
Part A2 – Incorporation and Registration

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Part A2 - Incorporation and Registration

Chapter 1

Interpretation

Head 1 Defined terms

(1) In this Part, unless the context otherwise requires—

“activity” means any activity that a company may be lawfully formed to carry on and includes the holding, acquisition or disposal of property of whatsoever kind;

“existing private company” means a private company limited by shares that was incorporated under the Companies Acts, 1963 to 2003 or previous enactments and which is in existence at the commencement of this section and which has not re-registered as another company type;

“registered person” means a person notified pursuant to Part A2, Head 21;

“relevant classification system” means NACE Rev. 1, that is to say, the common basis for statistical classifications of economic activities within the European Community set out in the Annex to Council Regulation (EEC);

“status date” means the date six months after the commencement of this head;

“transition period” means the period expiring twelve months after the status date.

(2) If, in any respect, any difficulties arise in the operation of the provisions of the Bill which necessitate the giving of more time for affected or interested parties to undertake any necessary actions or procedures in the periods provided for in the definitions of “status date” or the ending of the “transition period” in Subhead (1), the Minister may, by regulation, extend the period specified in each or either instance by periods not exceeding six months or eighteen months respectively.

Explanatory note

This head is a new head which contains provisions for the interpretation of certain terms used in this Part of the Bill. The head takes account of the recommendations of the First Report of the Company Law Review Group which provided that greater use should be made of defined terms in order to make the legislation more succinct.

The definitions of both “activity” and “relevant classification system” are taken from Section 42(7) of the Companies (Amendment)(No 2) Act, 1999.

The head defines two new dates, the status date and the end of the transition period. Between those two dates an existing private company limited by shares (governed by memorandum and articles of association) can convert to the status of new model private company limited by shares (governed by a single document constitution). At the end of the transition period if an existing private company has not so converted, or has not converted to a DAC (designated activity company) it is deemed to have the default constitution set out in the schedule (to be appended). The head also defines what is considered to be an existing private company for these purposes.

The purpose of Subhead 2 is to give the Minister a limited degree of flexibility to extend the period in question by the limits proposed.

It is considered to be in the interests of all concerned that the change over to the new regime being provided for the existing private companies limited by shares in Pillar A should be undertaken and completed as quickly as possible. Accordingly, it is proposed that in the 12 month period between the “status date” (which is six months after the commencement of the relevant provisions) and the end of the “transition period”, all existing private limited companies will have decided to register as a private company (with a “tailored” constitution), or register as a DAC.

At the end of the period, if they have done neither of the foregoing, they will automatically become a private company with the default constitution.

However, this will be a significant change for all concerned and no matter how well in advance people are advised of the coming changes (eg through CLRG report, publication of the Bill, CRO, IAASA and ODCE publicity etc.), there is no certainty that company personnel or their advisers (legal, accounting or secretarial) will be able to deal with the issues arising for all of the companies affected.

Further definitions may be identified and set out in this head.

Chapter 2

Incorporation and Consequential Matters

Head 2 Way of forming a company limited by shares

- (1) A company may be formed for any lawful purpose by any person or persons subscribing to a constitution and complying with the registration requirements in this Bill.
- (2) The liability of a member at any time shall be limited to the amount, if any, unpaid on the shares registered in the member's name at that time.
- (3) Subhead (2) is without prejudice to any other liability to which a member may be subject as provided by this Bill.
- (4) The number of members of a company is limited to—
 - (a) 99 persons; and
 - (b) current and/or former employees of the company; or
 - (c) in the case of a company that is a management company, persons who are the owners of a freehold or leasehold estate or interest in the land that is managed by that company.
- (5) A company shall not be formed or registered unless it appears to the Registrar that the company, when registered, will carry on an activity in the State.

Explanatory note

This head sets out the manner in which a private company limited by shares may be formed and further delimits the liability of any member of such a company. The text of the head is drawn from Head 5 of the Companies Act, 1963; it is amended to allow a private company limited by shares to be formed by one person as is currently permitted under Regulation 4 of the EC (Single Member Private Limited Companies) Regulation 1994.

The head reflects the recommendation of the First Report of the Company Law Review Group that any one or more persons may, by subscribing their names to an application for incorporation in a form prescribed for that purpose, form a private company limited by shares.

The references to the memorandum and articles of association are replaced by the term 'constitution'. This is in accordance with the recommendation of the First Report of the Review Group, which provided that the current two-document constitution of the private company limited by shares should be replaced by a single-document constitution.

Subhead (4) limits the number of members of a private company limited by shares to 99. This increases the limit on membership from 50 as currently prescribed in Head 33(1) of the Companies Act, 1963. In its First Report the Review Group recommended that the maximum number of members be increased to 150. This figure had to be subsequently revised in the light of requirement in Directive 2003/71/EC of the European Parliament and of the Council (i.e. the Prospectus Directive) which requires a company to issue a prospectus where shares are offered to 100 or more persons.

Subhead (5) is an amended re-enactment of section 42(1) of the Companies (Amendment) (No 2) Act, 1999.

Head 3 The form of the constitution

- (1) The constitution of the company shall state—
 - (a) its name;
 - (b) that it is a private company limited by shares, registered under this Part;
 - (c) If the company adopts supplemental regulations, those regulations;
 - (d) its authorised share capital, being the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount.
- (2) The constitution shall—
 - (a) be in a form in accordance with the form set out in [the First Schedule to this Part] or as near thereto as circumstances permit;

- (b) be divided into paragraphs numbered consecutively;
- (c) be signed by each subscriber in the presence of at least one witness who must attest the signature.

Explanatory note

This head is a new head. It gives effect to the idea that the constitution is the single document of incorporation of the private company limited by shares. As such, Sections 8-16 of the Companies Act, 1963 are no longer of any relevance to the private company limited by shares - they will be of relevance to other corporate entities dealt with in Pillar B of the Bill.

The new form of the constitution corresponds with the structure envisaged by the First Report of the Company Law Review Group, which provides a simplified form of application for incorporation of private companies.

Subhead (1) retains a requirement similar to that at Section 6 of the Companies Act, 1963, that the constitution of private companies must state the name of the company. The constitution is also required to state that the company is a private company limited by shares, i.e. a private company.

Subhead (1)(c) requires the constitution of private companies to state the supplemental regulations, if any, which have been adopted.

Subhead (1)(d) implements Section 6(4) of the Companies Act, 1963 for CLSs.

Subhead (2)(a) sets out the form that the constitution must take and this essentially replicates what is said in Section 16 of the Companies Act, 1963 (in relation to the memorandum and articles of association) to the effect that it must correspond to the form as set out in (Schedule 000) or as near thereto as circumstances permit.

Subheads (2)(b) and (2)(c) further add to the form that the constitution must take. The requirements of numbered paragraphs and an attested signature of each member reflect the existing Section 14 of the Companies Act, 1963 in relation to the articles of association.

Head 4 Restriction on alteration of constitution

A company may not alter the provisions contained in its constitution except in the cases, in the mode and to the extent for which express provision is made in this Bill.

Explanatory note

This head is based on Section 9 of the Companies Act, 1963.

