
Part A9 – Reorganisations and Takeovers

Contents of Part A9

Chapter 1 – Schemes of Arrangement

1. Interpretation of this Chapter
2. Company approval and court sanction of scheme of arrangement
3. Information as to arrangements with members and creditors
4. Provisions to facilitate reconstruction and amalgamation of companies

Chapter 2 – Takeover Offers

5. Interpretation of this Chapter
6. Power to acquire shares of shareholders dissenting from scheme or contract which has been approved by majority

Chapter 3 – Mergers

7. Interpretation of this Chapter
8. Mergers to which this Chapter applies
9. Draft terms of merger
10. Directors' explanatory report
11. Merger by validation procedure
12. Independent person's report
13. Accounting statement
14. Registration and publication of documents
15. Inspection of documents
16. General meetings of merging companies
17. Meetings of classes of shareholders
18. Purchase of minority shares
19. Application for confirmation of merger by court
20. Protection of creditors
21. Preservation of rights of holders of securities
22. Confirmation order
23. Saver for enactments regulating mergers
24. Registration and publications of confirmation of merger
25. Civil liability of directors and independent persons
26. Criminal liability for untrue statements in merger documents

Chapter 4 – Divisions

27. Interpretation of this Chapter
28. Divisions to which this Chapter applies
29. Draft terms of division
30. Directors' explanatory report
31. Division by validation procedure
32. Independent persons's report
33. Accounting statement
34. Registration and publication of documents
35. Inspection of documents
36. General meetings of the companies involved in division
37. Meetings of classes of shareholder
38. Purchase of minority shares
39. Application for confirmation of division by court
40. Protection of creditors
41. Preservation of rights of holders of securities
42. Confirmation order
43. Saver for enactments regulating divisions
44. Registration and publication of confirmation of division
45. Civil liability of directors and independent persons
46. Criminal liability for untrue statements in division documents

Part A9 – Reorganisations

Chapter 1

Schemes of Arrangement

Head 1 Interpretation of this Chapter

In this Part—

“arrangement” includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods;

“debenture trustees” in relation to a company means the trustees of a deed securing the issue of debentures by the company;

“new company” has the meaning in Part A9, Head 4 (1) (b) (ii) [equivalent of Section 203 of the Companies Act, 1963];

“old company” has the meaning in Part A9, Head 4 (1) (b) (ii) [equivalent of Section 203 of the Companies Act, 1963];

“scheme circular” means the statement to be sent as required by Part A9, Head 3 [equivalent of Section 202 of the Companies Act, 1963] to members and creditors, or classes of them, as the case may be;

“scheme meeting” means a meeting of creditors or any class of creditors or of members or any class of members;

“scheme order” means an order of the court sanctioning a compromise or scheme of arrangement referred to in Part A9, Head 3 [equivalent of Section 202 of the Companies Act, 1963].

Explanatory note

This head is new.

The definitions have been compiled into Head (1) in order to create a comprehensive list of the defined terms for the purposes of the Part. Many of the defined terms in this head are concepts recognisable under the Companies Act, 1963-2003. Others are newly created terms.

Head 2 Company approval and court sanction of a scheme of arrangement

- (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them—
 - (a) the directors may convene a scheme meeting or meetings; or
 - (b) where the directors have not convened a scheme meeting or meetings, the court may, on the application of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a scheme meeting or meetings to be summoned in such manner as the court directs.
- (2) Whenever such a meeting is convened or application is made as is mentioned in Subhead (1), the court may, on the application of the directors, the company, a creditor or liquidator, on such terms as seem just, stay all proceedings or restrain further proceedings against the company for such period as to the court seems fit.
- (3) If:
 - (a) a special majority vote in favour of a resolution agreeing to any compromise or arrangement; and
 - (b) the passing of the resolution or resolutions at the scheme meeting or meetings and notice of application to the court is advertised once in at least two daily newspapers circulating in the district where the registered office or principal place of business is situated; and
 - (c) the court by order sanctions the compromise or arrangement,

the compromise or arrangement shall be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(4) Part A4, Head 63 [equivalent of Section 144 of the Companies Act, 1963] shall apply to any such resolution as is mentioned in Subhead (3) (a) which is passed at any adjourned scheme meeting.

(5) (a) Where a State authority is a creditor of the company, such authority shall be entitled to accept and to be bound by proposals under this head notwithstanding—

(i) that any claim of such authority as a creditor would be impaired under the proposals, or

(ii) any other enactment.

(b) In this subhead, “State authority” means the State, a Minister of the Government or the Revenue Commissioners.

(6) (a) Where a scheme order is made, the company shall cause an office copy thereof to be delivered to the Registrar for registration within 21 days after the making of the order;

(b) A scheme order shall take effect immediately upon delivery of an office copy of the scheme order sanctioning the scheme to the Registrar for registration;

(c) A company and any officer in default which fails to make a return in accordance with this subhead shall be guilty of a category three offence;

(7) (a) A company shall attach a copy of every scheme order to every copy of the constitution of the company issued after the scheme order has been made.

(b) A company and any officer in default which fails so to attach a scheme order in accordance with this subhead shall be guilty of a category three offence.

(8) For the avoidance of doubt, nothing in this head or Heads 3 to 6 of this Part [equivalent of Sections 202 to 204 of the Companies Act, 1963] prejudices the jurisdiction of the Irish Takeover Panel under the Irish Takeover Panel Act, 1997, with respect to a compromise or scheme of arrangement that is proposed between a relevant company (within the meaning of that Act) and its members or any class of them and which constitutes a takeover within the meaning of that Act and, accordingly, the said Panel has, and shall be deemed always to have had, power to make rules under Section 8 of the said Act in relation to a takeover of the kind aforesaid, to the same extent and subject to the like conditions, as it has power to make rules under that section in relation to any other kind of takeover.

(9) The Irish Takeover Panel, in exercising its powers under the Irish Takeover Panel Act, 1997, and the High Court, in exercising its powers under this head and Heads 4 and 6 of this Part [equivalent of Sections 203 and 204 of the Companies Act, 1963], shall each have due regard to the other’s exercise of powers under the said Act or those heads, as the case may be.

Explanatory note

This head is an amended re-enactment of Section 201 of the Companies Act, 1963, as amended by Section 99 of the Company Law Enforcement Act, 2001. Section 23(5) of the Companies (Amendment) Act, 1990 has also been inserted into the head.

The Company Law Review Group examined the procedures for effecting a scheme of arrangement under Section 201 of the Companies Act, 1963 and noted that there were two principal shortcomings in the above procedure, namely the initiation of two separate legal proceedings to convene the scheme meetings and to approve the scheme and, secondly, the fact that the matter had to be brought before the Court three times in all in convening the scheme meeting, seeking direction as to advertising the petition and obtaining approval of the scheme. The section has been amended in accordance with the recommendations of the Review Group in its First Report.

Subhead (1)(a) is an amended re-enactment of Section 201(1) of the Companies Act, 1963. It has been amended in accordance with the recommendations of the Review Group, in its First Report, that Court approval should no longer be required to convene scheme meetings of shareholders or creditors, where the proposed meetings are convened by the board of directors. Currently, the court will not give pre-approval at this meeting - the court reserves its discretion at the third court hearing to disapprove a scheme. Therefore, there appears little virtue in retaining the court’s involvement. Such an amendment removes one of the two sets of legal proceedings as well as one of the court hearings.

Subhead (1)(b) retains the court involvement where the directors have not convened the scheme meeting and the court is given a discretion to order scheme meetings to be summoned in such manner as it directs.

Subhead (2) is a re-enactment of Section 201(2) of the Companies Act, 1963.

Subhead (3) is an amended re-enactment of Section 201(3) of the Companies Act, 1963.

Subhead 3(a) is an amended expression of the phrase - "...a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, vote in favour of a resolution agreeing to any compromise or arrangement...". The new wording is simpler and no change, in substance, is effected.

Subhead 3(b) has been newly inserted in accordance with the recommendations of the Review Group in its First Report. The Review Group recommended that the second court hearing, namely to advertise the passing of the scheme resolution and presentation of the scheme petition to the participants in the scheme, should be removed in most cases. This requirement to advertise is now satisfied by advertising in two daily newspapers circulated in the district where the registered office or principal place of business is located. The discretion of the court to apply extra advertising requirements can be accommodated for other companies in Pillar B of the Bill.

The Review Group further noted that the participants in the scheme ought to have been notified of the scheme meetings and, therefore there ought to be no requirement to re-notify them of the passing of the scheme resolutions. Currently, the courts appear to recognise this and the above amendments would remove what appears to be an otiose procedure.

Subhead 3(c) and the final phrase of Subhead (3) is a re-enactment of the final phrase in Section 201(3) of the Companies Act, 1963.

Subhead (4) is a slightly amended re-enactment of Section 201(4) of the Companies Act, 1963. Cross-references to other provisions have been amended as a result of the structure of the Bill.

Subhead (5) is a re-enactment of Section 23(5) of the Companies (Amendment) Act, 1990. It enables State Authorities to accept and be bound by schemes of arrangements under this head.

Subhead (6)(a) and (b) are an amended re-enactment of the first part of section 201(5) of the Companies Act, 1963 which deals with the requirement to deliver a copy of the scheme order to the Registrar. The requirement on the company to deliver a copy of the scheme order to the Registrar must now be effected within 21 days after the making of the order. All references to the registrar of companies have been replaced by references to the "Registrar".

Subhead (6)(c) is a slightly amended re-enactment of Section 201(6) of the Companies Act, 1963. It has been amended insofar as it now refers to a categorised offence.

Subhead (7)(a) is an amended re-enactment of the second part of Section 201(5) of the Companies Act, 1963 which deals with the requirement to attach a copy of the Scheme order to the memorandum of association. The new subhead simply refers to the constitution of the company as private companies will now have a single document constitution under Part II of the Bill.

Subhead (7)(b) is a slightly amended re-enactment of Section 201(6) of the Companies Act, 1963. It has been amended insofar as it now refers to a categorised offence.

Subheads (8) and (9) reenact Sections 201(6A) and 201(6B) of the Companies Act, 1963 with minor alterations.

