcement order may also make provision for the payment by the respondent to the applicant of reasonable costs associated with the application for the order. Such an enforcement order for costs will be treated as though it were an order for the payment of costs made by the High Court.

*Section 1424* provides that any amount payable in the State under an insolvency judgement by virtue of an enforcement order must be paid in the currency of the State (i.e. the Euro). This derives from Regulation 8 of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No.

333 of 2002). *Subsection (2)* makes provision for how payment should be calculated in circumstances where the amount stated in the insolvency judgment is stated in any currency other than the Euro.

*Section 1425* deals with requests for measures to secure and preserve any of the debtor's assets in the State. Such requests should be made to the High Court and that court may grant the measures provided it is within the court's jurisdiction to do so. Alternatively, the High Court may refuse to grant the measures sought if it is of the opinion that the court does not have jurisdiction in relation to the subject matter of the proceedings. This is taken from Regulation 9 of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002).

*Section 1426* determines the venue for the hearing of proceedings instituted in the State by a liquidator under Article 18 of the Insolvency Regulation. Such proceedings may be heard by the judge assigned to the circuit or district of the Circuit or District Court in which the defendant lives or carries on his or her business. This re-enacts Regulation 10 of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002).

*Section 1427* makes provision for the language of claims in relation to insolvency proceedings outside the State and applies the provisions of *section 714* of the Act in relation to insolvency proceedings in the State in that regard. This derives from Regulation 11 of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002).

*Section 1428* states that it will be for the High Court to determine whether judgments referred to in Article 25(1), or insolvency proceedings or judgments referred to in Article 26, should not be recognised or enforced on the grounds mentioned in those provisions. This derives from Regulation 12 of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002).

## **Chapter 2**

### **Other miscellaneous provisions**

*Section 1429* is new and provides for a deemed consent to disclosure with respect to an interest in shares or debentures acquired in a company registered in the State.

*Section 1430* applies the provisions on schemes of arrangement found in *Chapter 1 of Part 9* (other than *section 455*) of the Act to any company liable to be wound up under the Act. This is based on section 203(5) of the Companies Act 1963.

*Section 1431* is derived from section 32(1) of the Companies Act 1963 which was designed to prevent undesirable forms of inter-company financing between holding companies and subsidiaries. The provision ensures that a body corporate cannot be a member of a company which is its holding company and any allotment or transfer of shares in a company to its subsidiary shall be void (with a number of exemptions set out in the sections).

*Section 1432* comes from section 350 of the Companies Act 1963 and lays down a saving for enactments providing for winding up under certain former Companies Acts.

*Section 1433* is based on section 195(3) of the Companies Act 1990 and applies *section 405* of the Act (which contains the prohibition on acting in relation to an audit while a disqualification is in force) to any company within the meaning of *Chapter 4 of Part 14*, any friendly society and any industrial and provident society.

*Section 1434* allows a statutory auditor to draw or prepare any document for the purposes of the Act other than a deed or a constitution of a company. This is based on section 397 of the Companies Act 1963 and will have effect notwithstanding section 58 of the Solicitors Act 1954, which places a restriction on persons not qualified under that Act from drafting certain documents.

*Section 1435* is partly new and places a prohibition on partnerships with more than 20 members and derives from, *inter alia*, section 376 of the Companies Act 1963. The carve-out for certain types of partnerships (including solicitors and accountants firms) contained in section 13 of the Companies (Amendment) Act 1982 is carried over here. Specific provision is also made for horse breeding partnerships and partnerships for the provision of investment and loan finance facilities to persons engaged in industrial or commercial activities. Such partnerships were prescribed as exempt from the prohibition by virtue of S.I. No. 54 of 1988 and S.I. No. 506 of 2004 respectively. *Subsection (2)* allows the Minister to specify by order other partnerships which will be exempt from the limitation on the number of members. Before making such an order, the Minister must first consult with the Company Law Review Group on the matter and take into account the public interest in the granting of the exemption to the type of partnership in question. *Subsection (4)* makes it clear that this section will not apply to an investment limited partnership within the meaning of the Investment Limited Partnership Act 1994.

*Section 1436* derives from section 372 of the Companies Act 1963 and places a prohibition on banking partnerships with more than 10 members.

*Section 1437* makes provision for the signing of statutory financial statements in the case of a credit institution registered after 15<sup>th</sup> August 1879. This is taken from section 156(2) of the Companies Act 1963, as amended by the EC (International Financial Reporting Standards and Miscellaneous Amendments) Regulations 2005.

*Section 1438* is a new section that provides that the Comptroller and Auditor General is entitled to carry out statutory audits of companies not trading for gain. Furthermore, it provides that the Comptroller and Auditor General is entitled to carry out audits of statutory financial statements of any company not trading for gain in which he is appointed, under an enactment, the auditor of that company.

*Section 1439* applies *section 1402* (circumstances in which investment company may be wound up by the court) and *section 1403* (restoration of investment company by the court) of the Act to companies that are UCITS (Undertakings for Collective Investment in Transferable Securities).