Head 5 Registration of constitution

- (1) The constitution of a company shall be delivered for registration to the Registrar together with the statement, and where appropriate the documents, described in Part A2, Head 6 and the declaration described in Part A2, Head 7.
- (2) Where any constitution is delivered for registration under this head [equivalent of Section 17 of the Companies Act, 1963], the Registrar shall not register the constitution unless he is satisfied that all the requirements of the Companies Acts in respect of registration and of matters precedent and incidental thereto have been complied with.

Explanatory note

This is a new head, which relates to the registration of the constitution of private companies. This new head is composed of a re-enactment of Section 17 of the Companies Act, 1963, Subsection (1) of Section 5 of the Companies (Amendment) Act, 1983 and some subsections added in accordance with the recommendations of the Company Law Review Group. References to 'memorandum and articles of association' have been replaced by 'constitution'.

Furthermore, the words 'if any' have been deleted. Under Section 17 of the Companies Act, 1963 there is no requirement that the articles must be registered in the case of a private company limited by shares and in such companies the model articles in the First Schedule apply. This amendment was necessitated by the fact that the new regime for a private company involves a single-document constitution. A default constitution is provided for further on in this Part.

Section 17 was itself amended by Section 83 of the Company Law Enforcement Act, 2001 which dealt specifically with the Registrar accepting for registration a document containing text from the objects clause of the memorandum or from the articles of association and the numbering thereof. Such amendments have not been included in Subhead(1) for the reason that we are now dealing with a single document constitution.

Subhead (2) is a slightly amended re-enactment of Section 5(1) of the Companies (Amendment) Act, 1983. The references to the memorandum and articles of association have been replaced by a reference to the constitution of private companies.

Head 6 Statement to be delivered with the constitution

- (1) The statement required to be delivered pursuant to Part A2, Head 5(1) shall be in the prescribed form and shall contain the name and the particulars of the following—
 - (a) the person who is, or the persons who are, to be the first director or directors of the company;
 - (b) the person who is, or the persons who are, to be the first secretary or joint secretaries of the company; and
 - (c) the address of the company's registered office;
 - (d) the place, whether in the State or not, where the central administration of the company will normally be carried on.
- (2) Where the constitution is delivered to the Registrar pursuant to Part A2, Head 5 [equivalent of Section 17 of the Companies Act, 1963] by a person as agent for the subscribers to the memorandum the statement required to be delivered to the Registrar pursuant to this head shall so specify and shall specify the name and address of the person by whom the constitution is delivered.
- (3) If any of the persons named in the statement to be delivered pursuant to Part A2, Head 5 as directors of the company concerned is a person who is disqualified under the law of another state (whether pursuant to an order of a judge or a tribunal or otherwise) from being appointed or acting as a director or secretary of a body corporate or an undertaking, that person shall ensure that that statement is accompanied by (but as a separate document from that statement) a statement in the prescribed form signed by him specifying—
 - (a) the jurisdiction in which he is so disqualified;
 - (b) the date on which he became so disqualified; and
 - (c) the period for which he is so disqualified.
- (4) This head is without prejudice to Subhead (6) [equivalent of Section 3(3) of the Companies (Amendment) Act, 1982] or the requirements of any other enactment with regard to the registration of companies
- (5) Where no person in paragraph (a) of Subhead (1) is resident in Ireland there shall be delivered for registration a bond as provided by Part A4, Head 11 [the equivalent of Section 43 of the Companies (Amendment) (No.2) Act, 1999].
- (6) In respect of the activity, or one of the activities, to be carried out by the company in the State, a statement delivered pursuant to Part A2, Head 5 shall contain the following particulars —
 - (a) if it appears to the person making the statement that the activity belongs to a division, group and class appearing in the relevant classification system—
 - (i) the general nature of the activity, and
 - (ii) the division, group and class in that system to which the activity belongs;
 - (b) if it appears to the said person that the activity does not belong to any such division, group and class, a precise description of the activity,
 - (c) the place or places in the State where it is proposed to carry on the activity;
- (7) For the purposes of Subhead (6), if the purpose or one of the purposes for which the company is being formed is the carrying on of two or more activities in the State, the particulars in respect of the matters referred to in paragraphs (a) to (c) of that subhead to be given in the statement, shall be the particulars that relate to whichever of those activities the person making the declaration considers to be the principal activity for which the company is being formed to carry on in the State.
- (8) The statement shall be signed by or on behalf of the subscribers and shall be accompanied by a consent signed by each of the persons named in it as a director, secretary or joint secretary to act in that capacity.

Explanatory note

This is a new head, however, it substantially re-enacts, in amended form, Section 3 of the Companies (Amendment) Act, 1982.

Subhead (1) is slightly amended re-enactment of Section 3(1) of the Companies (Amendment) Act, 1982. The main amendment is the addition of paragraph (d), which is a new requirement.

Subhead (2) is a re-enactment of Section 3(4) of the Companies (Amendment) Act, 1982.

Subhead (3) is a slightly modified re-enactment of which was inserted by section 101 of the Company Law Enforcement Act, 2001.

Subhead (5) was previously introduced by Section 43 of the Companies (Amendment) (No2) Act, 1999.

Subhead (6) is an amended re-enactment of Section 42(2) of the Companies (Amendment) (No 2) Act, 1999.

Subhead (7) is a re-enactment of Section 42(3) of the Companies (Amendment) (No 2) Act, 1999.

Subhead(8) is a re-enactment of Section 3(3) of the Companies (Amendment) Act, 1982.

Section 3(2) of the Companies (Amendment) Act, 1982 has been deleted on the basis that the particulars are set out in a prescribed form and therefore do not need to be specified in the legislation.

Head 7 Declaration to be made to Registrar

- (1) The Registrar may accept as sufficient evidence—
 - (a) that the requirements mentioned in Part A2, Head 6 [the equivalent of Section 3 of the Companies Act, 1982] have been complied with; and
 - (b) that a company, when registered, will carry on an activity in the State, a declaration pursuant to this head.
- (2) The declaration shall state—
 - (a) that all the requirements in respect of registration and of matters precedent and incidental thereto have been complied with;
 - (b) that the purpose for which the company is being formed is the carrying out by it of an activity in the State;
 - (c) that the particulars contained in the statement delivered pursuant to Part A2, Head 5 are correct.

- (3) The declaration referred to in Subhead (1) shall be made either by—
 - (a) one of the persons named in the statement delivered pursuant to Part A2, Head 5 as directors of the company;
 - (b) the person or, as the case may be, one of the persons named in the said statement as secretary or joint secretaries of the company; or
 - (c) the solicitor, if any, engaged in the formation of the company.

Explanatory note

This is a new head. It substantially re-enacts in amended form Section 5 of the Companies (Amendment) Act, 1983.

Subhead (1) re-enacts part of Section 5(5) of the Companies (Amendment) Act, 1983, specifically that the Registrar may accept a declaration made under this head as sufficient evidence of the requirements under Head 6. The provisions relating to who may make the declaration are now set out separately in Subhead (3).

Paragraph (2)(a) requires a declaration of compliance with the registration related requirements of the Bill. This is essentially a re-enactment of the requirements found in Section 5 of the Companies (Amendment) Act, 1982 when Subheads (1) and (5) are read together.

Paragraph (2)(b) gives effect to requirements currently found in Section 42(2) of the Companies (Amendment) (No 2) Act, 1999 Paragraph (2)(c) is new.