Subhead 201(7) of the Companies Act, 1963 has been deleted. The interpretation of "arrangement" has been included in Head 1 of this Part. The interpretation of "company" has been removed since we are only concerned with private companies in Pillar A.

Head 3 Information as to arrangements with members and creditors

- (1) Where a scheme meeting is convened or summoned under Part A9, Head 2 [equivalent of Section 201 of the Companies Act, 1963] there shall—
 - (a) with every notice convening or summoning the meeting which is sent to a creditor or member, be sent also a scheme circular—
 - (i) explaining the effect of the compromise or arrangement,

- (ii) stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons,
 - (iii) where the compromise or arrangement affects the rights of debenture holders of a company, giving the like explanation in relation to the debenture trustees as it is required under subparagraph (ii) to give in relation to the company's directors;
- (b) in every notice convening or summoning the meeting which is given by advertisement, be included the scheme circular or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of the scheme circular.
- (2) Where a notice given by advertisement includes a notification that copies of the scheme circular can be obtained by creditors or members entitled to attend the scheme meeting, every such creditor or member shall, on making application in the manner indicated by the notice, be furnished by the company free of charge with a copy of the scheme circular.
- (3) Each director and debenture trustee shall provide the company in writing with the information concerning such director or debenture trustee, as the case may be, that is required for the scheme circular.
- (4)
- (a) Subject to Subhead (5), where a company fails to comply with any requirement of this head, the company and every officer of the company who is in default shall be guilty of a category three offence;
 - (b) For the purpose of this Subhead any liquidator of the company and any debenture trustee of the company shall be deemed to be an officer of the company.
- (5) A person shall not be liable to an offence under this head if that person shows that the default was due to the refusal of any other person, being a director or debenture trustee, to supply the necessary particulars as to his interests.

- (6) Reference in this head to directors includes reference to shadow directors and to de facto directors.

Explanatory note

This head is an amended re-enactment of Section 202 of the Companies Act, 1963. Amendments have been made in accordance with the recommendations of the Company Law Review Group in its First Report.

References to "a meeting of creditors or any class of creditors or members or any class of members" has been replaced by a reference to "a scheme meeting". The word "statement" is replaced by "scheme circular" where necessary and "debenture trustee" replaces "trustee for debenture holders of the company". All cross-references have been amended in accordance with the structure of the Bill.

Subhead (1)(a) is an amended re-enactment of Sections 201(1)(a) and 202(2) of the Companies Act, 1963.

Subhead (1)(b) is a re-enactment of Section 202(1)(b) of the Companies Act, 1963.

Subhead (2) is an amended re-enactment of Section 202(3) of the Companies Act, 1963.

Subhead (3) is an amended re-enactment of Section 202(6) of the Companies Act, 1963. The wording has been re-phrased and the fine has been removed in accordance with the views of the Review Group. The fine was seen as unnecessary as it was in the realm of private rights and if the subsection was not adhered to, it was open to the Courts to deprive the company of the scheme of arrangement.

Subhead (4) is an amended re-enactment of Section 202(4) of the Companies Act, 1963. The subsection has now been divided into two new paragraphs and it has been amended insofar as it now refers to a categorised offence.

Subhead (5) is an amended re-enactment of Section 202(5) of the Companies Act, 1963.

Subhead (6) is a new subhead. It includes shadow directors and de facto directors as directors for the purpose of this head. This has also been done in Part A5, Heads 3 and 4.

Head 4 Provisions to facilitate reconstruction and amalgamation of companies

(1) Where—

- (a) an application is made to the court for the sanctioning of a compromise or arrangement under Part A9, Head 2 [equivalent of Section 201 of the Companies Act, 1963];
- (b) it is shown to the court that—
 - (i) the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and
 - (ii) under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this head referred to as “the old company”) is to be transferred to another company (in this head referred to as “the new company”),

the court may, either by the order sanctioning the compromise or arrangement or by any subsequent order make provision for all the matters set out in Subhead (2).

(2) The matters for which the court may make provision are—

- (a) the transfer to the new company of the whole or any part of the undertaking and of the property or liabilities of any old company;
- (b) the allotting or appropriation by the new company of any shares, debentures, policies or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;
- (c) the continuation by or against the new company of any legal proceedings pending by or against any old company;
- (d) the dissolution, with or without winding-up, of any old company;

- (e) the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement;
- (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

(3) Where an order under this head provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of the new company, and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

(4)

- (a) Where an order is made under this head, every company in relation to which the order is made shall cause a plain copy of it to be delivered to the Registrar for registration within 21 days after the making of the order;
- (b) Where such copy is not so delivered, the company and every officer of the company who is in default shall be guilty of a category three offence.

(5) In this head, “property” includes property, rights and powers of every description, and “liabilities” includes duties.

Explanatory note

This head is an amended re-enactment of Section 203 of the Companies Act, 1963.

Subhead (1) is an amended re-enactment of the initial part of Section 203(1) of the Companies Act, 1963. It has also been broken into paragraphs and subparagraphs to enhance clarity. The phrase “proposed between a company and any person mentioned in that section” (referring to a compromise or arrangement proposed under Section 201 of the Companies Act 1963) has been deleted. References to the “transferor company” and “transferee company” have been replaced by references to the “old company” and “new company” respectively.

Subhead (2) is an amended re-enactment of the latter part of Section 203(1) of the Companies Act, 1963. References to the “transferor company” and “transferee company” have been replaced by references to the “old company” and “new company” respectively.

Subhead (3) is a re-enactment of subsection 203(2) of the Companies Act 1963.

Subsection (4) is an amended re-enactment of Section 203(3) of the Companies Act, 1963. The section has been split into two paragraphs and references to the “transferor company” and “transferee company” have been replaced by references to the “old company” and “new company” respectively. References to the registrar of companies have been replaced by references to the “Registrar”. It has also been amended insofar as it now refers to a categorised offence .

Subhead (5) is a re-enactment of Section 203(4) of the Companies Act, 1963.

Section 203(5) of the Companies Act, 1963 has been deleted as it reverts to the definition of a company as defined by the Act, as opposed to the definition in Section 201(7) of the Companies Act, 1963. Since we are only concerned with private companies here, this subsection, like Section 201(7), is not relevant.

Chapter 2

Takeover Offers

Head 5 Interpretation of this Chapter

(1) In this Chapter—

“assenting shareholder” means a holder of any of the shares affected in respect of which a scheme, contract or offer has become binding or been approved or accepted;

“call notice” has the meaning in Part A9, Head 6 (2) (a) [equivalent of Section 204 of the Companies Act, 1963];

“dissenting shareholder” means a holder of any of the shares affected in respect of which the scheme, contract or offer has not become binding or been approved or accepted or who has failed or refused to transfer his shares in accordance with the scheme, contract or offer;

“group company” with respect to a body corporate, means a holding company or subsidiary of such body corporate and any subsidiary of such holding company;

“information notice” has the meaning in Part A9, Head 6 (4) (a) [equivalent of Section 204 of the Companies Act 1963];

“offeror” has the meaning in Part A9, Head 6 (1) [equivalent of Section 204 of the Companies Act, 1963];

“offeree company” has the meaning in Part A9, Head 6 (1) [equivalent of Section 204 of the Companies Act, 1963];

“special majority” means a majority in number representing 75 per cent in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the scheme;

“shares affected” means the shares the acquisition of the beneficial ownership of which by an offeror is involved in the scheme, contract or offer referred to in Part A9, Head 6 [equivalent of Section 204 of the Companies Act, 1963].

(2) The provisions of Part A11, Chapter 5 [equivalent of S.I. No.333 of 2002, EC (Corporate Insolvency) Regulations 2002] applies to proceedings under this Part.

Explanatory note

The definitions have been compiled into Subhead(1) in order to create a comprehensive list of the defined terms for the purposes of the Part. Many of the defined terms in this head are concepts recognisable under the Companies Act, 1963-2003. Others are newly created terms.

Subhead (2) is new. It applies the provisions of S.I. No.333 of 2002, EC (Corporate Insolvency) Regulations, 2002 to reconstructions. This is also the current position as “insolvency proceedings” are interpreted as including reconstructions for the purpose of the Regulations.

Head 6 Power to acquire shares of shareholders dissenting from scheme or contract which has been approved by majority

(1) Where a scheme, contract or offer involving the acquisition by a person (in this head referred to as “the offeror”) of the beneficial ownership of all the shares (other than shares in which the offeror already has a beneficial interest) in the capital of a company (in this head referred to as “the offeree company”) has become binding or been approved or accepted in respect of not less than 80 per cent in value of the shares affected not later than the date 4 months after publication generally to the holders of the shares affected of the terms of such scheme, contract or offer, the remaining subheads of this head shall apply.

