COMPANY LAW REVIEW GROUP

THE RECOMMENDATIONS OF THE COMPANY LAW REVIEW GROUP RELATING TO SHARES AND SHARE CAPITAL IN THE COMPANIES ACT 2014

Contents

Introduction

The Companies Act 2014 introduced a significant number of reforms in the area of share capital and capital maintenance generally. These include:

- the abolition of the requirement for authorised share capital in a LTD;
- the concept of "company capital", as a term to comprise share capital, share premium, capital redemption reserve and capital conversion reserve, and the ability thereby to vary the par value of shares provided that the aggregate of "company capital" was not affected;
- a refocusing of the prohibition of financial assistance in connection with share issues and acquisitions to actions carried out for the primary purpose of assisting the issue or acquisition;
- a refocusing of the law relating away from capital maintenance to company solvency – ability to pay debts as they fall due – so as to permit a LTD to reduce share capital and engage in similar transactions by employing the summary approval procedure and without the requirement to seek court approval;
- the streamlining of procedures for share repurchases.

The Review Group's understanding is that the implementation of the reforms in this area has generally been warmly welcomed. That said, a number of perceived anomalies and other issues have arisen regarding share capital, including in the reforms introduced in the 2014 Act.

At a plenary meeting of the Review Group held on 14 September 2016, the CLRG subcommittee on Shares and Share Capital was delegated the task of examining these anomalies and issues.

The anomalies and other issues explored in this report have arisen from several sources:

- submissions made directly to the Department of Jobs, Enterprise and Innovation;
- submissions received by subcommittee members, in particular those made by the Business Law Committee of the Law Society of Ireland;
- submissions made by members of the subcommittee.

The Review Group adopted the recommendations of the subcommittee at its meeting on 28 March 2017.

1. Share Capital, Shares and Certain Other Instruments - Part 3, Section 64

1.1 Amendment to section 64(3)(c) relating to payment up or allotment of shares so as to provide that "fair value" of assets should be applied to the release of liquidated sums

Current Provision

Section 64(3) of the 2014 Act provides for the circumstances in which a share in a company is to be considered as paid up in cash. The text of this section is derived from comparable UK law, which transposed the Second Company Law Directive 77/91/EEC, rather than from a specific provision of the Directive. The current EU measure is Directive 2012/30/EU. Section 64 reads:

> ***64*** *(3) For the purposes of this Part a share in a company shall be taken to have been paid up (as to its nominal value or any premium on it) in cash or allotted for cash if the consideration for the allotment or the payment up is—*
>
> *(a) cash received by the company; or*
>
> *(b) a cheque received by the company in good faith which the directors have no reason for suspecting will not be paid; or*
>
> *(c) the release of a liability of the company for a liquidated sum; or*
>
> *(d) an undertaking to pay cash to the company on demand or at an identified or identifiable future date which the directors have no reason for suspecting will not be complied with.*

Submission

It is argued that there is a danger that the reference to the release of a liability by a company "for a liquidated sum" could be interpreted as referring to the nominal value of the liability in issue as opposed to its fair or commercial value. This could result in a loss to the company on the value of its share capital. The effect could be harmful to unsuspecting members, and could even affect creditors (*albeit* remotely) in the event that the company becomes insolvent. The inclusion instead of "fair value" would be intended to avoid this pitfall.

It has been submitted that consideration should be given to replacing the words *"for a liquidated sum"* at the start of subsection (3)(c) with the words *"the fair value of",* as illustrated here:

> ***64*** *(3) For the purposes of this Part a share in a company shall be taken to have been paid up (as to its nominal value or any premium on it) in cash or allotted for cash if the consideration for the allotment or the payment up is—*
>
> *(a) cash received by the company; or*
>
> *(b) a cheque received by the company in good faith which the directors have no reason for suspecting will not be paid; or*
>
> *(c) <u>the fair value of</u> the release of a liability of the company ~~for a liquidated sum~~; or*
>
> *(d) an undertaking to pay cash to the company on demand or at an identified or identifiable future date which the directors have no reason for suspecting will not be complied with.*

Further relevant considerations

- The definition of "cash consideration" set out in section 64(3) is a re-enactment of the provision under the previous legislation, which was contained in section 2(3)(a) of the

Companies (Amendment) Act 1983. With the exception of section 64(3)(d), (where the terminology used has been slightly varied), the meaning of “cash consideration” under the 1983 Act is specified in identical language in the 2014 Act.

- Cash consideration is defined in broadly similar terms under section 583 of the UK Companies Act 2006 and at subsection 3(c) specifies that a share shall be taken to have been paid up or allotted for cash consideration, inter alia, on "a release of a liability of the company for a liquidated sum". There is no reference to fair value.

- The EU law that section 64(3)(c) aims to reflect, now found in Directive 2012/30/EU, applies only to PLCs. The submission, if acted upon, would result in a legal provision applying to all companies, applying a fair value assessment to the release in favour of a company of a liquidated sum.

- Section 64(3) is deeming as cash what is in fact a non-cash consideration, rather than regulating the valuation of a non-cash consideration; the release of the company from a liability is considered to be the same as cash. Insofar as it may be considered worthwhile to amend the law for PLCs, it is worth noting that sections 1028 et seq. of the 2014 Act deal in detail with the valuation of non-cash assets received by PLCs as consideration for the issue of shares, which sections include provisions for the fair value. If it were considered appropriate to extend the concept of fair value to the release of a liability, this would provide a model.

- In exercising their duties, (including in respect of the allotment of any shares in consideration of the release of a liability of the company), company directors owe a legal duty to act in the interests of the company and also to act honestly and responsibly in the conduct of the affairs of the company. Directors must indemnify the company from any resulting loss or damage.

- Irrespective of whether the expression used is "for a liquidated sum" or "the fair value of", the law is only concerned that the consideration offered for the shares is sufficient. There is no general legal requirement that the consideration offered upon the allotment of shares is adequate.

- The prohibition on the allotment of shares at a discount in section 71(2) appears to afford protection against the possibility of a company suffering a loss in value on its share capital in the manner underlining this submission. As a matter of conventional statutory interpretation, a Court will normally require clear words to be included in a section of an Act if it is intended that the section is to override or affect another section of the Act. It is unlikely that section 64(3)(c) could be construed and used to supplant that prohibition.

- Where the value of the release of the company from the requirement to pay the liquidated sum has reduced to less than that liquidated sum, then that reduction ought in the normal course have been reflected in the accounts of the company by way of credit to reserves or debit to liabilities.

Recommendation

The Review Group is not convinced of the need to make the proposed amendment to section 64(3)(c) of the 2014 Act and does not recommend any amendment on that account.

1.2 Amendment to section 64(3)(c) relating to payment up or allotment of shares so as to provide an extension to the consideration for allotment of a share to be deemed to be a cash consideration

Submission

Unlike section 64(3) of the 2014 Act, section 583(3)(e) of the UK's Companies Act 2006 includes an extra category of consideration to be considered to be a cash consideration:

> *"payment by any other means giving rise to a present or future entitlement (of the company or a person acting on the company's behalf) to a payment, or credit equivalent to payment, in cash."*

Further relevant considerations

- The UK provision appears consistent with Article 7 of Directive 2012/30/EU which provides that "[T]he subscribed capital may be formed only of assets capable of economic assessment."

Recommendation

The Review Group views the addition of a further provision to section 64(3) favourably, which would resemble section 583(3)(e) of the UK's Companies Act 2006.

Draft amendment

Provide that section 64(3) of the 2014 Act be amended by the insertion, after "*will not be complied with"* of

> *", or*
>
> *(e) payment by any other means giving rise to a present or future entitlement (of the company or a person acting on the company's behalf) to a payment, or credit equivalent to payment, in cash."*

1.3 Amendment to section 64(4) relating to allotment or payment up of shares– references to "consideration other than cash"

Current Provision

*"**64** (4) In relation to the allotment or payment up of any shares in a company, references in this Act, other than in section 69(12)(c), to consideration other than cash and to the payment up of shares and premiums on shares otherwise than in cash include references to the payment of, or an undertaking to pay, cash to any person other than the company."*

Submission

Section 64(4) of the 2014 Act should be amended to clarify that the reference to the payment of cash (or an undertaking to pay cash) to any person other than the company should be for the purpose of the discharge of a liability owed by the company to that person or otherwise add value to the company. Otherwise, the section (as currently worded) could be interpreted as permitting shares to be allotted at a discount. The following amendment has been suggested, which adds to the end of the existing terms of section 64(4):

*"**64** (4) In relation to the allotment or payment up of any shares in a company, references in this Act, other than in section 69(12)(c) to consideration other than cash and to the payment up of shares and premiums on shares otherwise than in cash include references to the payment of, or an undertaking to pay, cash to any person other than the company in order to discharge a liability of the company or otherwise add value to the company."*

Further relevant considerations

- The current wording is drawn from the Companies(Amendment)Act 1983 section 2(3)(b):
  "(b) in relation to the allotment or payment up of any shares in a company, references in the Companies Acts, except in section 23, to consideration other than cash and to the payment up of shares and premiums on shares otherwise than in cash include references to the payment of, or an undertaking to pay, cash to any person other than the company."

- The prohibition on the allotment of shares at a discount in section 71(2) appears to afford protection against the possibility of a company suffering a loss in value on its share capital in the manner envisaged by this submission. Under section 71(2), there is a general prohibition on the allotment of shares at a discount (at a price lower than their nominal value). The allotment of shares at a discount would result in a company having less actual capital than if it had issued the shares at full price.

- If the wording were added, it is not clear whether the expression "discharge a liability of the company" would necessarily be interpreted in a manner which addresses the particular concern giving rise to the submission. A liability of the company might be discharged otherwise than at full value, thereby having the practical effect of the allotment of shares at a discount – the scenario this suggestion is intended to avoid. The payment or undertaking in practice is always at the request of or with the consent of the company.

- In exercising their duties, company directors owe a legal duty to act in the interests of the company and also to act honestly and responsibly in the conduct of the affairs of the company.

- Irrespective of the terminology used, the law is only concerned that the consideration offered for the shares is sufficient. It will not inquire into the reasonableness or value represented by the consideration provided. There is no general legal requirement that the consideration offered upon the allotment of shares is adequate.

Recommendation

The Review Group is not in favour of recommending the suggested amendment to section 64(4) of the 2014 Act.

2. Shares, Share Capital and Certain Other Instruments- Part 3

2.1 Restoration of a provision equivalent to section 62(2) of the Companies Act 1963 regarding use of a share premium account

Current Provision

Under section 62(2) of the 1963 Act, a company that had a share premium account could use that share premium for a number of purposes. These included the writing off of the company's preliminary expenses or the expenses of or commission paid or discount allowed on any issue of shares or debentures. It was also available for payment of premium on redemption of redeemable preference shares issued before 1 July 1991 (the date on which Part XI of the Companies Act 1990 came into force) and for repayment of premiums on redemption of any debentures.