Subhead (3) is a slightly amended re-enactment of Section 5(5) of the Companies (Amendment) Act, 1983. The reference to 'statutory declaration' in the current provision is replaced by an unsworn declaration, reflecting the recommendation of the First Report of the Review Group, to move away from the requirement of a statutory declaration, where such currently exists.

Head 8 Effect of registration

- (1) On the registration of the constitution of a company, the Registrar shall certify in writing that the company is incorporated and that the company is limited and shall issue a certificate of incorporation for and to the company.

- (2) From the date of incorporation mentioned in the certificate of incorporation, the subscriber or subscribers of the constitution, together with such other persons as may from time to time become members of the company, shall be a body corporate with the name contained in the constitution, having perpetual succession and a common seal.
- (3) The certificate of incorporation issued under Subhead (1) shall state that the company is a company limited by shares (CLS).
- (4) A certificate of incorporation given under Subhead (1) shall be conclusive evidence that the requirements mentioned in Part A2, Head 5 [equivalent of Section 3 of the Companies Act, 1982] have been complied with, and that the company is duly registered under this Bill.
- (5) The persons who are specified in the statement required to be delivered to the Registrar pursuant to Part A2, Head 5 [equivalent of Section 3 of the Companies Act, 1982] as the director or directors, secretary or joint secretaries of the company to which the statement refers shall, on the incorporation of the company, be deemed to have been appointed as the first director or directors, or secretary, as the case may be, of the company, and any indication in the constitution specifying a person as a director or secretary of a company shall be void unless such person is specified as a director or as secretary in the said statement.

Explanatory note

This head is new. It re-enacts Section 18 of the Companies Act, 1963 and Section 3(5) of the Companies (Amendment) Act, 1982 has also been included. It is also stated to be imperative that the Registrar shall issue a certificate “for and to” the company, since this is so important to proof of existence. The conclusive evidence is related back specifically to Section 5 of the Companies (Amendment) Act, 1983. Furthermore, “under his hand” has been dropped from Subhead (1) as it is seen as arcane and “Association” has also been dropped from Subhead (2) in view of the single-member incorporation. References to the memorandum and articles of association have been replaced by “constitution”.

Subhead (3) re-enacts Section 5(3) of the Companies (Amendment) Act, 1983 for a CLS.

Head 9 Provisions as to names of companies

- (1) The last word of the name of a company shall be “Limited” or “Teoranta”.
- (2) The words “Limited” or “Teoranta” may be abbreviated to “Ltd” or “Teo” in any usage after its registration by any person including the company.
- (3) Every company carrying on business under a name other than its corporate name shall register in the manner directed by law for the registration of business names but the use of the abbreviation “Ltd.” for “ Limited” or “Teo.” for “Teoranta” shall not of itself render such registration necessary.
- (4) No company shall be registered on incorporation, re-registration, merger or division, by a name which, in the opinion of the Registrar, is undesirable but an appeal shall lie to the court against a refusal to register.

Explanatory note

This is a new head. The text of the head is drawn from Section 6 (1)(b) of the Companies Act, 1963, Section 21 of the Companies Act, 1963 as amended by Section 86 of the Company Law Enforcement Act, 2001 and Section 22 of the Companies Act, 1963.

Subhead (4) has been amended insofar as the phrase “...on continuance, incorporation, re-registration, merger or division ...” has been newly inserted in accordance with the view of the Company Law Review Group.

Subhead (5) gives effect to a recommendation of the First Report of the Review Group that persons engaged in the formation of a company ought to be permitted to reserve a company name for a limited period of time.

Head 10 Trading under a misleading name

- (1) A person who is not a CLS and, if that person is a company, any officer of the company who is in default shall be guilty of a category three offence if he carries on any trade, profession or business under a name which includes, as its last part, the words “company limited by shares” or abbreviations of those words.

(2) A CLS and any officer of the CLS who is in default shall be guilty of a category three offence if, in circumstances in which the fact that it is a CLS is likely to be material to any person, it uses a name which may reasonably be expected to give the impression that it is a company other than a CLS.

- (3) Subhead (1) shall not apply to any company-
- (a) to which Part B7 [equivalent of Part XI of the Companies Act, 1963] applies; and
 - (b) which has provisions in its constitution that would entitle it to rank as a CLS if it had been registered in the State.

Explanatory note

An amended re-enactment of Sections 56(1), (2) and (4) of the Companies (Amendment) Act, 1983.

Head 11 Reservation of a company name

(1) In this head—

“reserved” means reserved under Subhead (4) for the purpose mentioned in Subhead (3);

“specified period” means the period specified in the relevant notification made by the Registrar under Subhead (5).

- (2) During the specified period and any extension under Part A2, Head 12 of that period, a company shall not be incorporated with a particular reserved name save on application of the person in whose favour that name has been reserved.
- (3) A person may apply to the Registrar to reserve a specified name for the following purpose, namely, the purpose of a company that is proposed to be formed by that person being incorporated with that name; such an application shall be accompanied by the prescribed fee.
- (4) On the making of such an application, the Registrar may, subject to Subhead (6), determine that the name specified in the application shall be reserved for the purpose mentioned in Subhead (3).
- (5) That determination shall be notified to the applicant by the Registrar and that notification shall specify the period (which shall not be greater than 28 days and which shall be expressed to begin on the making of the notification) for which the name is reserved.

(6) A name shall not be reserved that, in the opinion of the Registrar, is undesirable.

Explanatory note

This is a re-enactment of Section 59 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.

Head 12 Extension of the period of reservation

- (1) A person in whose favour a name has been reserved under Part A2, Head 11 may, before the expiry of the specified period, apply to the Registrar for an extension of the specified period; such an application shall be accompanied by the prescribed fee.
- (2) On the making of such an application, the Registrar may, if he or she considers it appropriate to do so, extend the specified period for such number of days (not exceeding 28 days) as the Registrar determines and specifies in a notification of the determination to the applicant.
- (3) If an application for the incorporation of a company with a name that has been reserved under Part A2, Head 11 is received by the Registrar during the specified period from the person in whose favour the name has been so reserved, the fee payable to the Registrar in respect of that incorporation shall be reduced by an amount equal to the amount of the fee paid under Part A2, Head 11(3) in respect of the reservation of that name.
- (4) In this head ‘specified period’ has the same meaning it has in Part A2, Head 11.

Explanatory note

Re-enactment of Section 60 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.

Head 13 Change of name

- (1) A company may, by special resolution and with the approval of the Registrar, signified in writing, change its name.

- (2) If, through inadvertence or otherwise, a company on its first registration, or on its registration by a new name, is registered by a name which, in the opinion of the Registrar, is too like the name by which a company in existence is already registered, the first-mentioned company may change its name with the approval of the Registrar and, if he so directs within 6 months of its being registered by that name, shall change it within a period of 6 weeks from the date of the direction or such longer period as the Registrar may think fit to allow.
- (3) Where a company changes its name under this head, the Registrar shall enter the new name in the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case.
- (4) A change of name by a company under this head shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings which might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.
- (5) A company which was registered by a name specified by statute, may, notwithstanding anything contained in that statute, change its name in accordance with Subhead (1), but if the Registrar is of the opinion that any Minister is concerned in the administration of the statute which specified the name of the company he shall not approve of the change of name save after consultation with that Minister.
- (6) Where the winding up of a company commences within one year after the company has changed its name, the former name as well as the existing name of the company shall appear on all notices and advertisements in relation to the winding-up.
- (7) If a company fails to comply with Subhead (2), the company and every officer in default shall be guilty of a category four offence.