(2) The offeror shall be entitled to acquire the beneficial ownership of all or any of the remaining shares affected on the same terms as have become binding or been approved or accepted if—

(a) the offeror at any time before the expiration of the period of 6 months immediately following such publication, gives notice in the prescribed form to any dissenting shareholder that it desires to acquire the beneficial ownership of his shares (which notice is referred to in this head as “the call notice”); and

- (b) one month passes following the date that the call notice was given without an application being made to the court by the dissenting shareholder, or following application to the court by the dissenting shareholder the court nonetheless approves such acquisition; and
- (c) where shares in the offeree company are, at the date of such publication, already in the beneficial ownership of the offeror, its group companies to a value greater than 20 per cent of the aggregate value of those shares and the shares affected, the assenting shareholders besides holding not less than 80 per cent in value of the shares affected are not less than 50 per cent in number of the holders of those shares.
- (3) Where the scheme, contract or offer provides that an assenting shareholder may elect between 2 or more sets of terms for the acquisition by the offeror of the beneficial ownership of the shares affected—
- (a) the call notice shall be accompanied by or embody a notice stating the alternative sets of terms between which assenting shareholders are entitled to elect and specifying which of those sets of terms shall be applicable to the dissenting shareholder if he does not before the expiration of 14 days from the date of the giving of the notice, notify to the offeror in writing his election as between such alternative sets of terms; and
- (b) the terms upon which the offeror shall under this head be entitled and bound to acquire the beneficial ownership of the shares of the dissenting shareholder shall be the set of terms which the dissenting shareholder shall so notify or, in default of such notification, the set of terms so specified as applicable.
- (4) (a) Save where the offeror has given a call notice, the offeror shall: within one month of the date of the scheme, contract or offer becoming binding, approved or accepted, give notice of that fact in the prescribed manner to all dissenting shareholders (which notice is in this head referred to as an “information notice”).
- (b) The offeror shall—
- (i) be bound to acquire the beneficial ownership of the remaining shares affected on the same terms as have become binding or been approved or accepted if—
- (I) the offeror has become entitled to acquire the shares under Subhead (2), or
- (II) save where subparagraph (i) applies, the dissenting shareholder at any time within 3 months from the giving of the information notice to him, requires the offeror to acquire his shares,
- (ii) pay the same consideration for all the shares affected, and where consideration is paid in cash by way of cheque to residents of the State, by way of a cheque drawn on a clearing bank in the State.
- (5) Subject to Subhead (6), call notices and information notices shall—
- (a) be signed by or on behalf of the offeror, provided that where there are several like call notices given, one or more of which has been signed by or on behalf of the offeror, the call notices not so signed shall be deemed to be so signed if such unsigned call notices state the name of the director who has so signed at least one of those call notices;
- (b) be given to the shareholder—
- (i) personally, or
- (ii) by delivery to his address in the register of members of the offeree company, or
- (iii) by sending it by ordinary post or by registered post to him—
- (I) at his address in the register of members of the offeree company, or
- (II) to the address, if any, within the State supplied by him in writing to the offeree company for the giving of notices to him.
- (6) Call notices and information notices shall be deemed to be correctly given—

Part A9 - Reorganisations and Takeovers

- (a) to the joint holders of a share, by giving the notice to the joint holder first named in the register of members in respect of the share;
 - (b) to the persons entitled to a share in consequence of the death or bankruptcy of a member—
 - (i) by giving it to the persons claiming to be so entitled, or
 - (ii) by delivery to the address supplied to the offeree company by the persons claiming to be so entitled, or
 - (iii) by sending it by ordinary post or by registered post to the persons claiming to be so entitled by name or by the title of representatives of the deceased or Official Assignee in bankruptcy or by any like description at the address supplied to the offeree company by the persons claiming to be so entitled, or
 - (iv) in the case of shares other than share warrants to bearer, where such persons have not notified the company in writing of such death or bankruptcy—
 - (I) by delivery to the member's address in the register of members of the offeree company, or
 - (II) by sending it by ordinary post or by registered post to the member—
 - (A) at the member's address in the register of members of the offeree company, or
 - (B) to the address, if any, within the State supplied in writing by the member to the offeree company for the giving of notices to him, or
 - (c) to persons with addresses in the register of members or notified to the company which are in jurisdictions outside the State whose laws regulate the communication into those jurisdictions of schemes, contracts or offers to which this head applies, by advertisement published in the CRO Gazette.
- (7) A dissenting shareholder may—
- (a) following receipt of a call notice apply to the court to retain his shares;
 - (b) save where the offeror has served a call notice—
 - (i) require the offeror to acquire his shares,
 - (ii) apply to the court to vary the terms of the scheme, contract or offer as applies to that dissenting shareholder including a variation such as to require payment to the dissenting shareholder of a cash consideration.
- (8) Where an offeror has become bound to acquire the shares of dissenting shareholders, the offeror shall—
- (a) deliver to the offeree company—
 - (i) a copy of the form of any call notice or information notice given,
 - (ii) a list of the persons served with any call notice or information notice and the number of shares affected held by them,
 - (iii) an instrument of transfer of the shares of the dissenting shareholders executed on behalf of the dissenting shareholders as transferor by any person appointed by the offeror and by the transferee (being either the offeror or a subsidiary of the offeror or a nominee of the offeror or of such a subsidiary);
 - (b) pay to or vest in the offeree company the amount or other consideration representing the price payable by the offeror for the shares, the beneficial ownership of which by virtue of this head the offeror is entitled to acquire.
- (9) Where an offeror has complied with Subhead (8), the offeree company shall—
- (a) thereupon register as the holder of those shares the person who executed such instrument as the offeror, so however, that an instrument of transfer shall not be so required for any share for which a share warrant is for the time being outstanding;

- (b) pay any sums received by the offeree company under this head into a separate bank account and, for a period of 7 years following 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 the said sums or other consideration were respectively received;
- (c) after the expiry of the 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 Finance, 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.
- (10) Where the scheme, contract or offer becomes binding on or is approved or accepted by a person in respect of a part only of the shares held by him, he shall be treated as an assenting shareholder as regards that part of his holding and as a dissenting shareholder as regards the remainder of his holding.
- (11) In the application of this head to an offeree company, the share capital of which consists of two or more classes of shares, references to the shares in the capital of the offeree company shall be construed as references to the shares in its capital of a particular class.
- (12) For the purposes of this head—
- (a) shares in the offeree company in the beneficial ownership of a group company of the offeror shall be deemed to be in the beneficial ownership of the offeror;
- (b) where—
- (i) a person has a beneficial interest, or pursuant to paragraph (a) is deemed to have a beneficial interest in shares in the shares of an offeree company (in this paragraph referred to as “that person’s shares”), and
- (ii) that person or a group company of that person has a beneficial interest in one third or more of the equity share capital of the offeror,
- then that person’s shares shall be deemed to be in the beneficial ownership of the offeror,
- (c) the acquisition of the beneficial ownership of shares in the offeree company by a group company of the offeror shall be deemed to be the acquisition of such beneficial ownership by the offeror;
- (d) where the offeror is not a body corporate (in this paragraph referred to as a “non-corporate offeror”) paragraphs (a), (b) and (c) shall apply to such non corporate offeror as they do to an offeror which is a body corporate, mutatis mutandis;
- (e) subject to paragraph (f), where a person agrees to acquire shares in an offeree company, such person shall be deemed to have acquired the beneficial interest in those shares and it shall be immaterial that any other person has any interest in those shares;
- (f) shares shall not be treated as being in the beneficial ownership of the offer or merely by reason of the fact that—
- (i) those shares are or may become subject to a charge in favour of another person, or
- (ii) those shares are the subject of a revocable or irrevocable undertaking on the part of their holder to accept an offer if such offer is made.

Explanatory note

This head is an amended re-enactment of Section 204 of the Companies Act, 1963. The section has been amended in accordance with the recommendations of the Company Law Review Group in its First Report. There have been some changes in style to the section and greater use has been made of the defined terms to make the section more easily navigable and succinct.

Part A9 - Reorganisations and Takeovers

The Review Group noted the complexity of descriptions applying to the entities involved in acquisitions and takeovers. In Section 204 of the Companies Act, 1963, they are referred to as the transferor and transferee. In view of the use by the proposed E.U. 13th Company Law Directive, the Irish Takeover Panel Act and the Rules under that Act (as well as the London City Code on which it is based), The Review Group recommended that “offeree” and “offeror” replace “transferor” and “transferee” respectively.

Furthermore, the application of these terms has also been amended in accordance with the view of the Review Group. The Review Group recommended that an offeror (previously a transferee), which must be a company under Section 204 of the Companies Act, 1963 to obtain rights, should be capable of being an individual. Hence, all references to an offeror include persons and companies, whereas references to an offeree apply to companies only. For this reason references are to offerors and offeree companies.

Subhead (1) is an amended re-enactment of the first part of Section 204(4) of the Companies Act, 1963. The style of the section has been changed as this new Subhead (1) sets out the conditions which must be met for the rest of the head to apply. The reference to “four fifths in value of the shares” has been replaced by “80 per cent in value of the shares”.

Subhead (2) is an amended re-enactment of the latter part of Subsections (1) and (2) of Section 204 of the Companies Act, 1963. It sets out the conditions necessary for the offeror company to acquire the beneficial ownership of the remaining shares on the same terms of those earlier acquired shares.

Subhead (2)(a) is taken, in substance, from part of Section 204(1) of the Companies Act, 1963. The notice referred to here has been named the “call notice” for ease of reference throughout this Part.

Subhead (2)(b) is taken, in substance, from the latter part of Section 204(1) of the Companies Act, 1963. There is no substantive change made. In the absence of the dissenting shareholders making application to the court within the specified one month period or where the dissenting shareholders make such application and the court approves of the acquisition, the offeror company acquires the shares.

Subhead (2)(c) is taken in substance from Sections 204(2) and (3) of the Companies Act 1963. The Review Group has made substantive changes to these provisions in accordance with its recommendations in its First Report. Under Section 204(2), where an offeror company and its subsidiaries have 20 per cent or more of the shares in the offeree company, then the offeror company must obtain approval from 75 per cent of the shareholders as well as 80 per cent in nominal value of the shares. Under Section 204(3), where shares in the

offeree company are held by a subsidiary of the offeror company, they are deemed to be held by the offeror company for the purposes of this head.

The Review Group noted an anomaly within these provisions. It failed to include shares of a holding company or a sister company of the offeror company and instead these were regarded as shares held independently of the offeror company for the purposes of this head. Thus, existing shareholders of the offeror company or its subsidiary were free to restructure in a new corporate entity in order to avoid the more stringent requirements as in the Supreme Court Case *Re: Fitzwilliam PLC, Duggan v Stoneworth Investment Ltd.* (2002) 1 IR 566. Accordingly, the Review Group recommended that the provisions be amended.

“Group companies” is a term which has also been newly inserted in this provision to include subsidiaries, holding companies and sister companies for the purpose of such amendment. It is defined in head 1 of this Part. The provisions have also been amended insofar as the requirement to obtain approval from 75 per cent of the shareholders has now been lowered to 50 per cent in accordance with the recommendations of the Review Group on its First Report.

Subhead (3) is an amended re-enactment of Section 204(10) of the Companies Act, 1963. “Notice” has been replaced by “call notice” as prescribed by the new Subhead (2)(a).

Subhead (4) is an amended re-enactment of Section 204(4) of the Companies Act, 1963. Subheads (4)(a) and (4)(b)(i) are taken, in substance, from Section 204(4). The style of the subsection has been changed and the term “information notice” has been introduced for ease of reference. No substantive changes have been made.