Although the issue of shares at a discount is now not permitted, there is no equivalent provision in the 2014 Act for a company to use the share premium for any of the other purposes above. Instead a company must reduce its share capital by carrying out a formal reduction of company capital under section 84 of the Act either by using the summary approval procedure or by passing a special resolution that is confirmed by the High Court.

Submission

The absence of a provision equivalent to section 62(2) of the 1963 Act has caused difficulty in practice for some companies. A consequence of this omission is that some companies may now be obliged to apply to court (with the potential to incur significant expense) in circumstances where they did not have to previously. A company opting to reduce its company capital by SAP will also incur expense – for example by having to obtain a statutory auditor's report.

Further relevant considerations

- A variant of section 62(2) was retained under sections 610(2) and (3) of the UK's Companies Act 2006. This might potentially give rise to a difference of treatment as between group companies operating here and in the United Kingdom.

- Section 126 in effect preserves the ability of a company to apply share premiums in paying up unissued shares to be allotted to members as fully paid bonus shares. However, the 2014 Act has no provision which directly corresponds to section 62(2), which enabled a company to use the share premium account to write off the company's preliminary expenses or the expenses of or commission paid or discount allowed on any issue of shares or debentures.

- Section 62(2) provided for the use of the share premium account for the payment of premium on redemption of debentures. On the face of it, this would enable part of company capital to be used to pay a distribution, which would cut across the ethic of the fundamental integrity of company capital. It is suggested therefore, whilst it is justifiable to restore the status quo ante in respect of debentures issued before the commencement of the 2014 Act, it is not proposed for any subsequently issued debentures.

- Section 106 of the 2014 Act, which restates section 220 of the 1990 Act, permits the use of undenominated capital for payment of premium on redemption of redeemable preference shares allotted before 1 February 1990.

Recommendation

The Review Group recommends the reinstatement of a provision including those parts of section 62(2) of the 1963 Act as are not included in section 126 of the 2014 Act (other than those alluding to issue of shares at a discount).

Draft amendment

Provide that a new subsection (5A) be inserted in section the 2014 Act immediately following section 71(5), as follows:

> *"(5A) The share premium account may, notwithstanding anything in subsection (5), be applied by the company:*
>
> *(a) in writing off*
>
> *(i) the preliminary expenses of the company, or*
>
> *(ii) the expenses of, or the commission paid on, any issue of shares or debentures of the company; or*
>
> *(b) in providing for the premium payable on redemption of any redeemable preference shares issued by a company before 1 July 1991 or of any debentures of the company issued by a company before 1 June 2015."*

Provide that *"1 July 1990"* be substituted for *"1 February 1990"* in section 106(5) of the 2014 Act.

3. Share Capital, Shares and Certain Other Instruments- Part 3, Section 75(1)(a)

3.1 Amendment to section 75(1)(a) to allow merger relief on share allotments at a premium in the case of a body corporate where there is a cash subscription (as well as a share issue) by the acquiring company

Current Provision

Section 71(5) of the 2014 Act provides that any value received by a company on the allotment of shares in excess of their nominal value must be transferred to the company's share premium account and will form part of the company's undenominated capital.

> ***71.*** *(5) Subject to sections 72, 73 and 75, any value received in respect of the allotment of a share in excess of its nominal value shall be credited to and form part of undenominated capital of the company and, for that purpose, shall be transferred to an account which shall be known, and in this Act is referred to, as the "share premium account".*

There are some exceptions to this requirement – one of which is provided for in section 75. This provides that the rule in relation to the transfer to the company's share premium account does not apply where a company allots and issues shares to the shareholders of a body corporate in consideration for the acquisition by the issuing company of all of the issued shares in the body corporate – such that the body corporate becomes the wholly owned subsidiary of the issuing company.

> ***75.*** *(1) This section applies where—*
> *(a) a company (the **"issuer"**) allots and issues shares to the shareholders of a body corporate in consideration for the acquisition by the issuer of all of the issued shares in the body corporate (the **"acquired shares"**) such that the body corporate becomes the wholly-owned subsidiary of the issuer;*
> *(b) the consolidated assets and liabilities of the issuer immediately after those shares are issued are exactly, except for any permitted cash payments, the same as—*
> *(i) if the body corporate was itself a holding company, the consolidated assets and liabilities of the body corporate immediately before those shares were issued, or*
> *(ii) if the body corporate was not a holding company, the assets and liabilities of the body corporate immediately before those shares were issued;*
> *(c) the absolute and relative interests that the shareholders in the body corporate have in the consolidated assets and liabilities of the issuer are in proportion to (or as nearly as may be in proportion to) the interest they had in—*
> *(i) if the body corporate was itself a holding company, the consolidated assets and liabilities of the body corporate immediately before the shares were issued;*
> *(ii) if the body corporate was not a holding company, the assets and liabilities of the body corporate immediately before the shares were issued; and*
> *(d) the issuer does not account for its investment in the body corporate at fair value in the issuer's entity financial statements.*

Submission

It is proposed that the relief under section 75 ought also to apply where the consideration for the acquisition comprises not only an allotment of shares but also where there is a limited cash payment amounting to no more than 10% of the total consideration.

Further relevant considerations

- Section 75 is a new provision which is not based on previous Irish companies legislation or on any recommendation of the Review Group. The other exceptions to the application of section 71(5), which are contained in sections 72 (mergers) and 73 (group reconstructions) similarly did not operate under previous companies legislation. However, these are both referenced in Pillar A of the General Scheme of Companies Consolidation and Reform Bill, (Part A3 – heads 7-10), which noted that the respective proposals were the equivalent of provisions under then UK legislation (Companies Act 1985). There is no specific head which corresponds to section 75. However, head 10 did provide for an extension or restriction of the relief to be possible by regulation in a statutory instrument.

- The acceptance of the submission would be consistent with the condition for eligibility of a transaction for stamp duty exemption under section 80 of the Stamp Duties Consolidation Act 1999 which permits the inclusion of up to 10% non-share consideration in a transaction to which the section applies.

- Although Schedule 4 to the 2014 Act is due to be replaced, the Review Group notes that the amendment would be consistent with Schedule 4 paragraph 15 (as it currently stands) which provides for when a transaction is to be treated as a merger:

  > *15. The conditions for accounting for an acquisition as a merger are—*
  > *(a) that at least 90 per cent of the nominal value of the equity shares in the undertaking acquired is held by or on behalf of the undertakings consolidated in the group financial statements,*
  > *(b) that the proportion referred to in clause (a) was attained pursuant to the arrangement providing for the issue of equity shares by the undertakings consolidated in the group financial statements,*
  > *(c) that the fair value of any consideration other than the issue of equity shares given pursuant to the arrangement by the undertakings consolidated in the group financial statements did not exceed 10 per cent of the nominal value of the equity shares issued.*

- Under UK company law, similar flexibilities are provided for in sections 611 to 614 of the Companies Act 2006 in the case of mergers and group reconstructions. No exception is provided in the case of the acquisition of shares in a body corporate. However, under section 614 there is scope to provide for further exceptions by way of regulations.

- Section 80 of the Stamp Duties Consolidation Act 1999 provides for relief from stamp duty where at least 90% shares in a target company are acquired in return for a company issuing shares to the holders of the shares in the target company. This leaves it open to the acquiring company to pay 10% in cash on such acquisition. The submission appears to be consistent with the ethic underlying the stamp duty approach.

- The Review Group notes however that companies availing of this proposed amended provision would not benefit from the current capital gains tax treatment applicable where there is no cash subscription. The proposal appears nonetheless to have advantages for companies when in particular they wish to transact with minority shareholders who wish to be paid out in cash rather than in shares.

Recommendation

The Review Group recommends that an amendment be made to section 75(1)(a) in order to allow a cash payment of up to 10% of the consideration where shares are being issued.

Draft amendment

Provide that Section 75(1)(a) of the 2014 Act be amended to read:

> *"a company (the **"issuer"**) allots and issues shares to the shareholders of a body corporate with or without a cash payment (provided any such cash payment amounts to no more than 10 per cent of the total consideration) in consideration for the acquisition by the issuer of all of the issued shares in the body corporate (the **"acquired shares"**) or the cancellation of some of those shares and the acquisition of the balance of such shares such that the body corporate becomes the wholly-owned subsidiary of the issuer;"*

4. Share Capital, Shares and Certain Other Instruments- Part 3, Section 82

4.1 Insertion of section 82(6)(A) and (6)(B) into the 2014 Act to clarify the meaning of what is "commonly known as a refinancing" such as to disapply the requirement for a SAP

Current Provision

Section 82(2) contains a general prohibition on a company giving financial assistance for the purpose of an acquisition of shares in either itself or its holding company. Section 82(6) sets out a list of transactions which are excluded from that prohibition, including, in section 82(6)(h), refinancings of previous transactions which had themselves been excluded from the prohibition on account of having been entered into in accordance with the summary approval procedure (**"SAP"**).

> *"**82** (2) It shall not be lawful for a company to give any financial assistance for the purpose of an acquisition made or to be made by any person of any shares in the company, or, where the company is a subsidiary, in its holding company ...*
> *(5) Subsection (2) does not prohibit the giving of financial assistance in relation to the acquisition of shares in a company or its holding company if-*
> *(a) the company's principal purpose in giving the assistance is not to give it for the purpose of any such acquisition; or*
> *(b) the giving of the assistance for that purpose is only an incidental part of some larger purpose of the company,*
> *and the assistance is given in good faith in the interests of the company.*
> *(6) Without prejudice to the generality of subsection (5), subsection (2) does not prohibit—*
> *(h) the giving of financial assistance—*
> *(i) by means of a loan or guarantee, the provision of security or otherwise to discharge the liability under, or effect that which is commonly known as a refinancing of, any arrangement or transaction that gave rise to the provision of financial assistance, being financial assistance referred to in subsection (2) that has already been given by the company in accordance with the Summary Approval Procedure or section 60(2) of the Act of 1963; or*
> *(ii) by means of any subsequent loan or guarantee, provision of security or otherwise to effect a refinancing of—*
> *(I) refinancing referred to subparagraph (i); or*
> *(II) refinancing referred to in this subparagraph that has been previously effected (and this subparagraph shall be read as permitting the giving of financial assistance to effect such subsequent refinancing any number of times) …"*

The intention of the Act was that the refinancing of such transactions would not require to be approved by a SAP.

Submission

A refinancing is not defined in the legislation but the language of paragraph (h) indicates that it is, or includes a transaction which effects "that which is commonly known as a refinancing". Legal practitioners involved in financing transactions perceive a lack of agreement around what is a 'refinancing' with the result that in some cases a conservative approach is being taken by them. In

practice, as a consequence, a SAP is being carried out in respect of refinancing transactions. Clarification is required to determine what constitutes a 'refinancing'.