Explanatory note

This head is a re-enactment of Section 23 of the Companies Act, 1963, as amended by Section 87 of the Company Law Enforcement Act, 2001. Subhead (2) has been amended by replacing "sanction of the Minister" with "approval of the Registrar". Subhead (7) has been deleted.

Head 14 Effect of constitution

- (1) Subject to the provisions of this Bill, the constitution shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants by each member to observe all the provisions of the constitution and any provision of the Companies Acts as to the governance of the company.
- (2) All money payable by any member to the company under the constitution shall be a debt due from him to the company.
- (3) An action to recover a debt created by this head shall not be brought after the expiration of 12 years from the date on which the cause of action accrued.
- (4) Where any provision of this Bill provides with respect to any matter, that—
 - (a) the constitution of a company may 'provide otherwise'; and
 - (b) the constitution does not, with respect to such matter, provide otherwise,

then those provisions of this Bill shall be deemed to pertain to the governance of the company.

Explanatory note

This head is a re-enactment, in a slightly amended form, of Section 25 of the Companies Bill, 1963. References to the memorandum and articles of association have been replaced with references to the "constitution".

Head 15 Alteration of constitution by special resolution

- (1) Subject to the provisions of this Bill, a company may by special resolution amend its constitution.
- (2) Any amendment so made in the constitution shall, subject to the provisions of this Bill, be as valid as if originally contained therein, and be subject in like manner to amendment by special resolution.

- (3) Where any amendment is made to a company's constitution notice of which the company is required to publish under Part A2, Head 16 [equivalent of Regulation 4 European Communities (Companies) Regulation 1973 (S.I. No.163 of 1973)], the company shall deliver to the Registrar, in addition to the alteration, a copy of the text of the constitution as so amended.
- (4) Subject to Subhead (5), and notwithstanding anything in the constitution of a company, no member of the company shall be bound by an amendment made to the constitution after the date on which he became a member, if and so far as the amendment requires him to take or subscribe for more shares than the number held by him at the date on which the amendment is made, or in any way increases his liability as at that date to contribute to the share capital of, or otherwise to pay money to, the company.
- (5) Subhead (4) shall not apply in any case where the member agrees in writing, either before or after the amendment is made, to be bound thereby.

Explanatory note

This head provides that the constitution of a private company is alterable by special resolution. This head is a new head which substantially reproduces Section 15 of the Companies Act, 1963 subject to necessary amendments. It is also drawn from Regulation 5 of S.I. 163/1973 and Section 27 of the Companies Act, 1963.

Subheads (1) and (2) adopt the provisions in Section 15 of the Companies Act, 1963, relating to the alteration of the articles, as the mode for the alteration of the constitution. References to the memorandum and articles of association are replaced by references to the constitution of private companies. Furthermore, "alteration or addition" was replaced by "amendment".

Subhead (3) re-enacts, in a slightly amended form, Regulation 5 of European Communities (Companies) Regulation 1973 (S.I. No.163 of 1973). References to the articles and memorandum of association are replaced by references to the "constitution" of the company.

Subheads (4) & (5) re-enact, in a slightly amended form, Section 27 of the Companies Act, 1963. References to the memorandum and articles of association are again replaced by references to the "constitution" of the company.

Head 16 Language of documents filed with Registrar

- (1) Without prejudice to any other provisions on the language of documents, any document filed with the Registrar shall be in the Irish or English language.
- (2) A translation of any such document may be filed in any official language of the European Community.
- (3) Every translation to which Subhead (2) refers shall be certified, in a manner approved by the Registrar, to be a correct translation.
- (4) In cases of discrepancy between the documents filed pursuant to Subhead (1) and a translation filed pursuant to Subhead (2) the latter may not be relied upon as against third parties. Third parties may nevertheless rely on said translation, unless the company proves that the third parties had knowledge of the version filed pursuant to Subhead (2).

Explanatory note

This is a new head.

Head 17 Authorisation of an electronic filing agent

- (1) A company may authorise a person (who shall be known and is in this Bill referred to as an "electronic filing agent") to do the following acts on its behalf.
- (2) Those acts are—
 - (a) the electronic signing of documents that are required or authorised, by or under this Bill or any other enactment, to be delivered by the company to the Registrar; and
 - (b) the delivery to the Registrar, by electronic means, of those documents so signed.

- (3) Subject to the following conditions being complied with, an act of the foregoing kind done by such an agent on behalf of a company pursuant to an authorisation by the company under this head that is in force, shall be as valid in law as if it had been done by the company (and the requirements of this Bill or the other enactment concerned with respect to the doing of the act have otherwise been complied with (such as with regard to the period within which the act is to be done)).
- (4) The conditions mentioned in Subhead (3) are—
- (a) that prior to the first instance of the electronic filing agent's doing of an act of the kind referred to in Subhead (2), pursuant to an authorisation by the company concerned under this head, the authorisation of the agent has been notified by the company to the Registrar in the prescribed form; and
- (b) the doing of the act complies with any requirements of the Registrar of the kind referred to in Sections 12(2)(b) and 13(2)(a) of the Electronic Commerce Act, 2000.
- (5) It shall be the joint responsibility of a company and the electronic filing agent authorised by it under this head to manage the control of the documents referred to in Subhead (2).
- (6) An electronic filing agent shall not, by virtue of his or her authorisation under this head to act as such, be regarded as an officer or servant of the company concerned for the purposes of Head 104 (a) of Part A6 [equivalent of Section 187 (2) (a) of the Companies Act, 1990].
- (2) Such a revocation by a company shall be notified by it, in the prescribed form, to the Registrar.
- (3) Unless and until the revocation is so notified to the Registrar, the authorisation concerned shall be deemed to subsist and, accordingly, to be still in force for the purposes of Head 17 of this Part [equivalent of Section 57(3) of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005].
- (4) If a revocation, in accordance with this head, of an authorisation under Head 17 of this Part [equivalent of Section 57 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005] constitutes a breach of contract or otherwise gives rise to a liability being incurred—
- (a) the fact that it constitutes such a breach or otherwise gives rise to a liability being incurred does not affect the validity of the revocation for the purposes of Head 17 of this Part [equivalent of Section 57 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005]; and
- (b) the fact of the revocation being so valid does not remove or otherwise affect any cause of action in respect of that breach or the incurring of that liability.

Explanatory note

This head re-enacts Section 58 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.

Explanatory note

This head re-enacts Section 57 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.

Head 18 Revocation of the authorisation of an electronic filing agent

- (1) A company may revoke an authorisation by it under Head 17 of this Part [equivalent of Section 57 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005] of an electronic filing agent.

Head 19 Copies of constitution to be given to members

- (1) A company shall, on being so required by any member, send to him a copy of the constitution, and in the event of a second or subsequent request, on payment of €5.
- (2) Where an alteration is made in the constitution of a company, every copy of the constitution issued after the date of the alteration shall be in accordance with the alteration.
- (3) If a company makes default in complying with this head, the company and every officer of the company who is in default shall be guilty of a category four offence.

Explanatory note

This head is a re-enactment of Section 29 and Section 30 of the Companies Act, 1963.