Subhead (4)(b)(ii) has been newly inserted in accordance with the recommendations of the Review Group in its First Report requiring payment of cash consideration by means of a cheque drawn on an Irish clearing bank.

Subheads(5) & (6) are new subheads. They import Article 7 of the Companies (Forms) Order, S.I. No. 45 of 1964, which stipulate how notices under this head are to be served. The actual form of the notices will continue to be prescribed by the S.I.

References to the notices necessitated by Section 204 of the Companies Act, 1963 are now referred to “call notice” and “information notice” in accordance with the Part. The requirement of the directors to sign the call notice is now expressly stated in subhead (5)(a). Any references to a “share warrant to bearer” have been deleted as share warrants are only relevant to public companies (these will be included in Pillar B).

Subhead (6)(c) addresses the situation where it is not lawful to post the call notice or information notice into jurisdictions outside the State whose laws regulate the communication of notices in their own jurisdiction (in practice meaning Australia and the U.S.). In such circumstances notice is effected through the CRO Gazette.

Subhead (7) is new. It provides that the Court has a discretion to vary the terms of the scheme, contract or offer only where the offeror has not given a call notice. Where a call notice has been issued the dissenting shareholder may apply to the Court to retain his shares. The Court was given a discretion, following an application by the dissenting shareholder, to "...order otherwise" in Section 204(1) of the Companies Act, 1963.

Subhead (8) is an amended re-enactment of Section 204(5) of the Companies Act, 1963. The subsection has been split into paragraphs to enhance clarity. Subhead (8)(a)(ii), requiring the offeror to deliver a list of persons served with any call notice or information notice and the number of affected shares held by them, has been added in accordance with the views of the Review Group. The last phrase of Section 204(5), imposing a requirement on the offeree company to effect registration of shares in the name of the offeror, has been included in the following subhead.

Subhead (9) is a new subhead comprised of a number of subsections of Section 204 of the Companies Act, 1963.

Subhead (9)(a) is an amended re-enactment of the last phrase of Section 204(5), imposing a requirement on the offeree company to effect registration of shares in the name of the offeror. The reference to share warrants has been removed as these are the concern of public companies only. For this reason, such reference will be included in Pillar B.

Subhead (9)(b) is an amended re-enactment of Section 204(6) of the Companies Act, 1963. The wording has been amended slightly in order to integrate it into this subhead and the time period for holding such money or other consideration on trust has been increased from 6 to 7 years.

Subhead (9)(c) is a new Subhead. It has been inserted in accordance with the recommendations of the Review Group in its First Report that unclaimed consideration in respect of shares compulsorily acquired as a result of Section 204 can remain on trust for dissenting shareholders for, at longest, 7 years.

The Review Group recommended unclaimed consideration should be held for 7 years at the longest and then given to the Minister for Finance who should indemnify the company against any future claims.

Subhead (9)(d) is a slightly amended re-enactment of Section 204(7) of the Companies Act, 1963. The style of the subsection has been amended in order to integrate it into this subhead.

Subhead (10) is a re-enactment of Section 204(9) of the Companies Act, 1963.

Subhead (11) is a re-enactment of Section 204(11) of the Companies Act, 1963.

Subhead (12) is a new Subhead:

Subhead 12(a) is taken in substance from the first phrase of Section 204(3) of the Companies Act, 1963.

Subhead 12(b) is new. It has been inserted in accordance with the recommendations of the Review Group in its First Report. It imputes ownership of shares, held by a person or group company in the offeree company, to the offeror company where the person or group company has a beneficial interest in at least one third of the equity share capital of the offeror. The one third interest tallies with the provisions of Section 54(5) and Section 72(2) of the Companies Act, 1990 in relation to the attribution of interests which should accept the offer.

Subhead 12(c) is taken in substance from the second phrase of Section 204(3) of the Companies Act, 1963.

Subsection 12(d) has been newly inserted to address the application of the head where the offeror is not a body corporate.

Subhead 12(e) is new. It has been introduced in accordance with the view of the Review Group. This reverses the effect of the Supreme Court judgment in *Tempany v Hynes* (1976) I.R. 101 which, in practice, has impeded the operation of Section 204 of the Companies Act, 1963. The effect of this judgment is to suggest that where the entire purchase money for an asset agreed to be acquired has not been paid, the unpaid seller retains a beneficial interest in the asset, as opposed to a non-possessory lien, which had been the situation prior to that judgment. The subhead now provides that the person who agrees to acquire the shares is deemed to acquire the beneficial interest in those shares.

Subhead 12(f) further clarifies the position in respect of shares being treated as not being in the beneficial ownership of the offeror.

Sections 205(12) and (13) of the Companies Act, 1963 have been deleted as they were seen to be transitional provisions.

Chapter 3

Mergers

Head 7 Interpretation of this Chapter

In this Chapter, unless the context otherwise requires—

“acquiring company”, has the meaning assigned to it by Part A9, Head 8 [equivalent of S.I No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 5];

“director”, in relation to a company which is being wound up, means liquidator;

“merger” means “merger by acquisition” or “merger by formation of a new company” within the meaning of Part A9, Head 8(1) [equivalent of S.I No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 5(1)].

Explanatory note

This head is a slightly amended re-enactment of S.I No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 4. These Regulations are now applied to private companies whereas previously their application was limited to public companies. All cross-references have been updated in accordance with the structure of the Bill.

Head 8 Mergers to which this chapter applies

(1) In this Chapter—

- (a) “merger by acquisition” means an operation whereby an existing company (“the acquiring company”) acquires all the assets and liabilities of another company or companies in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company, with or without any cash payment, and with a view to the dissolution of the company or companies being acquired; and
- (b) “merger by formation of a new company” means a similar operation where the acquiring company has been formed for the purpose of such acquisition.

(2) Where a company is being wound up it may—

- (a) become a party to a merger by acquisition or by formation of a new company, provided that the distribution of its assets to its shareholders has not begun at the date, under Part A9, Head 9 (4) [equivalent of S.I No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 6 (4)], of the draft terms of merger; or
- (b) opt to avail of the provisions of Part A9, Chapters 1 and 2 [equivalent of Sections 201 to 204 of the Companies Act, 1963] and Part A11, Head 40 [equivalent of Section 260 of the Companies Act, 1963].

(3) Subject to Subhead (2), the said provisions shall not apply to merger by acquisition or by formation of a new company.

Explanatory note

This head is a slightly amended re-enactment of S.I No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 5. All cross-references have been updated in accordance with the structure of the Bill.

Head 9 Draft terms of merger

- (1) Where a merger is proposed to be entered into, the directors of the merging companies shall draw up draft terms of the merger in writing.
- (2) The draft terms of merger shall state, at least—
 - (a) the name and registered office of each of the merging companies;
 - (b) the proposed share exchange ratio and the amount of any cash payment;
 - (c) the proposed terms relating to allotment of shares in the acquiring company;
 - (d) the date from which holders of such shares will become entitled to participate in the profits of the acquiring company;
 - (e) the date from which the transactions of the company or companies being acquired shall be treated for accounting purposes as being those of the acquiring company;

- (f) any special conditions, including special rights or restrictions, whether in regard to voting, participation in profits, share capital or otherwise, which will apply to shares or other securities issued by the acquiring company in exchange for shares or other securities in the company or companies being acquired;
- (g) any payment or benefit in cash or otherwise, paid or given or intended to be paid or given to any independent person referred to in Part A9, Head 12 [equivalent of S.I No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 8] and to any director of any of the merging companies insofar as it differs from the payment or benefit paid or given to other persons in respect of the merger and the consideration, if any, for any such payment or benefit.
- (3) Where the merger is a merger by formation of a new company the draft terms of merger shall include or be accompanied by the constitution or draft constitution of the new company.
- (4) The draft terms of merger shall be signed and dated on behalf of each of the merging companies by two directors of each such company and that date shall, for the purposes of this Part, be the date of the draft terms of merger.
- (2) The explanatory report shall at least detail and explain—
- (a) the draft terms of merger;
- (b) the legal and economic grounds for and implications of the draft terms of merger with particular reference to the proposed share exchange ratio, organisation and management structures, recent and future commercial activities and the financial interests of the holders of the shares and other securities in the company;
- (c) the methods used to arrive at the proposed share exchange ratio and the reasons for the use of these methods;
- (d) any special valuation difficulties which have arisen.
- (3) The explanatory report shall be signed and dated on behalf of each of the merging companies by two directors of each such company.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 7. All cross-references have been updated in accordance with the structure of the Bill.

Explanatory note

This head is a slightly amended re-enactment of S.I No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 6. All cross-references have been updated in accordance with the structure of the Bill.

References to the memorandum and articles of association have also been replaced by references to the constitution of the company.

Paragraph (2)(a) of Regulation 6 has not been included. This required the merging companies to state what form of company they were and is thus no longer relevant as this Part only applies to private companies limited by shares.

Head 10 Directors' explanatory report

- (1) A separate written report ("the explanatory report") shall be drawn up in respect of each of the merging companies by the directors of each such company.

Head 11 Merger by Validation Procedure

- (1) A merger may be affected by the validation procedure provided for in Part A4, Head 71 and Part A9, Head 16 shall regulate the passing of the special resolution of the merging companies.
- (2) Where the directors of the merging companies decide to propose a merger otherwise than by means of the validation procedure, Part A9, Heads 12, 13, 15, 16, 17, 18 and 19 [equivalent of S.I No.137 of 1987, EC (Mergers and Divisions) Regulations 1987] shall apply.

Explanatory note

This head is new. It was introduced in accordance with the recommendations of the Company Law Review Group to provide an alternative merger procedure without the involvement of the courts.