Further relevant considerations

- There is no common agreement among company law users or rulings by the courts as to what is "commonly known as a refinancing".

- The lack of clarity in the law in this area causes unnecessary cost to borrower companies.

Recommendation

The 2014 Act should, on a non-exhaustive basis, include a description of a refinancing transaction which would be deemed to fall within the existing expression of an arrangement "*commonly known as a refinancing".*

Draft amendment

Provide that new subsections (6A) and (6B) be inserted into the 2014 Act immediately following section 82(6), as follows:

> *"(6A) Without limitation to the ordinary meaning of the word "refinancing", for the purposes of paragraph (h)(i) of subsection (6) one or both of the following shall be deemed to be a "refinancing":*
>
> *(a) borrowing for the purpose of repaying (in whole or in part) a liability arising as a result of an arrangement or transaction previously approved in accordance with the Summary Approval Procedure or section 60(2) of the Act of 1963;*
>
> *(b) any change in:*
>
> *(i) the term for repayment of the borrowing; or*
>
> *(ii) the interest rate or rates payable thereon; or*
>
> *(iii) any terms, conditions, covenants, agreements or events of default governing or relating to the borrowing or any loan or guarantee or security;*
>
> *(6B) For the purposes of paragraph (h)(i) of subsection (6), where a transaction or arrangement previously approved in accordance with the Summary Approval Procedure or section 60(2) of the Act of 1963 provides for or has permitted the repayment and redrawing of any amounts, any repayment in whole or in part payment of any amount borrowed under any arrangement or transaction shall be disregarded."*

4.2 Amendment of section 82(6)(n) of the 2014 Act to permit payment of commissions to persons other than intermediaries

Current Provision

As stated above, section 82(6) contains a list of payments and actions by a company, which are exceptions to the prohibition on a company giving financial assistance for the purpose of an acquisition of shares in either itself or its holding company.

Section 82(6)(n) permits financial assistance:

> *in connection with an allotment of shares by a parent public company, the payment by a private limited subsidiary of that company of commissions, not exceeding 10 per cent of the money received in respect of such allotment, to intermediaries, and the payment by that subsidiary of professional fees;*

Section 1043 applies this exemption to PLCs, permitting the payment by a PLC of commission in respect of a share allotment by a PLC.

Submission

Commission in respect of underwriting or sub-underwriting commission is routinely paid to investors on a share issue by PLCs. Section 59 of the 1963 Act used expressly provide for the payment of commission, without specifying to whom they would be paid. The 2014 Act should be amended so as to enable this market practice to take place rather than such underwriters interposing an intermediary entity for receipt of the commission.

It is not proposed to extend the exemption to provide for payment of commission in connection with share allotments by companies other than PLCs.

Further relevant considerations

- When section 60 of the 1963 Act (the predecessor of section 82 in the 2014 Act) was reformed in the Investment Funds Companies and Miscellaneous Provisions Act 2005, section 59 of the 1963 Act was repealed. Section 59 had provided:

  It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company if—

  (a) the payment of the commission is authorised by the articles; and
  (b) the commission paid or agreed to be paid does not exceed 10 per cent. of the price at which the shares are issued or the amount or rate authorised by the articles, whichever is the less; and
  (c) the amount and rate per cent. of the commission paid or agreed to be paid is—
  (i)in the case of shares offered to the public for subscription, disclosed in the prospectus, or

(ii) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and delivered before the payment of the commission to the registrar of companies for registration, and, where a circular or notice not being a prospectus inviting subscription for the shares is issued, also disclosed in that circular or notice; and

(d) the number of shares for which persons have agreed for a commission to subscribe absolutely is disclosed in manner aforesaid.

The payments authorised by the former section 59 were perceived to be an exception to the prohibition on financial assistance and section 60 was amended accordingly. However in so doing, the insertion of "to intermediaries" narrowed the potential payees of the commission to intermediaries.

Recommendation

The 2014 Act should be amended so as to remove "to intermediaries" from section 82(6)(n).

Draft amendment

Provide that section 82(6)(n) be amended by the deletion of "to intermediaries".

5. Share Capital, Shares and Certain Other Instruments- Part 3, section 83

5.1 Insertion of section 31(2A) and amendment to section 83 to facilitate automatic conversion of shares to redeemable shares in accordance with provision contained in a company's constitution or added to it by special resolution

Current Provision

The 2014 Act permits companies to convert its shares into redeemable shares.

> "***83*** *(3) Save to the extent that its constitution otherwise provides, a company may, by special resolution, and subject to the provisions of this Act governing the variation of rights attached to classes of shares and the amendment of a company's constitution, convert any of its shares into redeemable shares."*

Prior to the 2014 Act, the governing statutory provision in relation to the conversion of shares into redeemable shares was section 210 of the Companies Act 1990. Section 210(1) provided that:

> *"Subject to subsections (2), (3), (4) and (5) and the provisions of the Companies Acts governing the variation of rights attached to classes of shares and the alteration of a company's memorandum or articles, a company may convert any of its shares into redeemable shares."*

The effect of the 1990 Act's provisions was that if a company had a conversion provision encapsulated in its Articles of Association (either from the outset of incorporation or by way of lawful amendment to the Articles of Association) which provided for conversion of shares into redeemable shares upon the occurrence of the specified trigger event, such a conversion would be valid and effective, subject of course to the provisions of subsections (2) to (5) of section 210 of the 1990 Act. Thus, under subsection (2), a holder of shares could veto the conversion of his/her shares into redeemable shares and under subsection (4) there could be no conversion of shares into redeemable shares if that would result in the nominal value of the non-redeemable issued shares being less than 10% of the nominal value of the total issued share capital.

Submission

The change in wording from section 210(2) of the 1990 Act to section 83(3) of the 2014 Act may be significant. Whereas the 1990 Act did not specify the method by which conversion could take place (and thus it could occur, for example, in a manner provided for in the Articles of Association), section 83(3) of the 2014 Act suggests that it is only to take place by way of special resolution "save to the extent that its constitution otherwise provides".

The Review Group understands that a view has been aired that the context in which the words "save to the extent that its constitution otherwise provides" appears to suggest that the constitution may take away that power rather than suggesting that the constitution could confer an even wider power (such as a power for the directors to resolve to convert shares).

Further relevant considerations

- The difference in language between section 83(3) of the 2014 Act and section 210(2) of the 1990 Act was not intended to effect a change in the law.

- The expression “save to the extent that the constitution provides otherwise” was intended to liberate companies to carry out particular tasks, and not to restrict them.

- For reference, the distinct wording of sections 83 and 84 is instructive:
    - Section 83(1) permits a company to make alterations of capital by way of ordinary resolution “save to the extent that its constitution otherwise provides”.
    - Section 84 permits a company to reduce its company capital by special resolution, again “save to the extent that its constitution otherwise provides”. However, in the case of section 84, subsection (4) provides:
      “(4) A company shall not purport to reduce its company capital otherwise than as provided for by this section.”

Recommendation

The Review Group does not accept the interpretation suggested by the senior counsel but notes that the absence of an express provision to refute it will cause difficulties for practitioners. It therefore proposes an amendment to section 31 of the 2014 Act to put the issue beyond doubt.

In addition, as the Act is intended to be accessible, the Review Group sees merit in clarifying that a company’s constitution can provide for conversion of shares.

Draft amendments

Provide that a new subsection (2A) be inserted into the 2014 Act immediately following section 31(2), as follows:

> *(2A) (a) Nothing in an optional provision or in another provision of this Act which is expressed to govern an optional provision shall limit or affect or be construed or interpreted as having limited or affected the ability of the company’s constitution to provide otherwise in any respect whatsoever and, without limiting the foregoing, a company's constitution may in particular include all or part of an optional provision with such additions and variations as do not contravene any other provision of this Act.*
>
> *(b)In this section “optional provision” has the same meaning as it has in Chapter 6 of Part 2.*

Provide also that a new subsection (3A) be inserted into the 2014 Act immediately following section 83(3), as follows:

> *(3A) A company’s constitution may provide for the conversion of the company’s shares to redeemable shares and for the conversion of redeemable shares to shares that are not redeemable.*

6. Share Capital, Shares and Certain Other Instruments- Part 3, Section 86

6.1 Amendment to section 86 to allow a different reference date for the identification of a company's share capital in an application to reduce company capital

Current Provision

In the case of a Court reduction of share capital, there is a requirement that the minute (*i.e*. the summary of share capital approved by the Court) must show the amount, if any, deemed to be paid up on each share at the date of the registration by the Registrar of the order and the minute.

> *"**86.** (1) On the doing of both of the following—*
>
> *(a) the production to the Registrar of an order of the court under section 85 confirming the resolution of the company with respect to reduction of its company capital; and*
>
> *(b) the delivery to the Registrar of a copy of the order and of a minute approved by the court showing, with respect to the company capital of the company as altered by the order—*
>
> *(i) the amount of the share capital;*
>
> *(ii) the number of shares into which it is to be divided and the amount of each share; and*
>
> *(iii) the amount, if any, at the date of the registration deemed to be paid up on each share, the Registrar shall register the order and minute."*
>
> *(2) On the registration of the order and minute and not before, the resolution for reducing company capital as confirmed by the order so registered shall take effect.*
>
> *(3) Notice of the registration of the order and minute shall be published in such manner as the court may direct.*
>
> *(4) The Registrar shall issue a certificate with respect to the registration of the order and minute, and that certificate shall be conclusive evidence that all the requirements of this Act relating to reduction of company capital have been complied with, and that the share capital of the company is such as is stated in the minute.*
>
> *(5) The minute, when registered, shall be deemed to be substituted for the corresponding part of the constitution of the company and shall be valid and capable of amendment as if it had been originally contained in it.*
>
> *(6) The substitution of any such minute for part of the constitution of the company shall be deemed to be an amendment of the constitution within the meaning of section 37(2)."*

Submission

The requirement under section 86(1)(b)(iii) that the minute approved by the Court must show the amount, if any, deemed to be paid up on each share at the date of the registration by the Registrar of the order and minute can give rise to difficulty in practice for PLCs – particularly those which are registered in Ireland but trading on markets in the USA and whose share value is subject to fluctuation. There will necessarily be a lapse in time between the preparation and subsequent approval of the minute by the Court and its registration with the Registrar during which period there is a possibility that the particulars on company capital recorded within the minute may have changed.

In practice, these companies have been required to, *inter alia,* swear affidavits providing updated particulars of share capital and shares in issue in advance of the hearing of the petition, request the Court to produce its order on the day of the hearing of the petition and have the order registered on

the same day with the CRO. This has been an additional administrative burden. It would be preferable if the particulars of share capital could instead be provided *"as at the latest practicable date"* before the delivery of the order and minute with discretion left to the Court to determine whether the date chosen was appropriate.