Subhead (1) is an amended re-enactment of Section 29(1) of the Companies Act, 1963. This subhead was amended insofar as it no longer requires the company to forward copies of Acts of the Oireachtas, which alter its constitution to its members. References to the memorandum and articles of association have been replaced with references to the “constitution” of the company.

Subhead (2) is a re-enactment, in a slightly amended form, of Section 30(1) of the Companies Act, 1963. References to the memorandum and articles of association have been replaced with references to the “constitution” of the company.

Subhead (3) is a re-enactment of Section 29(2) of the Companies Act, 1963.

Subsection (4) has been deleted.

Chapter 3

Corporate Capacity and Authority

Head 20 Capacity of a private company limited by shares

- (1) Subject to Subhead (2), notwithstanding anything contained in its constitution a company shall have, whether acting inside or outside of the State –
 - (a) full and unlimited capacity to carry on and undertake any business or activity, do any act or enter into any transaction; and,
 - (b) for the purposes of paragraph (a) of this subhead, full rights powers and privileges.
- (2) Nothing in Subhead (1) shall relieve a company from any duty or obligation under any enactment or the general law.

Explanatory note

This is a new head which gives effect to the recommendation in the First Report of the Company Law Review Group that private companies limited by shares should be granted the legal capacity of a natural person with the consequent effect that the doctrine of ultra vires is disapplied from private companies. The head is modelled on Section 16(1) of the New Zealand Companies Act, 1993

The Review Group recognised that nearly 90 per cent of registered companies are private companies limited by shares and the majority of these were closely-held companies. Accordingly, the Review Group believes that such companies should not be required to set out any objects or powers; such companies should be empowered with the capacity of a natural person. Thus, it recommended that, except where otherwise specifically required by a company's promoters, private companies limited by shares should have the legal capacity of a natural person.

Subhead (1) provides that private companies shall have the capacity to carry on and undertake any business activity, do any act or enter any transaction and for these purposes it is given full rights, powers and privileges.

Subhead (2) is a safety provision stating that private companies are not relieved from their duties or obligations under any enactment or the general law as a result of Subhead (1).

Head 21 Registered person

Where a company appoints any person (a "registered person") as a person entitled to bind the company it shall notify the Registrar in the prescribed form.

Explanatory note

This is a new head. The concept is drawn from Regulation 6(3) of the EC (Companies) Regulations, 1973 (although it is not a direct re-enactment).

Head 22 Persons or bodies of persons authorised to bind a company

- (1) For the purposes of any question whether a transaction fails to bind a company because of lack of authority on the part of the person exercising (or purporting to exercise) the company's powers, the board of directors of a company and any registered person shall be deemed to have authority to—
 - (a) exercise any power of the company; and
 - (b) authorise others to do so,and this applies regardless of any limitations in the company's constitution on the board's authority or a registered person's authority, but subject to Subheads (4) and (6).
- (2) Subhead (1) shall not be taken to prevent the exercise of a company's powers otherwise than by the board, a registered person or a person authorised by the board or by a registered person, where authority for that exercise exists.
- (3) Subhead (1) does not affect a director's duties (including his duty to observe any limitations in the company's constitution on the board's authority), or his or any other person's liability (including the liability of a registered person) in respect of any breach of those duties.
- (4) Where a company is purportedly a party to a transaction –
 - (a) in connection with which the board of directors exceeded limitations in the company's constitution on their authority; and
 - (b) to which a person falling within Subhead (5) is also a party,

Subhead (1) does not apply in favour of the party falling within Subhead (5).

- (5) A person falls within this subhead if he is –
- (a) a director or shadow director of the company or of its holding company; or
 - (b) a person connected with such a director; or
 - (c) a registered person; or
 - (d) a person connected with a registered person

and in this subhead, references to a person's being "connected" with another person are to be read in accordance with Part A5, Head 2 [equivalent of Section 26 of the Companies Act, 1990, as amended by Section 76 of the Company Law Enforcement Act, 2001].

- (6) Subhead (1) does not apply in relation to a power of the company which this Bill requires to be exercised otherwise than by the board.
- (7) Without prejudice to Subhead (2), in determining any question whether a person had ostensible authority to exercise any of a company's powers in a given case, no reference may be made to the company's constitution.
- (8) In this head, references to limitations in the company's constitution include references to limitations deriving from –
- (a) a resolution of the company or of any class of members; or
 - (b) any agreement between the members of the company or of any class of members;

and "transaction" includes any act or omission.

Explanatory note

This is a new head. The head sets out those persons who are authorised to bind a company and draws on the provision in the UK White Paper Modernising Company Law, July 2002 at 6.2 p 50.

Subhead (1) is a new provision aimed at enhancing clarity and certainty in relation to the issue of the authority of the Board of Directors to bind the company. It is similar to the current Model Article 80 of Part I of Table A of the First Schedule to the Companies Act 1963. Subheads (2), (3), (4), (5), (6), (7) and (8) are all new provisions which further elaborate on authority to bind the company.

Head 23 Powers of Attorney

- (1) A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds or do any other matter on its behalf in any place whether inside or outside the State.
- (2) A deed signed by such attorney on behalf of the company and under his seal shall bind the company and have the same effect as if it were under its common seal.

Explanatory note

This head is an amended re-enactment of Section 40 of the Companies Act, 1963.

Subhead (1) is an amended re-enactment of Section 40(1) of the Companies Act, 1963. It was amended in accordance with the recommendation of the First Report of the Company Law Review Group that Section 40 should be amended to expressly declare that the power to appoint an attorney (i) is regardless of any provision in the constitution, and (ii) extends to acts done within the State.

A further amendment was also made whereby the words "or to do any other matter" were added which extends the powers of the attorney to act on behalf of the company.

Subhead (2) is a re-enactment of sSection 40(2) of the Companies Act, 1963.

Chapter 4

Contracts and Other Transactions

Head 24 Form of contracts

- (1) Contracts on behalf of a company may be made as follows—
 - (a) a contract which, if made between natural persons, would be by law required to be in writing and to be under seal, may be made on behalf of the company in writing under the common seal of the company;
 - (b) a contract which, if made between natural persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under its authority, express or implied;
 - (c) a contract which if made between natural persons would by law be valid although made by parol only, and not reduced into writing may be made by parol on behalf of the company by any person acting under its authority, express or implied.
- (2) A contract made according to this head shall bind the company and its successors and all other parties thereto.
- (3) A contract made according to this head may be varied or discharged in the same manner in which it is authorised by this head to be made.

Explanatory note

This head is an amended re-enactment of Section 38 of the Companies Act, 1963. Subhead (1) is a slightly amended re-enactment of Section 38(1) of the Companies Act, 1963. The reference to "private persons" has been replaced by a reference to "natural persons".

Subheads (2) & (3) are re-enactments of Sections 38(2) & 38(3) of the Companies Act, 1963 respectively.

Head 25 The Common Seal

- (1) Every company shall have a common seal or seals that shall state the company's name, engraved in legible characters.