Head 12 Independent person's report

- (1) Each of the merging companies shall appoint an independent person to examine the draft terms of merger and to prepare a written report on them to the shareholders of the company concerned.
- (2) No person shall act as an independent person for the purposes of Subhead(1) unless he is authorised by the Minister, on application by the company concerned, to be such a person for the purposes of the proposed merger.
- (3) One or more independent persons may be authorised by the Minister on joint application by the merging companies for all the said companies.
- (4) None of the following persons shall be qualified to act as an independent person in respect of a proposed merger—
 - (a) a person who is or, within 12 months of the date of the draft terms of merger, has been, an officer or servant of the company;
 - (b) except with the leave of the Minister, a parent, spouse, brother, sister or child of an officer of the company;
 - (c) a person who is a partner or in the employment of an officer or servant of the company.
- (5) If an independent person becomes disqualified by virtue of this regulation he shall thereupon cease to hold office and shall give notice in writing of his disqualification to the Minister within 14 days thereof, but without prejudice to the validity of any acts done by him in his capacity as independent person.
- (6) Any person who acts as an independent person when disqualified from doing so under this regulation or who makes default in complying with Subhead (5) shall be guilty of a category two offence.
- (7) The report referred to in Subhead (1) shall—
 - (a) state the method or methods used to arrive at the proposed share exchange ratio;
 - (b) give the opinion of the person making the report as to whether the proposed share exchange ratio is fair and reasonable;
 - (c) give the opinion of the person making the report as to whether the method or methods used are adequate in the case in question;
 - (d) indicate the values arrived at using each such method;
 - (e) give the opinion of the person making the report as to the relative importance attributed to such methods in arriving at the values decided on;
 - (f) any special valuation difficulties which have arisen.
- (8) A person making a report under this regulation shall be entitled to require from the merging companies and their officers such information and explanation (whether orally or in writing) and to carry out such investigations as he thinks necessary to enable him to make the report.
- (9) Any of the merging companies and any officer thereof who—
 - (a) fails to supply to an independent person any information or explanation in his power, possession or procurement which that person thinks necessary for the purposes of this report; or
 - (b) knowingly or recklessly makes a statement or provides a document which—
 - (i) is misleading, false or deceptive in a material particular, and
 - (ii) is a statement or document to which this paragraph applies,shall be guilty of a category two offence.
- (10) Subhead (9) applies to any statement made, whether orally or in writing, or any document provided to any person making a report under this regulation being a statement or document which conveys or purports to convey any information or explanation which that person requires, or is entitled to require, under Subhead (8).

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 8. All cross-references have been updated in accordance with the structure of the Bill.

Head 13 Accounting statement

- (1) Where the latest annual accounts of any of the merging companies relate to a financial year ended more than six months before the date of the draft terms of merger, that company shall prepare an accounting statement in accordance with the provisions of this regulation.
- (2) The accounting statement shall, where required under Subhead (1), be drawn up—
 - (a) in the format of the last annual balance sheet and in accordance with the provisions of the Companies Acts; and
 - (b) as at a date not earlier than the first day of the third month preceding the date of the draft terms of merger.
- (3) Valuations shown in the last annual balance sheet shall, subject to the exceptions outlined in Subhead (4), only be altered to reflect entries in the books of account.
- (4) Notwithstanding the provisions of Subhead (3), the following shall be taken into account in preparing the accounting statement—
 - (a) interim depreciation and provisions; and
 - (b) material changes in actual value not shown in the books of account.
- (5) The provisions of the Part A6 relating to the auditor's report on the last annual accounts shall apply, with any necessary modifications, to the accounting statement required by Subhead (1).

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations, 1987, Regulation 9. All cross-references have been updated in accordance with the structure of the Bill.

Head 14 Registration and publication of documents

- (1) Each of the merging companies shall—
 - (a) deliver for registration to the Registrar, a copy of the draft terms of merger, signed and dated as required by Part A9, Head 9 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 6]; and
 - (b) publish in the CRO Gazette notice of delivery to the Registrar of the draft terms of merger.
- (2) The requirements of Subhead (1) shall be fulfilled by each of the merging companies at least one month before the date of the general meeting of each such company which by virtue of Part A9, Head 16 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 13] is to consider the draft terms of merger.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 11. All cross-references have been updated in accordance with the structure of the Bill and references to the "registrar of companies" have been replaced with "Registrar".

Subsection (1)(b) has been amended in accordance with the views of the Company Law Review Group. The reference to Iris Oifigiúil has been replaced by a reference to the CRO Gazette. The requirement to publish a notice "...in at least one daily newspaper in the district in which the registered office is located" in accordance with the view of the Review Group. The reasons for this are the cost of publication; the inefficiency of the notice reaching the intended recipients; and the fact that the CRO Gazette will now be freely available on-line.

Head 15 Inspection of documents

- (1) Each of the merging companies shall, subject to Subhead (2), make available for inspection free of charge by any member of the company at its registered office during business hours (subject to such reasonable restrictions as the company in general meeting may impose so that not less than 2 hours in each day be allowed for inspection)—

- (a) the draft terms of merger;
 - (b) the audited annual accounts for the preceding three financial years of each company or, where a company has traded for less than 3 financial years before the date of the draft terms of merger, the audited annual accounts for those financial years for which the company has traded;
 - (c) the explanatory reports relating to each of the merging companies referred to in Part A9, Head 10 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 7];
 - (d) the independent person's report, if any, relating to each of the merging companies referred to in Part A9, Head 12 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 8];
 - (e) the accounting statement, if any, in relation to any of the merging companies which is required to be prepared pursuant to Part A9, Head 13 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 9].
- (2) The provisions of Subhead (1) shall apply in the case of each of the merging companies for a period of one month before the general meeting which is to consider the draft terms of merger.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 12. All cross-references have been updated in accordance with the structure of the Bill.

Head 16 General meetings of merging companies

- (1) Subject to Subhead (4) of this head and to Part A9, Head 17 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 14], the draft terms of merger shall be approved by a special resolution passed at a general meeting of each of the merging companies.
- (2) Where the merger is a merger by formation of a new company, the constitution or draft constitution of the new company shall be approved by a special resolution of each of the companies being acquired.
 - (3) The notice convening the general meeting referred to in Subhead (1) shall contain a statement of every shareholder's entitlement to obtain on request, free of charge, full or, if so desired, partial copies of the documents listed in Part A9, Head 15 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 12].
 - (4) In the case of—
 - (a) a merger by acquisition; or
 - (b) an operation whereby one or more companies are acquired by another company which holds ninety per cent or more, but not all, of their shares and other securities conferring the right to vote at general meetings ("a voting right") (whether such shares and other securities are held either by the acquiring company together with or solely by other persons in their own names but on behalf of that company); or
 - (c) an operation to which Subhead (8) applies, approval of the draft terms of merger by means of a special resolution shall not be required in the case of the acquiring company provided that the following conditions are fulfilled—
 - (i) the provisions of Part A9, Head 14 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 11] and Part A9, Head 15 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 12] are complied with at least one month before the date of the general meeting of each of the companies being acquired, and

- (ii) one or more members of the company holding paid up share capital amounting in total value to not less than 5 per cent of such of the paid up share capital as confers a voting right, whether or not the shares held confer a voting right, shall be entitled, under the articles of association of the company, to require the convening of a general meeting of the company to consider the draft terms of merger.
- (5) The directors of each of the companies being acquired shall inform—
 - (a) the general meeting of that company; and
 - (b) the directors of the acquiring company,of any material change in the assets and liabilities of the company or companies being acquired between the date of the draft terms of merger and the date of such general meeting.
- (6) The directors of the acquiring company shall inform the general meeting of that company of the matters referred to in Subhead (5).
- (7) Part A9, Heads 10, 12 and 15 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulations 7, 8 and 12] shall not apply in the case of an operation under Subhead (4) (b) of this head, provided that the conditions under Part A9, Head 18 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 15] are fulfilled.
- (8) Notwithstanding anything contained in Part A9, Head 8 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 5], but subject to Subhead (9), this Chapter shall apply to an operation whereby a company (“the acquiring company”) acquires all the assets and liabilities of another company or companies and the acquiring company is the holder of all of the shares and other securities conferring the right to vote at general meetings of the company or companies being acquired, whether such shares and other securities are held either by the acquiring company together with or solely by other persons in their own name but on behalf of that company.

- (9) The following provisions of this Chapter shall not apply to an operation under Subhead (8), namely, Part A9, Heads 9 (2) (c), 9 (2) (d), 9 (2) (e), 10, 12, 15 (1) (c), 15 (1) (d), 22 (1) (b) and 24 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulations 6 (2)(c), 6 (2)(d), 6 (2)(e), 7, 8, 12(1)(c), 12(1)(d), 19(1)(b) and 21].

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 13. All cross-references have been updated in accordance with the structure of the Bill. References to the memorandum and articles of association have also been replaced by references to the constitution of the company.

Head 17 Meetings of classes of shareholders

Where the share capital of any of the merging companies is divided into shares of different classes, Part A3, Head 19 [equivalent of Section 38 of the Companies (Amendment) Act, 1983], shall apply.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 14. All cross-references have been updated in accordance with the structure of the Bill.

Head 18 Purchase of minority shares

- (1) Any person being—
 - (a) a shareholder in any of the merging companies who voted against the special resolution of the company concerned relating to the draft terms of merger; or
 - (b) in a case to which Part A9, Head 16 (4) (b) [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 13(4)(b)] relates, any shareholder other than the acquiring company, may, not later than 15 days after the relevant date, request the acquiring company in writing to acquire his shares for cash.

- (2) In this head “the relevant date” in relation to a company means the date on which the latest general meeting of that company to consider the draft terms of merger, or of any class of the holders of shares or other securities of such company, as required by this Chapter, is held.
- (3) Nothing in this head shall prejudice the power of the court to make any order necessary for the protection of the interests of a dissenting minority in a merging company.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 15. All cross-references have been updated in accordance with the structure of the Bill.

Head 19 Application for confirmation of merger by court

Where Part A9, Head 11 does not apply-

- (1) An application to the court for an order confirming a merger shall be made jointly by all the merging companies.
- (2) The application shall be accompanied by a statement of the size of the shareholding of any shareholder who has requested the purchase of his shares under Part A9, Head 18 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 15], and of the measures which the acquiring company

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 16. All cross-references have been updated in accordance with the structure of the Bill.

Head 20 Protection of creditors

- (1) A creditor of any of the merging companies who, at the date of publication of the notice under Part A9, Head 14 (1) (b) [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 11(1)(b)], is entitled to any debt or claim against the company, shall be entitled to object to the confirmation by the court of the merger.