Consider should therefore be given to making an amendment to section 86(1)(b) to delete the words *"at the date of registration"* and replace them with the words ***"****as at the latest practicable date before the date of delivery of the order and minute"***.**

Further relevant considerations

- Section 86(1) is effectively a re-enactment of the old procedure provided for under section 75(1) of the 1963 Act.

- The equivalent UK procedure (section 627 Companies Act 2006) requires the giving of notice to Companies House within 15 days of the passing of the resolution together with delivery of a statement of company capital setting out similar particulars to those in section 86(1)(b). However, there is no specification that these particulars must be up to date and accurate as *per* the date that notice is given.

- The purpose of the proposed change is for the benefit of some companies which are publicly listed and whose particulars as to share capital may have changed since the date of approval of the minute by the Court. Consequently, instead of amending section 86, there appears to be merit in including a change of this nature only in Chapter 3 of Part 17 where a standalone procedure can be prescribed for the reduction of capital in the case of PLCs whose securities are listed or traded on a securities market.

Recommendation

The Review Group is in favour of the proposal, but not as an amendment to section 86(1)(b). Instead an amendment should be applicable only to PLCs with quoted securities.

Draft amendment

Provide that a new section 1043A be inserted in the 2014 Act immediately following section 1043 as follows:

Application of section 86 in relation to certain PLCs

"***1043*** *In the case of a PLC section 86(1)(b) shall apply as if the following text were substituted for the text of sub paragraph (iii) thereof:*

"(iii) the amount, if any, as at the latest practicable date before the date of delivery of the order and minute, deemed to be paid up on each share, the Registrar shall register the order and minute."

7. Share Capital, Shares and Certain Other Instruments- Part 3, Section 88

7.1 Amendment to section 88 to allow variation of class rights

Current Provision

Section 88 re-enacts section 38 of the 1983 Act and provides the protocols and procedures for variation of class rights attaching to shares. Section 38 was enacted in the light of Regulation 3 of Table A Part 1 providing as follows:

> *3. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may, whether or not the company is being wound up, be varied or abrogated with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of a special resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall apply but so that the necessary quorum shall be two persons at least holding or representing by proxy one-third of the issued shares of the class. If at any adjourned meeting of such holders a quorum as above defined is not present those members who are present shall be a quorum. Any holders of shares of the class present in person or by proxy may demand a poll.*

Section 88(5) provides:

> *(5) Where the rights are attached to a class of shares in the company by the constitution and it does not contain provisions with respect to the variation of the rights, those rights may be varied if all the members of the company agree to the variation.*

Accordingly, the default under the current law is that all members must agree to a change in class rights whereas the default under the previous law was that a special resolution of the class with a quorum requirement applied.

Submission

The 2014 Act should be amended to restore the pre-2014 Act position.

Further relevant considerations

- The issue would arise where a private limited company in existence prior to the commencement of the 2014 Act:
    - with class rights in its articles;
    - with a general provision at the start of its articles which stated that various regulations of Table A including Reg 3 of Part 1 of Table A applied;
    - did not have an express provision set out in the articles on variation of those class rights;
    - converts to an LTD in accordance with section 59 and in its new constitution replicated the class rights provisions that were in the articles, but did not include a provision akin to Regulation 3 of Part 1 of Table A; and
    - did not include a provision in the constitution prohibiting or restricting the variation of class rights.

In such a case, the now LTD would not have the Regulation 3 default but would have the section 88(5) default.

- It would also arise with a newly incorporated LTD
    - set up with different share classes and class rights;
    - whose constitution is silent on the process for variation of the class rights and in particular does not contain a prohibition or restriction on variation of class rights.

  In such a case the new default would apply.

- There is a general assumption that all of Table A, including the likes of Regulation 3 of Part I of Table A has migrated into the new Act in one form or another and this is not so in this case.

Recommendation

The Review Group is of the view that the pre-existing default should be restored such that, in the absence of an express provision in the constitution prohibiting or restricting variation of class rights a special resolution of the affected class (with a one third quorum) should be capable of varying class rights.

Draft amendment

Provide that section 88(5) be deleted and replaced with the following:

> *(5) Where the rights are attached to a class of shares in the company by the constitution and it does not contain provisions with respect to the variation of those rights or any prohibition or restriction of the variation of the rights, those rights may be varied if but only if—*
>
> *(a) the holders of 75 per cent, in nominal value, of the issued shares of that class, consent in writing to the variation; or*
>
> *(b) a special resolution, passed at a separate general meeting of the holders of that class, sanctions the variation,*
>
> *and any requirement (however it is imposed) in relation to the variation of those rights is complied with, to the extent that it is not comprised in the requirements in paragraphs (a) and (b).*

8. Share Capital, Shares and Certain Other Instruments- Part 3, Section 91

8.1 Amendment to section 91 in order to enable three-party share-for-undertaking and share-for-share transactions to proceed

Current Provision

Section 91 of the 2014 Act is designed to enable three-party share-for-undertaking transactions to take place where a summary approval procedure takes place.

> *"**91** (1) Subject to subsection (3), a company (the "relevant company") may for any purpose (with the result that its company capital is thereby re-organised) transfer or dispose of—*
>
> *(a) one or more assets;*
>
> *(b) an undertaking or part of an undertaking; or*
>
> *(c) a combination of assets and liabilities,*
>
> *to a body corporate, on the terms that the consideration (or part of the consideration) therefor is as follows.*
>
> *(2) That consideration (or part of consideration) is one comprising shares or other securities of that body corporate paid (by the allotment of them) to the members of the relevant company or of its holding company rather than to the relevant company.*
>
> *(3) Subsection (2) applies whether or not the terms of the transfer or disposal referred to in subsection (1) also involve the payment of cash to the members of the relevant company or of its holding company or the relevant company.*
>
> *(4) A transaction to which subsection (1) applies shall not be undertaken unless it is—*
>
> *(a) approved by the relevant company by employing the Summary Approval Procedure; or*
>
> *(b) approved by special resolution passed by the relevant company that is confirmed by the court under section 85 as if that resolution were providing for a reduction of the company's company capital (and the provisions of sections 84 to 87 shall apply accordingly with the necessary modifications).*
>
> *(5) Where such a transaction is so approved or confirmed by order of the court under section 85 , there shall be deducted from such of the relevant company's reserves and company capital as the relevant company shall, by ordinary resolution, resolve an amount equivalent to the value (as stated in, or ascertainable from, the accounting records of the company immediately before the transfer or disposal) of the transferred or disposed asset or assets, undertaking or part of an undertaking mentioned in subsection (1).*
>
> *(6) Any transaction in contravention of this section shall be voidable at the instance of the relevant company against any person (whether a party to the transaction or not) who had notice of the facts which constitute such contravention."*

Submission

The language used in subsection (1), requiring there to be a reorganisation of company capital appears to be at odds with both the intention of the section and accounting practice under FRS 102, which reports three-party share-for-undertaking transactions in the accounts by way of movements in reserves rather than in company capital.

In addition, the requirement in subsection (4) has been interpreted by certain practitioners as precluding a three-party share-for-undertaking transaction where the company has adequate distributable reserves to underpin the transaction.

Further relevant considerations

- Section 91 is a new provision which is noted by Pillar A to follow on a recommendation contained in the Second Report of the CLRG. That recommendation (at para. 7.11.9) stated:

> *"Accordingly, the Review Group recommends that a company ought to be empowered to enter into transactions whereby an undertaking or part of an undertaking or a subsidiary is transferred to a new company which issues shares as consideration to the shareholders rather than to the transferring company, notwithstanding the absence of adequate distributable reserves, provided that a validation procedure is implemented with respect to that transaction. The scheme of head or the new Companies Bill provides accordingly."*

- It is unclear what was intended by the use of the word "reorganised" or why it seems to be a requirement of the subsection that company capital must be reorganised if there are sufficient reserves which can be written down to reflect the book value of the assets or undertaking being transferred to the other body corporate.

- The reference in subsection (1) to the reorganisation of company capital appears to conflict with subsection (5), which permits the company to write down either its reserves or company capital by the amount of the book value of the assets or undertaking being transferred.

- The difficulty appears capable of resolution by deleting the words "with the result that its company capital is thereby reorganised" in subsection (1). If these words are deleted, it would then be clear from subsection (5) that, if a company wishes to carry out such a transaction, having complied with subsection (4), it must write down either its reserves or company capital by the amount of the book value of the assets transferred.

Recommendation

The Review Group recommends the amendment of the section so as to make it clear that:

(a) a transaction can proceed even if there is no reorganisation on the company's company capital; and

(b) a transaction can proceed without regard to the section where the company has adequate distributable reserves.

Draft amendment

Provide that section 91 of the 2014 Act be amended:

(a) by the deletion in subsection (1) of *"(with the result that its company capital is thereby re-organised)"*;

(b) by the substitution of subsection (4) with the following:
"(4) A transaction to which subsection (1) applies shall not be undertaken unless:

(a) the relevant company has distributable reserves at least equivalent to the value (as stated in, or ascertainable from, the accounting records of the relevant company immediately before the transfer or disposal) of the transferred or disposed assets and deducts an amount from those reserves; or
(b) it is approved by the relevant company by employing the Summary Approval Procedure; or
(c) it is approved by special resolution passed by the relevant company that is confirmed by the court under section 85 as if that resolution were providing for a reduction of the company's company capital (and the provisions of sections 84 to 87 shall apply accordingly with the necessary modifications)."

9. Shares, Share Capital and Certain Other Instruments- Part 3, Section 95(1)(a)

9.1 Disapplication of section 95(1)(a) which requires directors' consent to the transfer of shares in the case of public limited companies

Current Provision

Section 95 of the 2014 Act provides that the directors of a company may at their discretion decline to register any transfer of a share in the company.

> ***"95.*** *(1) Save where the constitution of the company provides otherwise—*
> *(a) the directors of a company may in their absolute discretion and without assigning any reason for doing so, decline to register the transfer of any share;"*

Section 95(1)(a) is not included in the Table in section 1002 of the Act which sets out the provisions of Parts 1 to 14 that are disapplied in the case of PLCs.

Submission

Although there is a clear rationale in the case of private companies for imposing restrictions on the right to transfer shares, this rationale does not extend to the circumstances of PLCs. The non-inclusion of section 95(1) in the Table in section 1002 appears to have been an error.

Further relevant considerations

- Section 95(1)(a) enacts the substance of Model Regulation 3 of Part II of Table A of the First Schedule of the 1963 Act but extends its application beyond private companies limited by shares to include PLCs.

- Under the previous Companies Acts, Regulation 24 of Part 1 of Table A had applied to PLCs and was more restrictive as to the circumstances in which directors could refuse to register a share.