*Section 1440* is new – it provides for interaction between the Irish Takeover Panel Act 1997 and *Chapters 1 and 2 of Part 9* of the Act. It preserves the powers of the Panel to regulate takeovers, and provides that the Panel and the court should have due regard to each other's exercise of powers under the relevant Acts.

*Section 1441* deals with the eligibility of a person to act as a public auditor for the purposes of the Industrial and Provident Societies Acts 1893 to 2014 or the Friendly Societies Acts 1896 to 2014. Such a person must be a statutory auditor within the meaning of *section 2* of the Act. The prohibition on connected persons acting as auditor of a society is maintained.

This section has its basis in section 187 of the Companies Act 1990. The provisions of that Act in relation to the eligibility of a person to act as public auditor will continue in force in cases where the financial year of the society or friendly society in question began prior to the commencement of this *section 1441*. Persons who contravene the provisions of this section will be guilty of a category 2 offence. The section shall not apply to the Comptroller and Auditor General.

*Section 1442* is new. It facilitates the exemption of a specific category of captive insurers and re-insurers (of insurance/reinsurance companies) from the obligation under Article 41 of the Statutory Audits Directive (2006/43/EC) to have an audit committee. Captive insurance is considered to be inherently an exercise in self-insurance by a corporation and as such the inherent risk profile of most captive insurers is significantly different from other insurers, thereby removing the need for an audit committee. An obligation on such an entity to have an audit committee is not considered to serve any real purpose, and thus places an undue and significant demand on these undertakings.

Article 39 of the Statutory Audits Directive (2006/43/EC) provides that Member States may exempt public-interest entities which have not issued transferable securities admitted to trading on a regulated market within the meaning of point 14 of Article 4(1) of Directive 2004/39/EC from the requirement to have an Audit Committee. Article 39 of the Statutory Audits Directive (2006/43/EC) was not given effect in Ireland's main transposing instrument the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 (S.I. No. 220 of 2010) because it is a Member State option and, therefore, requires primary legislation in order to be exercised.

The section meets the criteria at Article 39 of Directive 2006/43/EC that the public interest entities in question cannot have issued transferable securities admitted to trading on a regulated market to avail of the exemption from the requirements to have an audit committee in respect of captive insurers and re-insurers (within the meaning of Article 13 of Directive 2009/138/EC, but excluding captives owned by a credit institution or group of credit institutions).

*Section 1443* aligns the Act with Section 224(6) of the Companies Act 1990 which allows a subsidiary of an insurance company to hold shares in its holding company when done pursuant to section 9(1) of the Insurance Act 1990.

*Section 1444* provides that in the case of a designated activity company, a public limited company, or a company limited by guarantee, carrying on life assurance business, or industrial assurance business or both, any amount properly transferred to the profit and loss account of the company from a surplus in the fund or funds maintained by it in respect of that business and any deficit in that fund or those funds shall be respectively treated for the purposes of *Chapter 7 of Part 3* as a realised profit and a realised loss, and, subject to the foregoing, any profit or loss arising on the fund or funds maintained by it in respect of that business shall be left out of account for those purposes. This section is based on Section 48 of the Companies (Amendment) Act, 1983.

*Section 1445* facilitates the bringing of notice in the Companies Registration Office Gazette in circumstances where a company - to which the Multi Unit Developments Act applies - is struck off the register under section 311 of the Companies Act 1963 Act or section 12 of the Companies (Amendment) Act 1982 Act to have the company restored to the register.

*Section 1446* dis-applies section 7 of the Official Languages Act 2003 in order to avoid an undesirable delay in publishing this Act. *Subsection (2)* provides that the text of this Act shall be made available electronically in each of the official languages as soon as practicable after its enactment.

*Section 1447* imports section 8 of the Companies Miscellaneous Provisions Act 2013 into the Act. It empowers the Minister to make provision with regards third country audit entities on companies falling within Regulation 113(2) of the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010 (S.I. No.220 of 2010).

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## Glossary of Abbreviations

Companies Act 1963	CA 1963
Companies (Amendment) Act 1977	C(A)A 1977
Companies (Amendment) Act 1982	C(A)A 1982
Companies (Amendment) Act 1983	C(A)A 1983
Companies (Amendment) Act 1986	C(A)A 1986
Companies (Amendment) Act 1990	C(A)A 1990
Companies Act 1990	CA 1990
Companies (Amendment) Act 1999	C(A)A 1999
Companies (Amendment) (No.2) Act 1999	C(A)(No.2)A 1999
Company Law Enforcement Act 2001	CLEA 2001
Companies (Auditing and Accounting) Act 2003	C(A&A)A 2003
Investment Funds, Companies and Miscellaneous Provisions Act 2005	IFCMPA 2005
Investment Funds, Companies and Miscellaneous Provisions Act 2006	IFCMPA 2006
Companies (Amendment) Act 2009	C(A)A 2009
Companies (Miscellaneous Provisions) Act 2009	C(MP)A 2009
Companies (Miscellaneous Provisions) Act 2013	C(MP)A 2013
Companies (Amendment) Act 2012	C(A)A 2012