- (2) If the court deems it necessary in order to secure the adequate protection of creditors of any of the merging companies it may—
- (a) determine a list of creditors entitled to object and the nature and amount of their debts or claims, and may publish notices fixing a period within which creditors not entered on the list may have a claim for inclusion on that list considered;
- (b) where an undischarged creditor on the list referred to in paragraph (a) does not consent to the merger, the court may dispense with the consent of that creditor, on the company securing payment of the debt or claim by apportioning to that creditor such following amount as the court may direct—
- (i) if the company concerned admits the full amount of the debt or claim, that amount,
- (ii) if the company concerned does not admit the debt or claim, or if the amount is contingent or not ascertained, an amount fixed by the court after the like inquiry and adjudication as if the company were being wound up by the court.
- (3) If, having regard to any special circumstances of the case it thinks proper so to do, the court may direct that Subhead (2) shall not apply as regards any class of creditors.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 17. All cross-references have been updated in accordance with the structure of the Bill.

Head 21 Preservation of rights of holders of securities

- (1) Subject to Subhead (2), holders of securities, other than shares, in any of the companies being acquired to which special rights are attached shall be given rights in the acquiring company at least equivalent to those they possessed in the company being acquired.
- (2) Subhead (1) shall not apply—
- (a) where the alteration of the rights in the acquiring company has been approved—

- (i) by a majority of the holders of such securities at a meeting held for that purpose, or
 - (ii) by the holders of those securities individually; or
 - (b) where the holders of those securities are entitled under the terms of those securities to have their securities purchased by the acquiring company.
- (2) The order of the court confirming the merger shall, with effect from the appointed date, have the following effects—
 - (a) all the assets and liabilities of the company or companies being acquired shall stand transferred to the acquiring company in accordance with the draft terms of merger as approved by the court;
 - (b) the shareholders of the company or companies being acquired shall become shareholders in the acquiring company in accordance with the draft terms of the merger as approved by the court;
 - (c) the company or companies being acquired shall, subject to Subhead (4), be dissolved;
 - (d) all legal proceedings pending by or against any of the dissolved companies shall be continued with the substitution, for the dissolved company, of the acquiring company.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 18. All cross-references have been updated in accordance with the structure of the Bill.

Head 22 Confirmation order

Where Part A9, Head 11 does not apply-

- (1) The court, on being satisfied that—
 - (a) the requirements of this Chapter have been complied with;
 - (b) proper provision has been made for—
 - (i) any dissenting shareholder of any of the merging companies who has made a request under Part A9, Head 18 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 15], and
 - (ii) any creditor of any of the merging companies who objects to the merger in accordance with Part A9, Head 20 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 17]; and
 - (c) the rights of holders of securities other than shares in any of the companies being acquired are safeguarded in accordance with Part A9, Head 21 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 18],
- (2) The court may, either by the order confirming the merger or by a separate order, make provision for such matters as the court considers necessary to secure that the merger shall be fully and effectively carried out.
- (3) The court may, in particular, by order—
 - (a) direct that the acquiring company shall, on a date specified by the court, purchase the shares of a dissenting shareholder who has made a request under Part A9, Head 18 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 15], and pay therefor the sum determined by the court, being not less than the market sale price of the shares on the appointed date; and
 - (b) provide for the reduction accordingly of the company's capital.
- (4) Part A3, Head 36 (1) [equivalent of Section 41(1) of the Companies (Amendment) Act, 1983 (which restricts the right of a company to purchase its own shares)] shall not apply to the purchase of any shares in pursuance of an order of the court under this head.

may make an order confirming the merger with effect from such date as the court appoints ("the appointed date").

- (6) If it is necessary for any of the companies being acquired to take any steps to ensure that its assets and liabilities are fully transferred, the court may specify a date which, save in exceptional cases, shall not be later than 6 months after the appointed date by which such steps must be taken and for that purpose may order that the dissolution of such company shall take effect on that date.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 19. All cross-references have been updated in accordance with the structure of the Bill.

Head 23 Saver for enactments regulating mergers

A merger shall not take effect under this Chapter in the absence of the approval, consent or clearance required by any other enactment.

Explanatory note

This head is a new head introduced in accordance with the recommendation of the Company Law Review Group. It simply provides for the regulation of mergers through other enactments and no merger is effected in the absence of compliance with such regulation.

Head 24 Registration and publication of confirmation of merger

- (1) Where the court has made an order confirming a merger an office copy thereof shall forthwith be sent to the Registrar for registration by such officer of the court as the court may direct.
- (2) The acquiring company shall cause to be published in the CRO Gazette notice of delivery to the registrar of companies of the order of the court confirming the merger within fourteen days of such delivery.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 21. All cross-references have been updated in accordance with the structure of the Bill and references to the “registrar of companies” have been replaced with “Registrar”.

Subhead (2) has been amended in accordance with the views of the Company Law Review Group. The reference to Iris Oifigiúil has been replaced by a reference to the CRO Gazette.

Head 25 Civil liability of directors and independent persons

- (1) Any shareholder of any of the merging companies who has suffered loss or damage by reason of misconduct in the preparation or implementation of the merger by a director of any such company or by the independent person, if any, who has made a report under Part A9, Head 12 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 8], shall be entitled to have such loss or damage made good to him by—
- (a) in the case of misconduct by a person who was a director of that company at the date of the draft terms of merger — that person;
 - (b) in the case of misconduct by any independent person who prepared a report under Part A9, Head 12 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 8], in respect of any of the merging companies — that person.
- (2) Without prejudice to the generality of Subhead (1), any shareholder of any of the merging companies who has suffered loss or damage arising from the inclusion of any untrue statement in the draft terms of merger, the explanatory report, the independent person’s report, if any, or the accounting statement, if any, provided for under Part A9, Head 13 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 9], shall, subject to Subheads (3) and (4), be entitled to have such loss or damage made good to him by every person who was a director of that company at the date of the draft terms of merger or, in the case of the independent person’s report by the person who made that report in relation to that company.
- (3) A director of a company shall not be liable under Subhead (2) if he proves—

- (a) that any of the documents referred to in Subhead (2) were issued without his knowledge or consent and that, on becoming aware of their issue, he forthwith informed the shareholders of that company that they were issued without his knowledge or consent; or
- (b) that as regards every untrue statement he had reasonable grounds, having exercised all reasonable care and skill, for believing and did, up to the time the merger took effect, believe that the statement was true.
- (4) A person who makes a report required by Part A9, Head 12 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 8], in relation to a company shall not be liable in the case of untrue statements in his own report if he proves—
- (i) that on becoming aware of the statement he forthwith informed the company concerned and its shareholders of the untruth, or
- (ii) that he was competent to make the statement and that he had reasonable grounds for believing and did up to the time the merger took effect believe that the statement was true.
- (3) It shall be a defence for a person charged with an offence under subhead (1) or (2) to show that, having exercised all reasonable care and skill, he had reasonable grounds for believing and did, up to the time of the issue of the documents, believe that the statement was true.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 23. All cross-references have been updated in accordance with the structure of the Bill.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 22. All cross-references have been updated in accordance with the structure of the Bill.

Head 26 Criminal liability for untrue statements in merger documents

- (1) Where any untrue statement has been included in the draft terms of merger, the explanatory report or the accounting statement, each of the directors and any person who authorised the issue of those documents shall be guilty of a category two offence.
- (2) Where any untrue statement has been included in the independent person's report the independent person and any person who authorised the issue of the report shall be guilty of a category two offence.

Chapter 4

Divisions

Head 27 Interpretation of this Chapter

In this Chapter, unless the context otherwise requires—

“acquiring companies” has the meaning assigned to it by Part A9, Head 28 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 25];

“division” means “division by acquisition” or “division by formation of new companies”, within the meaning of Part A9, Head 28 (1) [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 25].

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 24. These Regulations are now applied to private companies whereas previously their application was limited to public companies. All cross-references have been updated in accordance with the structure of the Bill.

Head 28 Divisions to which this Chapter applies

(1) In this Chapter—

- (a) “division by acquisition” means an operation whereby two or more companies (“the acquiring companies”) of which one or more but not all may be a new company acquire between them all the assets and liabilities of another company in exchange for the issue to the shareholders of that company of shares in one or more of the acquiring companies with or without any cash payment and with a view to the dissolution of the company being acquired; and
- (b) “division by formation of new companies” means a similar operation whereby the acquiring companies have been formed for the purposes of such acquisition.

(2) Where a company is being wound up it may—

- (a) become a party to a division by acquisition or by formation of new companies, provided that the distribution of its assets to its shareholders has not begun at the date, under Part A9, Head 29 (4) [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 26(4)], of the draft terms of division; or
 - (b) opt to avail of the provisions of Part A9, Chapters 1 and 2 [equivalent of Sections 201 to 204 of the Companies Act 1963], Part A11, Head 40 [equivalent of Section 260 of the Companies Act, 1963].
- (3) Subject to Subhead (2), the said provisions shall not apply to a division by acquisition or by formation of new companies.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 25. All cross-references have been updated in accordance with the structure of the Bill. Note the reference to Section 271 of the Companies Act, 1963 may be redundant as it appears the section is not being re-enacted in Part A11.