  > *24. The directors may decline to register the transfer of a share (not being a fully paid share) to a person of whom they do not approve, and they may also decline to register the transfer of a share on which the company has a lien. The directors may also decline to register any transfer of a share which, in their opinion, may imperil or prejudicially affect the status of the company in the State or which may imperil any tax concession or rebate to which the members of the company are entitled or which may involve the company in the payment of any additional stamp or other duties on any conveyance of any property made or to be made to the company.*

- Notwithstanding the unfettered discretion afforded by section 95(1)(a), directors are obliged to exercise this refusal power bona fide and for the benefit of the company as a whole.

- Restrictions on the transfer of shares in the case of listed companies are generally prohibited by the Irish and UK Listing Rules. Any such restriction proposed by company directors requires the approval of the listing authority. However, a restriction on the transfer of shares will be permissible where the shareholder refuses to disclose information relating to the nature and extent of his interests.

- The application of section 95(1)(a) to PLCs is not mandatory and it is open to a PLC to disapply its effects through its constitution. It appears likely that this anomaly has not caused a difficulty so far by reason of the typical provisions in the articles of association of PLCs.

- While the application of section 95(1) was not modified or disapplied by Part 17, section 95(2), which addresses the payment of a nominal fee to the company and the evidencing of the right of the transferor to transfer the shares in issue, has been modified by section 1045 in the case of PLCs.

Recommendation

The Review Group recommends an amendment to the 2014 Act so as to bring about the *status quo ante*.

Draft amendment

Provide that section 1045 of the 2014 Act be amended by the renumbering of the section as 1045(1) and the insertion of the following as subsection (2)

> *"(2) Save where the constitution of the company provides otherwise, the directors may decline to register:*
>
> *(a) the transfer of a share (not being a fully paid share) to a person of whom they do not approve; or*
>
> *(b) the transfer of a share on which the company has a lien; or*
>
> *(c) any transfer of a share which, in their opinion, may imperil or prejudicially affect the status of the company in the State or which may imperil any tax concession or rebate to which the members of the company are entitled or which may involve the company in the payment of any additional stamp or other duties on any conveyance of any property made or to be made to the company."*

10. Share Capital, Shares and Certain Other Instruments- Part 3, Section 105

10.1 Disapplication of section 105 to unlimited companies and the requirement for distributable profits for the redemption or purchase of shares

Current Provision

A private company requires sufficient distributable profits:-

(a) to make a dividend or other distribution to the members; or

(b) to redeem or purchase shares.

Section 1255 of the 2014 Act provides that an unlimited company is not required to have distributable profits in order to make a dividend or distribution. However, it would appear that an omission has been made in relation to the redemption or purchase of shares since section 105(2) of the Act (which requires the purchase or redemption of shares to be made out of distributable profits) has not been disapplied in relation to private unlimited companies with share capital (ULC) or public unlimited companies with share capital (PUC).

> *"**105** (1) A company may acquire its own shares by purchase, or in the case of redeemable shares, by redemption or purchase.*
>
> *(2) Any such acquisition is subject to payment in respect of the shares' acquisition being made out of—*
>
> *(a) profits available for distribution; or*
>
> *(b) where the company proposes to cancel, pursuant to section 106, shares on their acquisition, the proceeds of a fresh issue of shares made for the purposes of the acquisition, but subject to the restriction contained in subsection (3) as respects such proceeds being used to pay a premium there referred to."*

> ***"1252** (1) Save to the extent that its constitution otherwise provides, an ULC or PUC may, by special resolution, reduce its company capital in any way it thinks expedient and, without prejudice to the generality of the foregoing, may thereby—*
>
> *(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up,*
>
> *(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid up company capital which is lost or unrepresented by available assets, or*
>
> *(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid up company capital which is in excess of the wants of the company.*
>
> *(2) 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.*
>
> *(3) Without prejudice to any contrary provision of—*
>
> *(a) the resolution for, or any other resolution relevant to, the reduction of company capital, or*
>
> *(b) the ULC's or PUC's constitution,*
>
> *a reserve arising from the reduction of an ULC's or PUC's company capital is to be treated for all purposes as a realised profit.*

*"**1255** Neither the provisions of Chapter 7 of Part 3 nor any rule of law on the making of distributions out of a company's assets shall apply in relation to an unlimited company."*

Submission

Although there may be a way around this problem using section 1252 of the 2014 Act (which permits an unlimited company to reduce its company capital in any way it thinks expedient including by paying off any paid up company capital) an amendment ought to be made, as it was never intended that unlimited companies should be subject to the requirement for distributable reserves.

Further relevant considerations

- The solution involving the use of section 1252 in its present form could be very limited and the problem caused by the failure to disapply section 105 to unlimited companies might represent a technical trap for the unwary company.

- The Review Group considered whether to recommend the disapplication of other provisions of section 105 but concluded that no material inconvenience to companies and their shareholders would result from not doing so.

Recommendation

The Review Group recommends that an amendment be made so as to disapply the requirement for distributable reserves to redeem own shares.

Draft amendment

Provide that section 1254 of the 2014 Act be amended by amending the marginal note to read "Application of sections 105 and 114 to ULCs and PUCs", the renumbering of the section as 1254(1) and the insertion of a new subsection (2) as follows:

"(2) Without affecting subsection (1), section 105 shall apply to an ULC and a PUC as if:

(a) the following text were substituted for the text of subsection (2) thereof:

"(2) The payment (if any) for such acquisition is not required to be made out of profits available for distribution."; and

(b)subsection (3) did not apply."

Provide that the tables in section 1230 of the 2014 Act be amended by the inclusion of section 106(3) and 106(4) as provisions disapplied to unlimited companies.

10.2 Amendment to section 105 to clarify that the 21 day display period for a contract for purchase of own shares need not apply where the special resolution is passed by written resolution procedure

Current Provision

Section 105 of the Act sets out the law applicable to the buy-back of own shares by a company. If, under section 194, a company opts to pass a special resolution by way of a written resolution to approve the buy-back of its shares (as opposed to passing the special resolution at an extraordinary general meeting of the company to approve the acquisition), section 105(9) provides for the substitution of certain language in section 105(8) (which would apply in the case of holding an EGM to approve). In that event, section 105(8)(a) would then state as follows:

> *"**105**(8)(a)the proposed contract of purchase or, if the contract is not in writing, a written memorandum of its terms shall be furnished to the members of the company on request or made available for inspection by the members at the registered office of the company during the period of 21 days before the date of the signing of the resolution by the last member to sign."*

Submission

Some practitioners are taking the view that the substitute wording under section 105(9) has introduced uncertainty as to whether the 21-day waiting period, intended to be capable of being abridged, has in fact been kept in place where a majority members' written resolution is used.

Further relevant considerations

- If the majority members' written resolution (MWR) is used, the contract of purchase has to be (A) made available to members on request, or (B) made available at the registered office, in either case at some stage during the 21 day period before the date of the signing of the resolution by the last member to sign in accordance with the MWR procedure. If one alternative is chosen, the most logical being the provision of the copy, then there is no issue.

Recommendation

The Review Group recommends an amendment to provide clarity.

Draft amendment

Provide that section 105(8)(a) be amended as it is to apply where the written resolution procedure is used, so as it reads as follows:

> *"**105**(8)(a) the proposed contract of purchase or, if the contract is not in writing, a written memorandum of its terms shall:*
>
> *(i) be furnished to each member of the company; or*
>
> *(ii) during the period of 21 days before the date of the signing of the resolution by the last member to sign, be made available for inspection by the members at the registered office of the company."*

11. Share Capital, Shares and Certain Other Instruments- Part 3, section 106

11.1 Amendments to sections 106, 480 and 503 to clarify *post*-merger treatment of merging companies' shares acquired by a successor company

Current Provision

Section 102 of the 2014 Act states what is to happen to shares acquired by it in the transactions described in the section.

> ***102*** *(1) Subject to the provisions of this Chapter, a company may acquire its own fully paid shares—*
>
> *(a) by transfer or surrender to the company otherwise than for valuable consideration;*
>
> *(b) by cancellation pursuant to a reduction of company capital by either of the means referred to in section 84;*
>
> *(c) pursuant to an order of the court under section 212;*
>
> *(d) where those shares are redeemable shares, by redemption or purchase under section 105;*
>
> *(e) by purchase under section 105;*
>
> *(f) where those shares are preference shares referred to in section 108, by redemption under that section; or*
>
> *(g) pursuant to a merger or division under Chapter 3 or 4 of Part 9.*

> ***106*** *(1) Shares acquired by a company under section 105, or otherwise acquired by it under section 102 (1)(a), shall be cancelled or held by it (as "treasury shares").*

Submission

Clarification is required on the status of own shares acquired by a company pursuant to either a merger or division under Chapter 3 or 4 of Part 9 respectively, as permitted by section 102(1)(g) of the 2014 Act. In particular, the law should state the rights (if any) that attach to them, how they should they be categorised in the accounts of a successor company and whether they can be either re-issued or cancelled.

Further relevant considerations

- The definition of "Treasury Shares" in section 106(1) covers shares acquired by a company under section 105, or otherwise acquired by it under section 102(1)(a) but not by other methods. This therefore excludes shares acquired by a company pursuant to a merger or division and shares acquired by a company under Chapter 3 or 4 of Part 9 under section 102(1)(g).

Recommendation

The Review Group recommends the making of amendments that align the law applicable to shares acquired in a merger with those acquired by other procedures.

Draft amendment

Provide that:
Section 106 be amended to include reference to subparagraph (g) of section 102(1) as follows:

*"**106** (1) Shares acquired by a company under section 105, or otherwise acquired by it under section 102 (1)(a) or (g), shall be cancelled or held by it (as "treasury shares")."*

In respect of mergers, section 480 be amended by the insertion of a new subparagraph, subsection 3(b) as follows:

*"**480**(3) The order of the court confirming the merger shall, from the effective date, have the following effects:*

(a) all the assets and liabilities of the transferor company or companies are transferred to the successor company …

(b) any fully paid shares previously issued by a successor company and held by a transferor company, and which are acquired by a successor company in itself pursuant to a merger under this Chapter shall be deemed to be treasury shares held by the successor company, to which the provisions of section 109 shall apply."

In respect of divisions, section 503 be amended by the insertion of a new subparagraph, subsection 4(j) as follows:

*"**503** (4) The order of the court confirming the division shall, from the effective date, have the following effects:*

(a) each asset and liability of the transferor company is transferred to the successor company or companies; …

(j) any fully paid shares previously issued by a successor company and held by a transferor company, and which are acquired by a successor company in itself pursuant to a division under this Chapter shall be deemed to be treasury shares held by the relevant successor company, to which the provisions of section 109 shall apply."

As a consequence, section 109(2) should be amended by the addition of a paragraph (c):

"(c) shares previously issued by a successor company and held by a transferor company, and which are acquired by a successor company as provided by section 480 or 503."