- (2) Save as otherwise provided by this Bill or by the constitution of a company, the seal shall be used only by the authority of the directors or of a committee of directors authorised by the directors in that behalf, and every instrument to which the seal shall be affixed shall be signed by a director and shall be countersigned by the secretary or by a second director or by some other person appointed by the directors for the purpose.
- (3) Where a company has a registered person within the meaning of Part A2, Head 21 [equivalent of Reg.6(2) of EC (Companies) Regulations, 1973], the seal may be used by such person, and when so used every instrument to which the seal shall be affixed shall be signed by such person.

Explanatory note

This head is new. The requirement to have a common seal is currently found in Subsection (2) of Section 18 of the Companies Act, 1963. The Company Law Review Group, in its First Report, advised that the requirement to have a common seal be retained.

Subhead (1) is a re-enactment, in a slightly amended form, of Section 114(1)(b) of the Companies Act, 1963. A company may have more than one seal.

Subhead (2) is drawn from Model Article 115 of Part I of Table A of the First Schedule to the Companies Act, 1963. It is amended insofar as the requirement that the seal shall be used only by the authority of the directors of the company or by the authority of a committee of directors is subject to where otherwise provided by this Bill or by the constitution of the company.

Subhead (3) gives effect to the recommendation of the First Report of the Review Group that a person registered under Regulation 6(2) of the EC (Companies) Regulations, 1973 should be deemed to be a person appointed by the directors to affix the seal and sign the instrument under seal and in such a case no counter-signature is required.

Head 26 Power for company to have official seal for use abroad

- (1) A company may, if authorised by its constitution, have for use in any territory, district or place not situate in the State, an official seal which shall resemble the common seal of the company with the addition on its face of the name of every territory, district or place where it is to be used.

- (2) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.
- (3) A company having an official seal for use in any such territory, district or place, may, by writing under its common seal, authorise any person appointed for the purpose in that territory, district or place to affix the official seal to any deed or other document to which the company is party in that territory, district or place.
- (4) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period, if any, mentioned in the instrument conferring the authority, or, if no period is there mentioned, then until the notice of revocation or determination of the agent's authority has been given to the person dealing with him.
- (5) The person affixing any such official seal shall, by writing under his hand, certify on the deed or other instrument to which the seal is affixed, the date on which and the place at which it is affixed.

Explanatory note

This head is a re-enactment, in a slightly amended form, of section 41 of the Companies Act, 1963. Subhead (1) is an amended re-enactment of Section 41(1) of the Companies Act, 1963. It has been amended by removing the phrase "whose objects require or comprise the transaction of business outside the State". This amendment was necessitated by the fact that a private company no longer has an objects clause and is now deemed to have the capacity of a natural person in accordance with the recommendation of the First Report of the Company Law Review Group. References to the memorandum and articles of association have been replaced with references to the "Constitution" of the company.

Subhead (2) is a re-enactment of Section 41(2) of the Companies Act, 1963.

Subhead (3) is a re-enactment of Section 41(3) of the Companies Act, 1963.

Subhead(4) is a re-enactment of Section 41(4) of the Companies Act, 1963.

Subhead (5) is a re-enactment of Section 41(5) of the Companies Act, 1963.

Head 27 Official seal for sealing securities

- (1) A company may have for use, for sealing securities issued by the company and for sealing documents creating or evidencing securities so issued, an official seal which is a facsimile of the common seal of the company with the addition on its face of the word "Securities" or the word "Urrúis".
- (2) A company which was incorporated before the commencement of this Bill and which has such an official seal as is mentioned in Subhead (1) of this head may use the seal for sealing such securities and documents as are mentioned in that subhead notwithstanding anything in any instrument constituting or regulating the company or in any instrument made before such commencement which relates to any securities issued by the company, and any provision of such an instrument which requires any such securities or documents to be signed shall not apply to the securities or documents if they are sealed with that seal.

Explanatory note

This head is a re-enactment of Section 3 of the Companies (Amendment) Act, 1977.

Head 28 Pre-incorporation contracts

- (1) Any contract or other transaction (including any application to any lawful authority) purporting to be entered into by a company prior to its formation or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by it and entitled to the benefit thereof as if it had been in existence at the date of such contract or other transaction and had been a party thereto.
- (2) Prior to ratification by the company the person or persons who purported to act in the name or on behalf of the company shall, in the absence of express agreement to the contrary, be personally bound by the contract or other transaction and entitled to the benefit thereof.
- (3) Where a contract or other transaction is so ratified, any taxation exigible in respect of such transaction shall be payable by the company alone.

Explanatory note

This head is a re-enactment of Sections 37 (1) & 37(2) of the Companies Act, 1963. Section 37(3) has been deleted as obsolete.

Head 29 Bills of exchange and promissory notes

A bill of exchange or promissory note shall be deemed to have been made, accepted or endorsed on behalf of a company, if made, accepted or endorsed in the name of or by or on behalf or on account of, the company by any person acting under its authority.

Explanatory note

This head is a re-enactment of Section 39 of the Companies Act, 1963.

Head 30 Liability for use of incorrect company name

Where an officer of a company or any person on its behalf—

- (a) uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraved in legible characters on its seal; or
- (b) issues or authorises the issue of any business letter of the company or any notice or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque or order for money or goods wherein its name is not mentioned in manner described in Part A2, Head 32 (1) (b) [equivalent of Section 114(1)(c) of the Companies Act, 1963]; or
- (c) issues or authorises the issue of any invoice, receipt or letter of credit of the company wherein its name is not mentioned in manner described in Part A2, Head 32 [equivalent of Section 114 of the Companies Act, 1963], such officer or person shall be—
 - (i) guilty of a category three offence, and

- (ii) be personally liable to the holder of the bill of exchange, promissory note, cheque or order for money or goods for the amount thereof unless it is duly paid by the company or it appears to the court that no injustice will be done by imposing liability therefore on the company.

Explanatory note

This head is a re-enactment, in a slightly amended form, of Section 114(4) of the Companies Act, 1963.

Subhead (a) is an amended re-enactment of Section 114(4)(a) of the Companies Act, 1963. "As aforesaid" is deleted and replaced by "in legible characters on its seal". This was necessitated due to the fact that Subsection (4) is now a head in itself and the cross reference to the earlier text is thus rendered useless.

Subhead (b) is an amended re-enactment of Section 114(4)(b) of the Companies Act, 1963. "In manner aforesaid" is deleted and replaced by "in manner described in Part A2, Head 32 (1)". This was necessitated due to the fact that Subsection (4) is now a head in itself and the cross reference to the earlier text is thus rendered useless.

Subhead (c) is a re-enactment of Section 114(4)(c) of the Companies Act, 1963.

Head 31 Authentication of Documents

A document or proceeding requiring authentication by a company may be signed by a director, secretary, a registered person or other authorised officer of the company, and need not be under its common seal.

Explanatory note

This head is a re-enactment of Section 42 of the Companies Act, 1963.

Chapter 5

Company Name, Registered Office and Legal Proceedings

Head 32 Publication of name by company

- (1) Every company—
- (a) shall display its name in a conspicuous position, in letters easily legible on the outside of every office or place in which its business is carried on, including at its registered office; and
 - (b) shall have its name mentioned in legible characters in all business letters of the company and in all notices and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company and in all invoices, receipts and letters of credit of the company.
- (2) If a company does not display its name in manner directed by this Bill, the company and every officer of the company who is in default shall be guilty of a category four offence, and if a company does not keep its name displayed in manner so directed, the company and every officer of the company who is in default shall be guilty of a category four offence
- (3) The use of the abbreviation “Ltd” instead of “Limited” or “Teo” instead of “Teoranta” shall not be a breach of the provisions of this head.