Head 29 Draft terms of division

- (1) Where a division is proposed to be entered into, the directors of the companies involved in the division shall draw up draft terms of the division in writing.
- (2) The draft terms of division shall state, at least—
 - (a) the name and registered office of each of the companies involved in the division;
 - (b) as to each of such companies, whether it is a public company limited by shares, a public company limited by guarantee and having a share capital or a body corporate to which Part B8, Head 2(1) [equivalent of Section 377 (1) of the Companies Act, 1963] relates;
 - (c) the proposed share exchange ratio and the amount of any cash payment;
 - (d) the proposed terms relating to allotment of shares in the acquiring companies;

- (e) the date from which holders of such shares will become entitled to participate in the profits of one or more of the acquiring companies;
 - (f) the date from which the transactions of the company being acquired shall be treated for accounting purposes as being those of any of the acquiring companies;
 - (g) any special conditions, including special rights or restrictions, whether in regard to voting, participation in profits, share capital or otherwise, which will apply to shares or other securities issued by the acquiring companies in exchange for shares or other securities in the company being acquired;
 - (h) any payment or benefit in cash or otherwise paid or given or intended to be paid or given to any independent person referred to in Part A9, Head 32 [equivalent of S.I No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 28] and to any director of any of the companies involved in the division insofar as it differs from the payment or benefit paid or given or intended to be paid or given to other persons in respect of the division and the consideration, if any, for any such payment or benefit;
 - (i) the precise description and allocation of the assets and liabilities of the company being acquired to be transferred to each of the acquiring companies;
 - (j) the allocation of shares in the acquiring companies to the shareholders of the company being acquired and the criteria on which such allocation is based.
- (3) Where the division involves the formation of one or more new companies the draft terms of division shall include or be accompanied by the constitution or draft constitution of each of the new companies.
- (4) The draft terms of division shall be signed and dated on behalf of each of the companies involved in the division by two directors of each such company and that date shall, for the purposes of this Chapter, be the date of the draft terms of division.
- (5) Where an asset of the company being acquired is not allocated by the draft terms of division and where the interpretation of those terms does not make a decision on its allocation possible, the asset or the consideration therefor shall be allocated to the acquiring companies in proportion to the share of the net assets allocated to each of those companies under the draft terms of division.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 26. All cross-references have been updated in accordance with the structure of the Bill and references to the memorandum and articles of association have also been replaced with "constitution".

Head 30 Directors' explanatory report

- (1) A separate written report ("the explanatory report") shall be drawn up in respect of each of the companies involved in the division by the directors of each such company.
- (2) The explanatory report shall at least detail and explain—
- (a) the draft terms of division;
 - (b) the legal and economic grounds for and implications of the draft terms of division with particular reference to the proposed share exchange ratio, organisation and management structures, recent and future commercial activities and the financial interests of holders of the shares and other securities in the company;
 - (c) the methods used to arrive at the proposed share exchange ratio and the reasons for the use of these methods;
 - (d) any special valuation difficulties which have arisen.
- (3) Where it is proposed that any of the acquiring companies will allot shares for a consideration other than in cash, the explanatory report shall state that the report required by Part B2, Head 21 [equivalent of Section 30 of the Companies (Amendment) Act, 1983], is being or has been prepared and that it will be delivered to the Registrar for registration in accordance with Part B2, Head 22 [equivalent of Section 31 of the Companies (Amendment) Act, 1983].

- (4) The explanatory report shall be signed and dated on behalf of each of the companies involved in the division by two directors of each such company.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 27. All cross-references have been updated in accordance with the structure of the Bill and references to the “registrar of companies” have been replaced by a reference to the “Registrar”.

Head 31 Division by validation procedure

- (1) A division may be affected by the validation procedure provided for in Part A4, Head 71 and Part A9, Head 16 shall regulate the passing of the special resolution of the merging companies.
- (2) Where the directors of the merging companies decide to propose a merger otherwise than by means of the validation procedure, Part A9, Head 32, 33, 35, 36, 37, 38 and 39 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, shall apply.

Explanatory note

This head is new. It was introduced in accordance with the recommendations of the Company Law Review Group to provide an alternative division procedure without the involvement of the courts.

Head 32 Independent person’s report

- (1) Each of the companies involved in the division shall appoint an independent person to examine the draft terms of division and to prepare a written report on them to the shareholders of the company concerned.
- (2) No person shall act as an independent person for the purposes of Subhead (1) unless he is authorised by the Minister on application by the company concerned to be such a person for the purposes of the proposed division.
- (3) One or more independent persons may be authorised by the Minister on joint application by the companies involved in the division for all the said companies.

- (4) None of the following persons shall be qualified to act as an independent person in respect of a proposed division—

- (a) a person who is or, within 12 months of the date of the draft terms of division, has been an officer or servant of the company;
- (b) except with the leave of the Minister, a parent, spouse, brother, sister or child of an officer of the company;
- (c) a person who is a partner or in the employment of an officer or servant of the company.

- (5) If an independent person becomes disqualified by virtue of this head he shall thereupon cease to hold office and shall give notice in writing of his disqualification to the Minister within 14 days thereof, but without prejudice to the validity of any acts done by him in his capacity as independent person.
- (6) Any person who acts as an independent person when disqualified from doing so under this head or who makes default in complying with Subhead (5) shall be guilty of a category two offence.
- (7) The report referred to in Subhead (1) shall—
- (a) state the method or methods used to arrive at the proposed share exchange ratio;
- (b) give the opinion of the person making the report as to whether the proposed share exchange ratio is fair and reasonable;
- (c) give the opinion of the person making the report as to whether such method or methods are adequate in the case in question;
- (d) indicate the values arrived at using each such method;
- (e) give the opinion of the person making the report as to the relative importance attributed to such methods in arriving at the values decided on;
- (f) any special valuation difficulties which have arisen.

- (8) The report required by Part B2, Head 21 [equivalent of Section 30 of the Companies (Amendment) Act, 1983], may be prepared by the person preparing the report required by this head.
- (9) A person making a report under this head shall be entitled to require from the companies involved in the division and their officers such information and explanation (whether orally or in writing) and to carry out such investigations as the independent person thinks necessary to enable him to make the report.
- (10) Any of the companies involved in the division and any officer thereof who—
- (a) fails to supply to an independent person any information or explanation in his power, possession or procurement, and which that person thinks necessary for the purpose of his report; or
 - (b) knowingly or recklessly makes a statement or provides a document which—
 - (i) is misleading, false or deceptive in a material particular, and
 - (ii) is a statement or document to which this subsection applies,
- shall be guilty of a category two offence.
- (11) Subhead (10) applies to any statement made, whether orally or in writing, or any document provided to any person making a report under this head being a statement or document which conveys or purports to convey any information or explanation which that person requires, or is entitled to require, under Subhead (9).
- (2) The accounting statement shall, where required under Subhead (1), be drawn up—
- (i) in the format of the last annual balance sheet and in accordance with the provisions of the Companies Acts, and
 - (ii) as at a date not earlier than the first day of the third month preceding the date of the draft terms of division.
- (3) Valuations shown in the last annual balance sheet shall, subject to the exceptions outlined in Subhead (4), only be altered to reflect entries in the books of account.
- (4) Notwithstanding the provisions of Subhead (3), the following shall be taken into account in preparing the accounting statement—
- (a) interim depreciation and provisions; and
 - (b) material changes in actual value not shown in the books of account.
- (5) The provisions of [the Companies Acts] relating to the auditor's report on the last annual accounts shall apply, with any necessary modifications, also to the accounting statement required by Subhead (1).

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 29. All cross-references have been updated in accordance with the structure of the Bill.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 28. All cross-references have been updated in accordance with the structure of the Bill.

Head 33 Accounting statement

- (1) Where the latest annual accounts of any of the companies involved in the division relate to a financial year ended more than six months before the date of the draft terms of division, that company shall prepare an accounting statement in accordance with the provisions of this head.

Head 34 Registration and publication of documents

- (1) Each of the companies involved in the division shall—
- (a) deliver for registration to the Registrar a copy of the draft terms of division, signed and dated as required by Part A9, Head 29 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 26]; and
 - (b) publish in the CRO Gazette notice of delivery to the Registrar of the draft terms of division.

- (2) The requirements of Subhead(1) shall be fulfilled by each of the companies at least one month before the date of the general meeting of each such company which by virtue of Part A9, Head 34 [equivalent of S.I. No 187 of 1987 EC (Mergers and Divisions) Regulations 1987, Regulation 30].

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 30. All cross-references have been updated in accordance with the structure of the Bill and references to the “registrar of companies” have been replaced with “Registrar”.

Subsection (1)(b) has been amended in accordance with the views of the Company Law Review Group. The reference to Iris Oifigiúil has been replaced by a reference to the CRO Gazette. The requirement to publish a notice “...in at least one daily newspaper in the district in which the registered office is located” in accordance with the view of the Review Group. The reasons for this are the cost of publication; the inefficiency of the notice reaching the intended recipients; and the fact that the CRO Gazette will now be freely available on-line.

Head 35 Inspection of documents

- (1) Each of the companies involved in the division shall, subject to subsection (2), make available for inspection free of charge by any member of the company at its registered office during business hours (subject to such reasonable restrictions as the company in general meeting may impose so that not less than 2 hours in each day be allowed for inspection)—
- (a) the draft terms of division;
 - (b) the audited annual accounts for the preceding three financial years of each company, or where a company has traded for less than 3 financial years before the date of the draft terms of division, the audited annual accounts for those financial years for which the company has traded;
 - (c) the explanatory reports relating to each of the companies referred to in Part A9, Head 30 [equivalent of S.I No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 27];

- (d) the independent person's report, if any, relating to each of the companies referred to in Part A9, Head 32 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 28];

- (e) the accounting statement, if any, in relation to any of the companies which is required to be prepared pursuant to Part A9, Head 33 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 29].

- (2) The provisions of Subhead (1) shall apply in the case of each of the companies for a period of one month before the general meeting which is to consider the draft terms of division.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 31. All cross-references have been updated in accordance with the structure of the Bill.

Head 36 General meetings of the companies involved in a division

- (1) Subject to Subhead (4) of this head and to Part A9, Head 37 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 33], the draft terms of division shall be approved by a special resolution passed at a general meeting of each of the companies involved in the division.
- (2) Where the division involves the formation of one or more new companies, the constitution or draft constitution of each of the new companies shall also be approved by a special resolution of the company being acquired.
- (3) The notice convening the general meeting referred to in Subhead (1) shall contain a statement of every shareholder's entitlement to obtain on request, free of charge, full or, if so desired, partial copies of the documents listed in Part A9, Head 35 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 31];
- (4) This head shall not apply in the case of an acquiring company provided that the following conditions are fulfilled—

- (i) the provisions of Part A9, Head 34 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 30] and Part A9, Head 35 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 31], are complied with at least one month before the date of the general meeting of the company being acquired, and
- (ii) one or more members of the company holding paid up share capital amounting in total value to not less than 5 per cent of such of the paid up share capital as confers the right to vote at general meetings, whether or not the shares held confer such voting right, shall be entitled, under the constitution of the company, to require the convening of a general meeting of the company to consider the draft terms of division.