12. Share Capital, Shares and Certain Other Instruments- Part 3, section 117

12.1 Amendment to section 123 to exclude (i) payment off of paid up share capital and (ii) the extinguishment or reduction of a member's liability on shares not fully paid up from the definition of "distribution"

Current Provision

The 1983 Act, section 51(2) defined "distribution" and provided for two exceptions to the rule that a company shall not make a distribution except out of profits available for that purpose. One of these exceptions was contained in subsection (2)(c) and applied to "the reduction of share capital … by paying off paid up share capital." This exception was included in earlier drafts of the Companies Bill but was removed at a very late stage before enactment of the 2014 Act.

While the Act, at section 117(1), continues to provide that "[a] company shall not make a distribution except out of profits available for the purpose" in section 123 (which defines distribution and sets out certain exceptions) it no longer contains the 1983 Act exception.

> *"**123** (1) In this Part "distribution" means every description of distribution of a company's assets to members of the company, whether in cash or otherwise, except distributions made by way of—*
>
> *(a) an issue of shares as fully or partly paid bonus shares;*
>
> *(b) the redemption of preference shares pursuant to section 108 out of the proceeds of a fresh issue of shares made for the purposes of redemption;*
>
> *(c) the redemption or purchase of shares pursuant to section 105 and the other relevant provisions of this Part out of the proceeds of a fresh issue of shares made for the purposes of the redemption or purchase;*
>
> *(d) the payment pursuant to section 106 (5) of any premium out of the company's undenominated capital on a redemption referred to in that provision; and*
>
> *(e) a distribution of assets to members of the company on its winding up."*

Submission

A view has been expressed that, because of the width of the definition of "distribution", a reduction of capital involving a payment to the shareholders is a distribution and therefore requires the company to have distributable profits of an amount at least equal to that to be paid off the share capital. This appears to be supported by section 117(9) which provides that in the case of a reduction in capital which does not involve payment out to shareholders, the resulting reserve is to be treated as a realised profit.

Section 84(1)(c) does provide that a company can "… pay off any paid up share capital…" without making reference to a requirement to have distributable reserves to do so. However, the absence of such a reference in that section cannot be relied on as resolving the dilemma arising from the omission of the exception from section 123 of the 2014 Act.

The 1983 Act exception should be re-enacted in order to put the issue beyond doubt.

> *"**84** (1) Save to the extent that its constitution otherwise provides, a company may, subject to the provisions of this section and sections 85 to 87 , reduce its company capital in any way it thinks expedient and, without prejudice to the generality of the foregoing, may thereby—*

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid up company capital which is in excess of the wants of the company."

Further relevant considerations

- It is not just a reduction of capital by "paying off paid-up share capital" that has not been expressly declared not to be a distribution (as was the case under the 1983 Act) but also "the reduction of share capital by extinguishing or reducing all or part of a member's liability on shares not fully paid up". Both of these transactions were specifically excluded by section 51(2)(c) of the 1983 Act.

- Although originally included in the Companies Bill 2012 the two exceptions contained in section 51(2)(c) of the 1983 Act were removed by Government amendment at Seanad Committee Stage in June 2014. Proposing the amendment, Minister Sean Sherlock TD stated: *"The amendments amend the definition of "distribution" by eliminating as an exception 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 be subject to the normal rules of requiring distributable reserves. This is consistent with section 117(3) which provides that a company shall not apply an unrealised profit in paying up debentures or any amounts unpaid on any of its issued shares."*

- The Review Group agrees with the commentary accompanying the amendment. However, that amendment did not take into account the new and detailed regime for the reduction of share capital requiring either a court order or a Summary Approval Procedure with contingent director liability.

- A similar exception to that contained in section 51 of the 1983 Act is set out in the equivalent section of the UK's Companies Act 2006. Section 829(2)(b) provides that the following are not "distributions":

  "the reduction of share capital—

  (i) by extinguishing or reducing the liability of any of the members on any of the company's shares in respect of share capital not paid up, or

  (ii) by repaying paid-up share capital;"

Recommendation

The Review Group recommends that these two examples be included in the list of exclusions from the definition of "distribution".

Draft amendment

Provide that section 123 of the 2014 Act be amended by:

(a) the deletion at the end of paragraph (d) of *"and";* and

(b)the insertion after *"winding up"* in paragraph (e) of:

"(f)the reduction of share capital-

(i) by paying off paid up share capital, or

(ii) by extinguishing or reducing all or part of a member's liability on shares not fully paid up

provided in the case of a company limited by shares that such provision is affected in accordance with section 84."

13. Share Capital, Shares and Certain Other Instruments- Part 3, section 118

13.1 Amendment to section 118 in order to provide that the restriction on the distribution of pre-acquisition profits applies where sections 72, 73 and 75 are applicable notwithstanding that there is no share premium in the shares of the acquiring company

Current Provision

Under section 71(5) of the 2014 Act, where shares are issued for a consideration in excess of their par or nominal value that excess value must be credited to the share premium account, which forms part of undenominated capital. Sections 72, 73 and 75, which deal with share-for-share transactions, provide for options in determining the value of share premiums.

Additionally, section 118 provides for the treatment of pre-acquisition profits and section 118(4) provides that if a transaction qualifies under section 72, 73 or 75 then the restriction on pre-acquisition profits does not apply.

> ***"118.*** *(1) Subject to subsections (3) and (4), any amount of the accumulated profits or losses attributable to any shares in a subsidiary for the time being held by a holding company or any other of its subsidiaries shall not, for any purpose, be treated in the holding company's financial statements as profits available for distribution so far as that amount relates to accumulated profits or losses for the period before the date on or as from which the shares were acquired by the company or any of its subsidiaries (which period is referred to in subsection (2) as the "pre-acquisition period").*
>
> *(2) For the purpose of determining whether any profits or losses are to be treated as profits or losses for the pre-acquisition period, the profit or loss for any financial year of the subsidiary may, if it is not practicable to apportion it with reasonable accuracy by reference to the facts, be treated as accruing from day to day during that year and be apportioned accordingly.*
>
> *(3) If the Summary Approval Procedure is followed in respect of such treatment, subsection (1) does not prohibit—*
>
> *(a) the whole of the amount referred to in that subsection; or*
>
> *(b) such proportion of that amount as is specified in the declaration referred to in section 205,*
>
> *being treated as profits available for distribution by the holding company for the period, and the period only, referred to in section 202 (1)(a) (as that provision applies by virtue of section 202 (2) and (3)).*
>
> *(4) Subsection (1) does not apply to the profits or losses attributable to shares in a subsidiary held by a holding company where those shares were acquired in a transaction to which section 72, 73 or 75 applies."*

Submission

The question has been raised as to whether, as a matter of interpretation, a transaction may fall to be treated as one to which section 72, 73 or 75 applies (and therefore there is no pre-acquisition restriction by virtue of section 118(4)) even when there is no share premium. In other words, do sections 72, 73 and 75 apply to a transaction even when there is no share premium?

Further relevant considerations

- Those sections deal with acquisitions by way of mergers, group reconstructions and types of share-for-share exchanges. The principle behind subsection (4) of section 118 was to avoid any question of a "dividend trap" pursuant to section 118 subsequently (and perhaps inadvertently) arising for a new Irish holding company, where the holding company was established pursuant to one of those types of acquisitions.

Recommendation

It would be sensible to make it clear in subsection (4) that it is not relevant that there would be no share premium arising on foot of the relevant transaction, it being acknowledged that this is an unlikely occurrence.

Draft amendment

Provide that section 118 be amended by the addition at the end of subsection (4) of:
"(whether or not any shares issued by a company issuing shares pursuant to any such transaction are issued at a premium)."

14. Share Capital, Shares and Certain Other Instruments- Part 3, section 126

14.1 Amendment to section 126 to clarify reserves that may be converted to share capital by way of bonus issue

Current Provision

Under section 126 of the 2014 Act, a company in general meeting may capitalise any part of a "relevant sum" which is not available for distribution by applying such sum in paying up in full unissued shares to be allotted as fully paid bonus shares to those members of the company who would have been entitled to that sum if it were distributed by way of dividend.

"Relevant sum" is defined in section 126 (2) as meaning: (a) any sum for the time being standing to the credit of the company's undenominated capital, (b) any of the company's profits available for distribution, or (c) any sum representing unrealised revaluation reserves.

> *"**126**. (1) Each provision of this section applies save where the company's constitution provides otherwise.*
>
> *(2) In subsections (3) and (4) "relevant sum" means—*
>
> *(a) any sum for the time being standing to the credit of the company's undenominated capital;*
>
> *(b) any of the company's profits available for distribution; or*
>
> *(c) any sum representing unrealised revaluation reserves.*
>
> *(3)The company in general meeting may, on the recommendation of the directors, resolve that any relevant sum be capitalised and applied on behalf of the members who would have been entitled to receive that sum if it had been distributed by way of dividend and in the same proportions in or towards paying up in full unissued shares of the company of a nominal value equal to the relevant sum capitalised (such shares to be allotted and distributed credited as fully paid up to and amongst such holders and in the proportions as aforementioned).*
>
> *(4)The company in general meeting may, on the recommendation of the directors, resolve that it is desirable to capitalise any part of a relevant sum which is not available for distribution, by applying such sum in paying up in full unissued shares to be allotted as fully paid bonus shares, to those members of the company who would have been entitled to that sum if it were distributed by way of dividend (and in the same proportions)."*

Submission

Under previous legislation, Table A (regulation 130A) provided that the company in general meeting could capitalise any part of the amount for the time being standing to the credit of *any of the company's reserve accounts* by allotting bonus shares.

It would appear therefore that the new regime under section 126 of the 2014 Act is narrower, in that certain reserves cannot be capitalised, as they fall outside the definition of "relevant sum". For example, a reserve which arises on a capital contribution to a company of a non-cash asset (*e.g.*, shares in another company) could not be capitalised, as it does not appear to fall within the definition of "relevant sum". Such a reserve could have been capitalised under the Companies Acts 1963–2013.

Section 126 is stated to apply "save where the company's constitution provides otherwise". This suggests that it should be possible for the company's constitution to explicitly permit the capitalisation of reserves which do not fall within the definition of "relevant sum".

However, the view that has been aired, referred to at 5.1 above [page 21] has suggested that the meaning of the phrase "save to the extent that the company's constitution provides otherwise" is that the constitution may take away or restrict the power to capitalise a "relevant sum", rather than suggesting that the constitution could in fact confer an even wider power, such as a power for the company to capitalise undistributable reserves which do not come within the definition of "relevant sum".

An amendment is required in order to clarify (a) where the phrase "save where the company's constitution provides otherwise", that a constitution can confer a broader or wider power on the company than that permitted in the optional provision, and (b) that the definition of "relevant sum" be expanded to include any of a company's undistributable reserves.

Further relevant considerations

- Section 126 had initially provided for a broader definition of "relevant sum" and provided that any sum for the time being standing to the credit of the company's reserves (including any undenominated capital) was capable of being capitalised. This was based on the wording of both Model Regulation 130 and 130A from Table A. However, the provision was amended by Government Amendment at Dail Eireann Report Stage (25 March 2014) when the current definition of "relevant sum" in section 126(2) was substituted for the previous text. The amendment was agreed to without explanation or parliamentary debate.