Explanatory note

This head is a re-enactment, in a slightly amended form, of Sections 114(1), 114(2) & 114(3) of the Companies Act, 1963. Subhead (1)(a) is an amended re-enactment of Section 114(1)(a) of the Companies Act, 1963. The amendments made include replacing “Shall paint or affix and keep painted or affixed” with “shall display” for the reason that it was more straightforward.

The requirement that the company name shall be displayed at the company’s registered office was also added in Subhead (1)(a)(ii). The purpose of this is to facilitate the service of a document on the company, which, under Section 379(1) of the Companies Act, 1963, may be carried out by “leaving it at or sending it by post to the registered office”. It has been brought to the attention of the Review Group that the CRO has encountered many problems in relation to the service of documents on companies for the simple reason that the company name is not displayed at the registered office of the company. For the purpose of completeness and to ensure greater service of documents on companies, it was thought that this amendment was desirable.

Subhead (1)(b) is a re-enactment of Section 114(1)(c) of the Companies Act, 1963.

Subhead (2) is a re-enactment of Section 114(2) of the Companies Act, 1963, amended to replace “paint or affix” with “display”.

Subhead (3) is a re-enactment, in a slightly amended form, of Section 114(3) of the Companies Act, 1963. The reference to PLCs has been deleted given that private companies are the only companies relevant in this Part.

Head 33 Registered office of company

- (1) A company shall, at all times, have a registered office in the State to which all communications and notices may be addressed.
- (2) Particulars of the situation of the company’s registered office shall be specified in the statement delivered pursuant to Part A2, Head 6 [equivalent of Section 3 of the Companies (Amendment) Act, 1982], prior to the incorporation of the company.
- (3) Notice of any change in the situation of the registered office of a company shall be given in the prescribed form within fourteen days after the date of the change to the Registrar who shall record the same.
- (4) A company’s registered office may be care of an agent approved for this purpose by the Registrar.
- (5) The notification by that agent of any change in his address will satisfy the company’s requirements under Subhead (3).

- (6) If default is made in complying with this head, the company and every officer of the company who is in default shall be guilty of a category four offence.

Explanatory note

This head is an amended re-enactment of Section 113 of the Companies Act, 1963, as amended by Section 4 of the Companies (Amendment) Act, 1982.

Subheads (1) – (3) are re-enactments of Sections 113(1), (2) and (3), of the Companies Act, 1963. Section 113(3) has been amended as the statement that inclusion of particulars in an annual return does not satisfy the requirement has been omitted.

Subhead (6) is a re-enactment of Section 113 (5).

Section 113(4) has been deleted as obsolete.

Subheads (4) & (5) are new subheads which provide for the company's registered office being an office of a professional firm.

Head 34 Service of proceedings

- (1) A document may be served on a company—
- (a) by leaving it at or sending it by post to the registered office of the company or;
 - (b) if the company has not given notice to the Registrar of the situation of its registered office or if the particulars of the situation of a registered office as notified to the Registrar are not such as to identify the exact location, by delivering it to the Registrar.
- (2) For the purposes of this head, any document left at or sent by post to the place for the time being recorded by the Registrar as the situation of the registered office of a company, shall be deemed to have been left at or sent by post to the registered office of the company notwithstanding that the situation of its registered office may have changed.

Explanatory note

This is a re-enactment of Section 379 of the Companies Act, 1963.

Head 35 Security for costs

Where a company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require security to be given for those costs and may stay all proceedings until the security is given.

Explanatory note

This head is a re-enactment, in a slightly amended form, of Section 390 of the Companies Act, 1963. The words "limited company" have been replaced by "company" given that only private companies limited by shares are covered in this part.

The word "sufficient" has been deleted. The effect of this will be to give the court a discretion as to the amount of security that is required to be provided. The current position is that the Court is required to order that "full security" for costs is given; in other circumstances and, traditionally, 1/3 of the costs was the norm.

Head 36 Enforcement of orders and judgments against companies and their officers

- (1) Any judgment or order against a company wilfully disobeyed may, by leave of the court, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by order of sequestration of their property.
- (2) In order for an application to be made for the attachment of directors or other officers or for the sequestration of their property, a "penal notice" must be included in the court order.
- (3) The meaning of "attachment against the directors" and "sequestration" shall be as provided for, from time to time, and at any time, in the Rules of the Superior Courts.

Explanatory note

This is a new head which is aimed at enhancing the enforcement of orders and judgments against companies and their officers.

Subhead (1) is drawn from Order 42, Rule 32 of the Rules of the Superior Courts, 1986. This provision was considered to be such a fundamental exception to the principle of separate legal personality of a corporate entity that it needed to be stated in primary legislation and not merely in the Rules of the Superior Courts.

Subhead (2) is new and is designed to put the officers of the company on notice that if the company fails to comply with the order or judgment, then they may be attached and their assets sequestered.

Subhead (3) is a new provision referring to the Rules of the Superior Courts. This is necessary in light of the origins of Subhead (1).

Chapter 6

Conversion of an Existing Company to a Company Limited by Shares

Head 37 Conversion of existing companies or re-registration as Designated Activity Companies

- (1) Every existing private company shall at the end of the transition period become a “company limited by shares” to which Pillar A applies.
- (2) An existing private company may re-register as a designated activity company by passing an ordinary resolution before the status date resolving that the company be so registered and must comply with the provisions contained in Pillar B, Part 3, Chapter 2.
- (3) An existing private company that has published a prospectus or that has obtained an admission to trading on a regulated market for its debentures, which shall include debenture stock, bonds and any other debt instruments of a company or any forms of securitised debt, including depositary receipts in respect of such securities, whether constituting a charge on the assets of the company or note, must register as a DAC and the provisions of Part B3 shall apply to such companies.

Explanatory note

This is a new head. The head provides a transitional regime whereby an existing private company limited by shares is to be converted to a private company at the end of the transition period unless it has re-registered as a designated activity company before the status date.

Both the “transition period” and “status date” are defined in Head 1 of this Part for these purposes. A definition of an “existing private company” is also contained in that provision.

Subhead (3) ensures that only a DAC (and not a private company to which Pillar A applies) may publish a prospectus to be admitted to trading.

Head 38 Relief where there is a failure to re-register as a designated activity company

- (1) Where an existing private company does not re-register as a designated activity company, any qualifying member or creditor may apply to the court for an order that it should be re-registered as a designated activity company and the Court shall, unless cause is shown to the contrary, make the order sought or make such other order as seems just.
- (2) A qualifying member or creditor means —
 - (a) the holder of not less in the aggregate than 15 per cent in nominal value of the company's issued share capital or any class thereof or
 - (b) the holder of not less than 15 per cent of the Company's debentures entitling the holder to object to any alteration in the company's objects clause.

Explanatory note

This is a new head. The head provides a safeguard for both creditors and members of a company that fails to elect to become a DAC, thus becoming a private company with no objects clause. The head is based on Section 10 of the Companies Act, 1963. Subhead (1) permits a qualifying member or creditor to apply to the court for an order that the company should be re-registered as a DAC. The Court is given discretion in deciding whether to grant such relief.

Subhead (2) sets out who is a qualifying member or creditor for the purpose of Subhead (1).