- (5) The directors of the company being acquired shall inform—
- (a) the general meeting of that company; and
 - (b) the directors of the acquiring companies,

of any material change in the assets and liabilities of the company being acquired between the date of the draft terms of division and the date of the general meeting.

- (6) The directors of each acquiring company shall inform the general meeting of that company of the matters referred to in Subhead (5).
- (7) This head shall not apply in the case of the company being acquired where the acquiring companies together hold all the shares and other securities conferring the right to vote at general meetings of that company and where the information delivered under Subhead (4) covers any material change in the assets and liabilities after the date of the draft terms of the division.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 32. All cross-references have been updated in accordance with the structure of the Bill and references to the memorandum and articles of association have also been replaced with "constitution".

Head 37 Meetings of classes of shareholder

Where the share capital of any of the companies involved in a division is divided into shares of different classes, Part A3, Head 21 [equivalent of Section 38 of the Companies (Amendment) Act, 1983], shall apply.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 33. All cross-references have been updated in accordance with the structure of the Bill.

Head 38 Purchase of minority shares

- (1) Any of the shareholders in any of the companies involved in a division who voted against the special resolution of the company concerned relating to the draft terms of division may, not later than 15 days after the relevant date, request the acquiring company in writing to acquire his shares for cash.
- (2) In this regulation "the relevant date" in relation to a company means the date on which the latest general meeting of that company to consider the draft terms of division, or of any class of the holders of shares or other securities of such company, as required by this chapter, is held.
- (3) Nothing in this head shall prejudice the power of the court to make any order necessary for the protection of the interests of a dissenting minority in a company involved in a division.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 34. All cross-references have been updated in accordance with the structure of the Bill.

Head 39 Application for confirmation of division by court

Where Part A9, Head 32 does not apply—

- (1) An application to the court for an order confirming a division shall be made by all the companies involved in a division.

- (2) The application shall be accompanied by a statement of the size of the shareholding of any shareholder who has requested the purchase of his shares under Part A9, Head 38 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 34] and of the measures which the acquiring companies propose to take to comply with such shareholder's request.
- (ii) if the company concerned does not admit the debt or claim, or if the amount is contingent or not ascertained, an amount fixed by the court after the like inquiry and adjudication as if the company were being wound up by the court.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 35. All cross-references have been updated in accordance with the structure of the Bill.

- (3) If, having regard to any special circumstances of the case, it thinks proper so to do, the court may direct that Subhead (2) shall not apply as regards any class of creditors.
- (4) Each of the acquiring companies shall be jointly and severally liable for all the liabilities of the company being acquired.

Head 40 Protection of creditors

- (1) A creditor of any of the companies involved in a division who, at the date of publication of the notice under Part A9, Head 34 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 30(1)(b)], is entitled to any debt or claim against the company, shall be entitled to object to the confirmation by the court of the division.
- (2) If the court deems it necessary in order to secure the adequate protection of creditors of any of the companies involved in the division it may—
- (a) determine a list of creditors entitled to object and the nature and amount of their debts or claims, and may publish notices fixing a period within which creditors not entered on the list may have a claim for inclusion on that list considered;
- (b) where an undischarged creditor on the list referred to in paragraph (a) does not consent to the division, the court may dispense with the consent of that creditor, on the company securing payment of the debt or claim by appropriating to that creditor such following amount as the court may direct—
- (i) if the company concerned admits the full amount of the debt or claim, that amount,

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 36. All cross-references have been updated in accordance with the structure of the Bill.

Head 41 Preservation of rights of holders of securities

- (1) Subject to Subhead (2), holders of securities, other than shares, in any of the companies being acquired, to which special rights are attached shall be given rights in the acquiring companies at least equivalent to those they possessed in the company being acquired.
- (2) Subhead (1) shall not apply—
- (a) where the alteration of the rights in an acquiring company has been approved—
- (i) by a majority of the holders of such securities at a meeting held for that purpose, or
- (ii) by the holders of those securities individually; or
- (b) where the holders of those securities are entitled under the terms of those securities to have their securities purchased by an acquiring company.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 37. All cross-references have been updated in accordance with the structure of the Bill.

Head 42 Confirmation order

Where Part A9, Head 32 does not apply—

- (1) The court, on being satisfied that—
 - (a) the requirements of this Chapter have been complied with;
 - (b) proper provision has been made for—
 - (i) any dissenting shareholder of any of the companies involved in the division who has made a request under Part A9, Head 38 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 34], and
 - (ii) any creditor of any of the companies who objects to the division in accordance with Part A9, Head 40 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 36]; and
 - (c) the rights of holders of securities other than shares in any of the companies being acquired are safeguarded in accordance with Part A9, Head 41 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 37],

may make an order confirming the division with effect from such date as the court appoints (“the appointed date”).

- (2) The order of the court confirming the division shall, with effect from the appointed date, have the following effects—
 - (a) all the assets and liabilities of the company or companies being acquired shall stand transferred to the acquiring companies in accordance with the draft terms of division as approved by the court;
 - (b) the shareholders of the company being acquired shall become shareholders in the acquiring companies or any of them in accordance with the draft terms of division as approved by the court;
 - (c) the company or companies being acquired shall, subject to Subhead (4), be dissolved;

- (d) all legal proceedings pending by or against any of the dissolved companies shall be continued with the substitution, for the dissolved company, of the acquiring companies or such of them as the court having seisin of the proceedings may order.
- (3) The court may, either by the order confirming the division or by a separate order, make provision for such matters as the court considers necessary to secure that the division shall be fully and effectively carried out.
- (4) The court may, in particular, by order—
 - (a) direct that an acquiring company shall, on a date specified by the court, purchase the shares of a dissenting shareholder who has made a request under Part A9, Head 38 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 34] and pay therefor the sum determined by the court, being not less than the market sale price of the shares on the appointed date; and
 - (b) provide for the reduction accordingly of the company’s capital.
- (5) If it is necessary for the company being acquired to take any steps to ensure that its assets and liabilities are fully transferred, the court may specify a date which, save in exceptional cases, shall not be later than 6 months after the appointed date, by which such steps must be taken and for that purpose may order that the dissolution of such company shall take effect on that date.
- (6) Part A3, Head 36 [equivalent of Section 41 (1) of the Companies (Amendment) Act, 1983] (which restricts the right of a company to purchase its own shares) shall not apply to the purchase of any shares in pursuance of an order of the court under this regulation.

Explanatory note=

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 38. All cross-references have been updated in accordance with the structure of the Bill.

Head 43 Saver for enactments regulating divisions

A division shall not take effect under this Chapter in the absence of the approval, consent or clearance required by any other enactment.

Explanatory note

This head is a new head introduced in accordance with the recommendation of the Company Law Review Group. It simply provides for the regulation of divisions through other enactments and no merger is effected in the absence of compliance with such regulation.

Head 44 Registration and publication of confirmation of division

- (1) Where the court has made an order confirming a division an office copy thereof shall forthwith be sent to the Registrar for registration by such officer of the court as the court may direct.
- (2) Each of the acquiring companies shall cause to be published in the CRO Gazette notice of delivery to the Registrar of the order of the court confirming the division within fourteen days of such delivery.

Explanatory note

This head is a slightly amended re-enactment of S.I. No. 137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 40. All cross-references have been updated in accordance with the structure of the Bill. All cross-references have been updated in accordance with the structure of the Bill and references to the "registrar of companies" have been replaced with "Registrar".

Subhead (2) has been amended in accordance with the views of the Company Law Review Group. The reference to Iris Oifigiúil has been replaced by a reference to the CRO Gazette.

Head 45 Civil liability of directors and independent persons

- (1) Any shareholder of any of the companies involved in a division who has suffered loss or damage by reason of misconduct in the preparation or implementation of the division by a director of any such company or by the independent person, if any, who has made a report under Part A9, Head 33 [equivalent of S.I. No. 137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 28] shall be entitled to have such loss or damage made good to him by—
 - (a) in the case of misconduct by a person who was a director of that company at the date of the draft terms of division - that person;
 - (b) in the case of misconduct by any independent person who prepared a report under Part A9, Head 32 [equivalent of S.I. No. 137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 28] in respect of any of the companies — that person.
- (2) Without prejudice to the generality of Subhead (1), any shareholder of any of the companies who has suffered loss or damage arising from the inclusion of any untrue statement in the draft terms of division, the explanatory report, the independent person's report, if any, or the accounting statement, if any, shall, subject to Subheads (3) and (4), be entitled to have such loss or damage made good to him by every person who was a director of that company at the date of the draft terms of division or, in the case of the independent person's report, by the person who made that report, in relation to that company.
- (3) A director of a company shall not be liable under Subhead (2) if he proves—
 - (a) that any of the documents referred to in Subhead(2) was issued without his knowledge or consent, and that on becoming aware of their issue he forthwith informed the shareholders of that company that they were issued without his knowledge or consent; or

- (b) that as regards every untrue statement he had reasonable grounds, having exercised all reasonable care and skill, for believing and did, up to the time the division took effect, believe that the statement was true.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 42. All cross-references have been updated in accordance with the structure of the Bill.

- (4) A person who made a report required by Part A9, Head 32 [equivalent of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 28] in relation to a company shall not be liable in the case of untrue statements in his own report if he proves—
 - (i) that on becoming aware of the statement, he forthwith informed the company concerned and its shareholders of the untruth, or
 - (ii) that he was competent to make the statement and that he had reasonable grounds for believing and did up to the time the division took effect believe that the statement was true.

Explanatory note

This head is a slightly amended re-enactment of S.I. No.137 of 1987, EC (Mergers and Divisions) Regulations 1987, Regulation 41. All cross-references have been updated in accordance with the structure of the Bill.

Head 46 Criminal liability for untrue statements in division documents

- (1) Where any untrue statement has been included in the draft terms of division, the explanatory report or the accounting statement, each of the directors and any person who authorised the issue of those documents shall be guilty of a category two offence.
- (2) Where any untrue statement has been included in the independent person's report, the independent person and any person who authorised the issue of the report shall be guilty of a category two offence.
- (3) It shall be a defence for a person charged with an offence under Subhead (1) or (2) to show that, having exercised all reasonable care and skill, he had reasonable grounds for believing and did, up to the time of the issue of the documents, believe that the statement was true.