- This amendment may have been prompted by concerns about the use by a company of any of its reserves (including temporary reserves which could reverse over time such as foreign currency translation reserves and cash flow hedge reserves) for the purpose of creating permanent company capital in the form of the issue of bonus shares. The amendment may also have been necessitated by the need to ensure compliance with the requirements of section 117(3).

- Under the old Regulation 130 in Table A, the company's ability to capitalise any part of its reserves was not completely unfettered. For example, regulation 130 specified that a company's share premium account could only be capitalised to the extent permitted by section 62 of the 1963 Act. Regulation 130:

  *"**130**. The company in general meeting may upon the recommendation of the directors resolve that any sum for the time being standing to the credit of <u>any of the company's reserves</u> (including any capital redemption reserve fund or share premium account) or to the credit of profit and loss account be capitalised and applied on behalf of the members who would have been entitled to receive the same if the same had been distributed by way of dividend and in the same proportions either in or towards paying up amounts for the time being unpaid on any shares held by them respectively <u>or in paying up in full unissued shares</u> or debentures of the company of a nominal amount equal to the sum capitalised (such shares or debentures to be allotted and distributed credited as fully paid up to and amongst such holders in the*

proportions aforesaid) or partly in one way and partly in another, so however, that the only purpose for which sums standing to the credit of the capital redemption reserve fund or the share premium account shall be applied shall be those permitted by sections 62 and 64 of the Act."

- However, Regulation 130 was capable of amendment by companies. While the application of Regulation 130 was made subject to section 62 and 64 of the 1963 Act, those sections have been superseded by the new regime governing share capital.

- The Review Group considered at length the situations that may arise where an asset or class of assets is revalued upwards with the creation of a revaluation reserve. Under section 149 of the 1963 Act as originally enacted, undistributable reserves could be applied for the purposes of a bonus issue of shares to shareholders. Although the relevant provisions of section 149 were repealed by the Companies (Amendment) Act 1983, those provisions were largely re-enacted as a company option by the amended Regulations 130 and 130A referred to above. The undistributable reserves that have been therefore capable of use for the purposes of a bonus issue have included revaluation reserves. It is of course possible that an asset so revalued and underpinning the making of a bonus issue of shares may reduce in value. In such circumstances, a company's directors are obliged when preparing accounts to do so on a "true and fair basis", reflecting any downward revaluation in the profit and loss account. It should be emphasised that this would be the case in any event regardless of whether the value of the asset had underpinned the creation of a revaluation reserve in the first place.

- The Review Group is accordingly of the opinion that the reasoning that may have led to the Seanad stage amendments did not take account of the fact that any negative change in reserves goes directly to the profit and loss account as a provision and restricts the making of distributions.

Recommendation

The Review Group recommends that amendments be made to remove any ambiguity about this provision. The Review Group also observed that the capitalisation of reserves generally tends to "lock in" money as opposed to facilitating the payment of money out from the company.

Draft amendments

Provide that a new subsection (2A) be inserted into section 31 of the 2014 Act immediately following section 31(2), as set out in section 5.1 on page 22.

Provide that section 126 be amended by the insertion in subsection (2) of a paragraph (d) as follows:

"(d) any part of the amount for the time being standing to the credit of any of the company's reserve accounts."

15. Acquisitions- Part 9, section 459(7) and SI 255/2006

15.1 Amendment to paragraph 11 of schedule 6 to the 2014 Act to enable unclaimed consideration arising in the acquisition by way of statutory squeeze-out of shares in a listed company to transfer to the Minister for Public Expenditure and Reform

Current Provision

In the case of the acquisition of a listed company by public offer (as opposed to a takeover by scheme of arrangement), the statutory procedure for the squeeze-out of minorities is contained in SI 255/2006, (the Irish transposition of the EU Takeovers Directive 2004/25/EC) rather than under the 2014 Act. The provisions of the SI apply to main-market listed companies, while the Act applies to all other companies. Section 459(7) of the Act, which applies to companies other than main-market listed companies and therefore applies to Irish companies admitted to AIM and its Dublin equivalent the ESM, has language very similar to that contained in the SI but with the additional provision that after the expiry of 7 years any monies received by the offeree company transfer to the Minister for Public Expenditure and Reform. Under Regulation 25(4) of the SI, the equivalent monies must be held by the target company in perpetuity.

Regulation 22(2) of SI 255/2006 provides that *"section 204 of the 1963 Act shall not apply to a bid for a company or other body corporate falling within paragraph (1) in so far as it relates to securities."* Section 204 previously dealt with the position of minority shareholders in a takeover.

Paragraph 11(2)(a) of Schedule 6 to the 2014 Act provides: " *... (a) the reference in Regulation 22(2) of the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006 (SI No. 255 of 2006) to section 204 of the Act of 1963 shall be read as a reference to Chapter 2 of Part 9."* This means that section 459(7) does not apply and the ability to transfer the money to the Minster for Public Expenditure and Reform does not apply.

Regulation 25 of SI 255/2006 requires the following:

> *"**25** (1) Where a notice has been given by an offeror ... the offeror shall, before the expiration of 1 month from the date of the giving of the notice –*
>
> *(a) transmit to the offeree company a copy of the notice together with subject to paragraph (3), an instrument of transfer of the securities of the dissenting security holders executed on behalf of the dissenting security holders as transferor by any person appointed by the offeror (being either the offeror or a subsidiary of the offeror or a nominee of the offeror or of such a subsidiary), and*
>
> *(b) pay to or vest in the offeree company the amount or other consideration representing the price payable by the offeror for the beneficial ownership of the securities which by virtue of Regulation 23 the offeror is entitled to acquire ...*
>
> *(4) Any sums received by the offeree company under this Regulation shall be paid into a separate bank account and any such sums and any other consideration so received shall be held by the company on trust for the several persons entitled to the securities in respect of which the said sums or other consideration were respectively received."*

2014 Act:

*"**459** (7) Where an offeror has complied with subsection (6), the offeree company shall—*

(a) thereupon register as the holder of those shares the person who executed such instrument as the transferee,

(b) pay any sums received by the offeree company under this section into a separate bank account and, for a period of 7 years after the date of such receipt, hold any such sums and any other consideration so received on trust for the several persons entitled to the shares in respect of which those sums or other consideration were respectively received,

(c) after the expiry of the foregoing period of 7 years, transfer any money standing to the credit of that bank account and any shares, other securities or other property vested in it as consideration, together with the names of the persons believed by the company to be entitled thereto to the Minister for Public Expenditure and Reform, who shall indemnify the company in respect of such sums, shares, securities or property and any claim which may be made therefor by the persons entitled thereto,

(d) for as long as shares in the offeror are vested in the offeree company (where shares in the offeror have been issued as all or part of the consideration) not be entitled to exercise any right of voting conferred by those shares except by and in accordance with instructions given by the shareholder in respect of whom those shares were so issued or his or her successor-in-title."

Submission

The reform available to all other companies under section 459 is denied to listed companies. An amendment is required to address this anomaly.

Further relevant considerations

- Could this issue be resolved by an insertion into Part 17 that would apply the provisions of section 459(7) to listed companies notwithstanding anything stated in the EU Takeovers Directive?

- Would a separate amendment also be required to Regulation 22 of SI 255/2006 to clarify that section 459(7) shall apply to affected companies or other bodies corporate? An amendment may also be required to the terms of Paragraph 11(2)(a) of Schedule 6 to the 2014 Act.

Recommendation

The Review Group recommends that the reform available to non-listed companies be applied to listed companies.

Draft amendment

Provide that paragraph 11(2)(a) of Schedule 6 to the 2014 Act be amended by the insertion after *"Chapter 2 of Part 9"* of *"provided that, notwithstanding Regulation 22 of those Regulations, section 459(7) shall apply to any company to which those Regulations apply".*

16. Mergers- Part 9, section 480(5)-(8)

16.1 Amendment to section 480(5)-(8) to provide for a document to issue from the Registrar of Companies following a SAP merger of which judicial and administrative notice would be taken

Current Provision

Section 480(5)-(8) sets out certain registration provisions which apply consequent upon a court ordered merger.

> ***"480*** *(5) Without prejudice to subsections (6) and (7), the successor company shall comply with registration requirements and any other special formalities required by law and as directed by the court for the transfer of the assets and liabilities of the transferor company or companies to be effective in relation to other persons.*
>
> *(6) There shall be entered by the keeper of any register in the State-*
>
> *(a) upon production of a certified copy of the order under subsection (2) [this is the court order confirming the merger] and*
>
> *(b)without the necessity of there being produced any other document … the name of the successor company in place of any transferor company in respect of the information, act, ownership or other matter in that register and any document kept in that register*
>
> *(7) Without prejudice to the generality of subsection 6, the Property Registration Authority, as respects any deed (within the meaning of section 32 of the Registration of Deeds and Title Act 2006) registered by that Authority or produced for registration by it, shall, upon production of the document referred to in subsection (6)(a) but without the necessity of there being produced that which is referred to in subsection (6)(b), enter the name of the successor company in place of any transferor company in respect of such deed.*
>
> *(8) Without prejudice to the application of subsection (6) to any other type of register in the State, each of the following shall be deemed to be a register in the State for the purposes of that subsection:*
>
> *(a) the register of members of a company referred to in section 169;*
>
> *(b) the register of holders of debentures of a public limited company kept pursuant to section 1120;*
>
> *(c) the register kept by a public limited company for the purposes of sections 1048 to 1053;*
>
> *(d) the register of charges kept by the Registrar pursuant to section 414;*
>
> *(e) the Land Registry;*
>
> *(f) any register of shipping kept under the Mercantile Marine Act 1955."*

Submission

It is not clear from the provisions of the 2014 Act whether these registration provisions will apply in the event that the successor company effects a merger by way of SAP. This is because section 472 (which provides for when a merger takes place by way of SAP) expressly disapplies most of the remaining sections of Chapter 3 of Part 9 – including section 480(5)-(8). This issue should be remedied by the issue by the Registrar of Companies of a document equivalent to the Court order above.

Further relevant considerations

- The 2015 CRO Annual Report indicated that 4 domestic mergers were completed using SAP during the course of the year.

Recommendation

The Review Group considered that a possible solution to this matter could be an amendment to the 2014 Act to provide for the delivery by a director of the successor company to the Registrar of a certificate of merger in a prescribed form which, once registered, will be recognised as evidence of the merger for the purposes of all Irish registries and the courts.

The Review Group recommends that this proposal be further considered by the CLRG Reorganisations, Acquisitions, Mergers and Divisions subcommittee.