Head 39 Applicable laws during transition

- (1) Pending the end of the transition period, the provisions contained in Pillar B, Part 3 shall apply to an existing private company, unless and until it delivers a constitution to the Registrar.
- (2) The provisions contained in Part A2 shall apply to an existing private company either—
 - (a) upon the expiry of the transition period; or

- (b) upon the delivery by such a company of a constitution to the Registrar in accordance with Part A2, Head 5 [equivalent of Section 17 of the Companies Act, 1963].

Explanatory note

This is a new head. The head sets out the applicable laws during the transition period. It was considered by the Company Law Review Group to be fundamentally important that every existing private company limited by shares knows precisely what the law applicable to them is at any time.

Subhead (1) provides that the provisions in Pillar B shall apply to an existing private limited company pending the end of the transition period unless it delivers a constitution to the Registrar. During this period the law applicable to existing private companies limited by shares is that which will apply to DACs in the future. The law applicable to DACs will be kept as similar as possible to the current law applicable to private companies limited by shares to ensure a smooth transition. It is the view of the Review Group that major reform of the DAC, at this stage, should be sacrificed in the interests of certainty for existing private companies during this transition stage.

Subhead (2) provides that the provisions of Pillar A relating to a private company are not applicable until the expiration of the transition period unless the existing private company limited by shares delivers a constitution to the Registrar. This will provide further certainty for existing private companies during the transition period.

Head 40 Adoption of new constitution by members

- (1) An existing private company may, on or after the status date, by special resolution passed in accordance with its existing memorandum and articles of association and subject to compliance with this Bill as to the variation of rights and obligations of members, adopt a new constitution in the form specified at Part A2, Head 6 [equivalent of Section 3 of the Companies (Amendment) Act, 1982].
- (2) An existing private company that has adopted, in whole or in part, the regulations of Table A Part II of the First Schedule to the Companies Act, 1963 as its articles of association, will continue to be governed by those regulations after the repeal of that Act, and those regulations shall be interpreted according to the form in which they existed on the date of repeal.

Explanatory note

This is a new head. This head sets out the manner in which an existing private company limited by shares may adopt a new constitution, which may subsequently be delivered to the Registrar for the purpose of converting to a private company.

Head 41 Certification of new constitution by directors

- (1) The directors of an existing private company shall, unless it has already adopted a constitution in accordance with Part A2, Head 40—
- (a) prepare a constitution in the form specified at Part A2, Head 3 [equivalent of Sections 6-16 of the Companies Act, 1963];
 - (b) deliver a copy of such constitution to each member;
 - (c) deliver the constitution to the Registrar for registration,
- before the end of the transition period.
- (2) The directors shall, in compliance with Subhead (1), ensure that such constitution does not alter the rights and obligations of the members of the existing company and, without prejudice to the generality of the foregoing, does not alter the rights and obligations of members of the existing company as set out in its memorandum and articles of association in relation to -
- (a) rights and duties on the transfer or transmission of shares;
 - (b) voting at meetings of members;
 - (c) the appointment and removal of directors;
 - (d) preferential or fixed entitlements to distributions;
 - (e) liability to pay calls on shares; or
 - (f) the distribution of surplus assets of the company,

and accordingly the constitution shall contain such supplemental regulations as are necessary to give effect to the foregoing.

- (3) The constitution need not contain any supplemental regulations, to the extent that the provisions of Pillar A of this Bill regulate the matters which would be governed by those regulations.

Explanatory note

This is a new head. The head facilitates the conversion of existing private companies limited by shares into a private company. The board of directors is permitted to take such a decision under this provision. Such a decision would normally be taken by the members in general meeting in accordance with the normal principles of corporate governance. The reason for giving this power to the directors is that such an expedient measure is believed to be in the best interests of directors to convert the existing private company limited by shares.

Subhead (1) sets out what is required of the directors.

Subhead (2) contains a safeguard whereby a duty is imposed on the directors to ensure that the rights of all the members are safeguarded when they exercise this discretion.

Subhead (3) is aimed at keeping the constitution of the private company as simple as possible.

Head 42 Deemed constitution

A company which has not delivered a constitution for registration within the transition period shall be deemed, from the expiry of that period, to have a constitution in accordance with the Schedule to this Part in place of its existing memorandum and articles of association and the Registrar shall register same in the name of the company and shall send to the company its registered constitution.

Explanatory note

This is a new head. The head applies a pro forma, de minimis constitution which is to be set out in a Schedule to this Part. Such a constitution will apply in place of the old memorandum and articles of association, where either the members or the directors fail to deliver a constitution for registration before the end of the transition period.

This was considered by the Review Group to be, on balance, a proportionate and reasonable measure given that the private company will be a preferable alternative for a large majority of existing private companies. Furthermore, there are two built-in safeguards in this Part for aggrieved members and creditors: Head 38 affords relief to both members and creditors where there is a failure to re-register as a DAC and Head 43 affords relief to both members and creditors where a constitution prejudices their interests.

Head 43 Relief for members and creditors

- (1) Provide that any member of a company who considers that his rights or obligations have been prejudiced may apply to the court for an order under Part A4, Head 72 [equivalent of Section 205 of the Companies Act, 1963] and in any such application it shall be presumed, until the contrary is provenj that the directors have exercised their powers in a manner oppressive to such member or in disregard of his interests as a member where the directors have failed to comply with Part A2, Head 41 (1) and (2) unless the members of the company adopt a new constitution in accordance with Part A2, Head 40.
- (2) Provide that a qualifying creditor can apply to court for relief where a constitution (howsoever coming into being – whether adopted by members, certified by directors or deemed by law) prejudices their interests, provided that they have a legal or equitable right to that interest.

In this head “qualifying creditor” has the same meaning as in Part A2, Head 38(2).

Explanatory note

This is a new head. The head provides a mechanism by which both members and creditors may be entitled to relief. The provision is seen as a justification for the provision of a “deemed constitution” in Head 59 where an existing private company fails to deliver a constitution for registration before the end of the transition period. Subhead (1) expressly permits a member to apply to the court for relief where his rights or interests have been prejudiced, under Section 205 of the Companies Act, 1963. In such circumstances there is a presumption that the directors have exercised their powers in an oppressive manner or in disregard of their interests as a member.

Subhead (2) states that a creditor may apply to the court for relief where a constitution prejudices their interests, regardless of the manner in which the constitution came into being.

First Schedule

MODEL FORM OF CONSTITUTION OF A PRIVATE COMPANY LIMITED BY SHARES

1. The name of the company is: BUNYIP LIMITED
2. The company is a company limited by shares, registered under Part A2 of the [Companies Consolidation Act, 2007].
3. The liability of the members is limited.
4. [The share capital of the company is €100 divided into 100 shares of €1 each.]

We, the several persons whose names and addresses are subscribed, wish to be formed into a company in pursuance of this constitution, and we agree to take the number of shares in the capital of the company set opposite our respective names.

<i>Names and Addresses of Subscribers</i>	<i>Number of Shares taken by each Subscriber</i>
1. Brent Todd Address:	50
2. Christine Anu Address:	50
Total shares taken:	100

Dated the _____ day of _____ 20 ____

Witness to the above Signatures:

Name:

Address:

SUPPLEMENTAL REGULATIONS