17. Public Limited Companies- Part 17, Chapter 4

17.1 Amendment to Chapter 4 of Part 17 (requirement to make a notification in respect of interests in shares) so as not to apply to rights to subscribe for shares

Current Provision

Chapter 4 of Part 17 of the 2014 Act (Interests in shares: disclosure of individual and group acquisitions) deals with the disclosure of interests in shares in PLCs.

In the context of disclosure of interests in shares in PLCs, section 77(6) of the 1990 Act had provided that a right to acquire an interest in shares was disclosable. Section 77(7) of the 1990 Act clarified however that a right to acquire an interest in shares did not include a right to subscribe for shares. Accordingly, it was clear that the reference to a right to acquire shares was to acquire interests in existing issued shares and not to acquire unissued shares.

In determining whether an interest is notifiable for the purposes of disclosure of interests in PLC shares, section 1050 of the 2014 Act cross refers to sections 257–260 on disclosure by directors and secretaries of interests in shares and debentures. Section 258 provides that an interest includes a right to acquire shares. However, there does not seem to be any provision equivalent to section 77(7) of the 1990 Act stating that there is no obligation to disclose rights or obligations to subscribe for shares.

Section 264(3) of the 2014 Act is similar to section 77(7) of the 1990 Act and does apply to PLCs. However, this section only applies to PLCs as regards the notification by directors and secretaries of interests in shares and not the wider notification obligation found in Chapter 4, Part 17 for PLCs.

Submission

In view of the fact that a company will be aware of rights it has granted to a grantee, the original grantee of the right to subscribe for shares should not be required to notify the company of the grant of those rights.

Further relevant considerations

- Neither the Heads of Bill nor the Explanatory Memorandum indicate that it was intended to extend the notification obligation in Chapter 4 of Part 17 to include rights and obligations to subscribe for shares. The language of Chapter 4 of Part 17 is such that it contemplates disclosure of interests in issued shares only (and not rights to subscribe for shares yet to be issued).

Recommendation

The Review Group recommends that this narrow exclusion from the obligation to notify an interest should be accommodated.

Draft amendment

Provide that section 1047 of the 2014 Act be amended by the insertion of new subsections (4) and (5) as follows:

"(4) Where a company has granted rights to a person to subscribe for shares in the company, those rights shall, in the case of that person only, be deemed for the purposes of this Chapter not to be rights to acquire those shares in the company requiring notification by that person.

(5) Where a person has become obliged as original contracting party with a company to subscribe for shares in the company, such obligation shall, in the case of that person only, be deemed for the purposes of this Chapter not to be a right to acquire those shares in the company requiring notification by that person."

18. Re-Registration- Part 20

18.1 Amendments to sections 1297 and 1299 (requirements for re-registration of a company as a CLG or a DAC limited by guarantee) to provide for dealing with the option to reduce or cancel share capital by SAP

Current Provision

The 2014 Act provides that a company may convert to become a CLG - a company limited by guarantee without a share capital. Section 1297 provides in such event that an application to court must be made to deal with re-registering the company's share capital.

> ***"1297*** *(2)(c) unless the position concerning the allotted share capital of the company, at the date of the application for re-registration, is as referred to in subsection (3), the court, on application to it by the company in that behalf, sanctions its reregistration as a company limited by guarantee and gives directions as to how its company capital is to be treated in the framework of the resultant company.*
> *(3) The position mentioned in subsection (2)(c), concerning the company's allotted share capital, is that the following conditions are satisfied—*
> *(a) no amount is paid up on it, and*
> *(b) 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."*

Section 1299 provides for a similar requirement where a company wishes to re-register as a DAC limited by guarantee – i.e. a company with both a share capital as well as a guarantee from members.

Submission

This requirement, where there is share capital, to make an application to court for directions as to what to do with that share capital is inconsistent with the principle that in companies other than PLCs, it should be possible for share capital to be cancelled:

-in the case of an unlimited company by simple resolution of the members or the directors (in accordance with the unlimited company's constitution)
-in the case of LTDs and DACs by SAP.

The 2014 Act should be amended to permit cancellation of share capital consistent with other procedures involving the reduction or cancellation of share capital.

Further relevant considerations:

- There is a workaround that involves the issue of nil-paid shares and the cancellation of existing shares but it is cumbersome.

- In the case of conversion to a DAC limited by guarantee, there still will be a share capital. Accordingly there should be an option for the share capital to remain unchanged without a requirement to go to court for an order.

Recommendation

The share capital of a company converting to CLG should be capable of being dealt with without the requirement to make a court application, in the case of companies other than PLCs.

Draft amendments

Provide that section 1297(3) of the 2014 Act be amended by the substitution of the following text for the current text:

"(3) The position mentioned in subsection (2)(c), concerning the company's allotted share capital, is that one of the following conditions is satisfied—

(a) (i)no amount is paid up on it; and

(ii) 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;

(b) where the company is an unlimited company, the members and/or the directors have, in accordance with the constitution of the company, passed a resolution to cancel the share capital with effect from reregistration;

(c)where the company is an LTD or a DAC limited by shares, a summary approval procedure to cancel the share capital with effect from reregistration has taken place."

Provide that section 1299(3) of the 2014 Act be amended by the substitution of the following text for the current text:

"(3) The position mentioned in subsection (2)(c), concerning the company's allotted share capital, is that one of the following conditions is satisfied—

(a) the share capital is to remain unchanged upon reregistration;

(b) (i)no amount is paid up on it; and

(ii) 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;

(c)where the company is an unlimited company, the members and/or the directors have, in accordance with the constitution of the company, passed a resolution to reduce the share capital with effect from reregistration;

(d)where the company is an LTD or a DAC limited by shares, a summary approval procedure to reduce the share capital with effect from reregistration has taken place."

Provide that amendments be made to Chapter 7 of Part 4 of the 2014 Act in order to integrate the amendments recommended into the provisions generally applicable to the summary approval procedure.

19. Public Limited Companies- Part 17, section 1072

19.1 Amendment to section 1072 to recognise buy-back of shares by Irish PLCs listed on UK AIM as 'overseas market purchase"

Current Provision

A buy-back of shares by an Irish PLC, with a listing only on the Alternative Investment Market in the UK (AIM), or which has a listing on another securities market, but which wishes to effect the buy-back on AIM, would appear to be neither an *"overseas market purchase"* as defined by section 1072(2), a *"market purchase"* as defined by section 1072(1)(b), nor an *"off-market purchase"* as defined by section 1072(1)(a) of the 2014 Act.

Such a purchase would not be an *"overseas market purchase"*, because the shares would not be purchased on a "regulated market", as defined by section 1000 of the 2014 Act (as AIM is not a "regulated market"), or on another market recognised for the purposes of section 1072, because AIM has not been recognised by SI 214/2015, even though it is a significant stock market outside the State. The SI recognises only the LSE-Regulated Market, the NYSE and NASDAQ.

Such a purchase would also not be a *"market purchase"* because the shares would not be purchased on a "securities market", as defined, within the State.

Finally, such a purchase would not appear to be an *"off-market purchase"* because even though the shares would be purchased by the PLC on a "securities market" as defined by section 1072 those shares would normally be subject to a marketing arrangement on that securities market as they would be listed on AIM.

Submission

SI 214/2015 should be amended to include AIM share repurchases.

Further relevant considerations

- It was not intended that a buy-back made by an Irish PLC could fall outside the scope of the definitions of any of "overseas market purchase", "market purchase" or "off-market purchase" as set out in section 1072. Existing law was repeated without analysis.

- The affected PLCs will be required to comply with other provisions of the 2014 Act – for example, the duty under section 1080 to notify overseas market purchases on its website and under section 1079 to make returns to the CRO within the reduced timeframe of three days of the overseas market purchase.

- The imminent departure of the UK from the EU should have no bearing on this proposal. At present law permit overseas market purchases on non-EU US markets. It is logical to permit on-market share buybacks on well-regulated markets on which Irish PLCs shares are traded, whether in the EU or not

Recommendation

It is recommended that the Minister draft a new SI which would specifically recognise the AIM under section 1072(2)(a)(ii) of the 2014 Act for the purposes of an *"overseas market purchase"*.

Draft amendment

Provide by Statutory Instrument as follows:

COMPANIES ACT 2014 (RECOGNISED STOCK EXCHANGES) REGULATIONS 2017

I, Minister for Jobs, Enterprise and Innovation, in exercise of the powers conferred on me by sections 12 and 1072 of the Companies Act 2014 (No. 38 of 2014), hereby make the following Regulations:

1. These Regulations may be cited as the Companies Act 2014 (Recognised Stock Exchanges) Regulations 2017 and shall come into operation on [DATE] 2017.

2. In these Regulations "Act of 2014" means the Companies Act 2014 (No.38 of 2014).

3. Each of the following is prescribed for the purposes of section 1072 of the Act of 2014:

(a) the London Stock Exchange — Regulated Market;

(b) the London Stock Exchange – AIM Market;

(c) the New York Stock Exchange; and

(d) the market known as Nasdaq operated by Nasdaq Stock Market, Incorporated.

4. The Companies Act 2014 (Recognised Stock Exchanges) Regulations 2015 (S.I. No 214 of 2015) are revoked.

GIVEN under my Official Seal,
[Date] 2017.
Minister for Jobs, Enterprise and Innovation

20. Shares, Share Capital and Certain Other Instruments, Part 3

20.1 Suggestion received: Introduction of a definition and related provisions for capital contributions

Current Provision

At present, there is no legal definition of what is "capital contribution" nor is there any legal provision that regulates companies making them or receiving them.

Submission

A new provision should be inserted into the 2014 Act which defines "capital contributions". This provision should also state that capital contributions are not considered to form part of company capital. Expressly providing for capital contributions would remove any uncertainty in respect of the non-application to capital contributions of the rules on both unlawful distributions and reduction of capital.

Further relevant considerations

- The concept of capital contributions does not have any company law status in Ireland and their introduction would represent a new departure in law. There is no consensus on how a capital contribution should be classified.

- Capital contributions are not specifically recognised in UK companies legislation and the Companies Act 2006 does not refer to capital contributions. In most circumstances under UK law, capital contributions will be considered as an unconditional gift. In 2009 in *Revenue and Customs v Alan Blackburn Sports Limited,* the Court of Appeal, following a previous decision of the Privy Council *(Kellar v Stanley Williams)* took the view that a company should be able to treat a capital contribution as a gift, separate from its share capital and without any obligation to allot shares in return for the contribution.

- It is unclear what knock-on effects would arise in other legislative codes from introducing a form of statutory framework for capital contributions, in particular the taxation implications that would arise. Wide-ranging consultation with affected parties would be necessary before consideration could be given to any change to the *status quo*.

- It has been suggested that the development of a statutory framework around capital contributions may lead to the undermining of other provisions of the 2014 Act, for example, the regulation of loans given by directors to a company.

Recommendation

The Review Group recommends making no provision as to capital contributions.