
Part B6 – Re-registration & Conversion of Companies

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Part B6 - Re-registration & Conversion of Companies

Chapter 1

Preliminary and Interpretation

Head 1 Defined terms and expressions

(1) In this Part:

“Another company type” means a company of a type that may be formed and registered under this Bill;

“Authorised minimum” has the meaning ascribed to it by Part B2, Head 1;

“Constitution” in the context of a private company means its constitution as defined in Part A of this Bill and in the case of any other company type means its memorandum and articles;

“Destination company type” means the company type as which a company wishes to be re-registered;

“Statement of compliance” means a statement by a director or secretary of the company that the requirements of this Part as to re-registration as the company type concerned have been complied with, including the passing of the special resolution for re-registration;

“Statement of guarantee” means a statement that each member undertakes that, if the company is wound up while he or she is a member or within one year after he or she ceases to be a member, he or she will contribute to the assets of the company such amount as may be required for (a) payment of the debts and liabilities of the company contracted before he or she ceases to be a member, (b) payment of the costs, charges and expenses of winding-up and (c) adjustment of the rights of contributories among themselves, not exceeding a specified amount.

Chapter 2

General Provisions as to Re-registration

Head 2 Re-registration of company as a different type of company

- (1) Subject to Chapter 3 of this Part, a company may become or be re-registered as another company type only if—
- (a) a special resolution, complying with Subhead (2) that it should be so re-registered is passed; and
 - (b) an application for the purpose, in the prescribed form and signed by a director or secretary of the company, is delivered to the Registrar together with the documents mentioned in Subhead (3).
- (2) The special resolution must—
- (a) alter the company's constitution so that it states that the company is to be a company of the type as to which the company wishes to re-register;
 - (b) make such other alterations in the company's constitution as are necessary to bring it, in substance and in form, into conformity with the requirements of this Bill with respect to the constitution of that resulting company type; and
 - (c) make such other alterations in the company's constitution as are requisite in the circumstances.
- (3) The documents referred to in Subhead (1) are—
- (a) a copy of the special resolution that the company should re-register as another company type;
 - (b) a copy of the constitution of the company as altered by the resolution;
 - (c) a statement of compliance that the requirements of this Part as to re-registration as another company type have been complied with by the company.
- (4) The Registrar may accept the statement of compliance as sufficient evidence that the special resolution has been duly passed and the said conditions have been satisfied and that the company is entitled to be re-registered as the company type concerned.
- (5) If, on an application for re-registration of a company as another company type under Subhead (1), the Registrar is satisfied that a company is entitled to be so re-registered, he shall—
- (a) retain the application and other documents delivered to him under this Part; and
 - (b) issue the company with a certificate of incorporation altered to meet the circumstances of the case, which certificate states that it is issued on re-registration and the date on which it is issued.
- (6) Upon the issue to a company of a certificate of incorporation on re-registration under Subhead (5)—
- (a) the company shall, by virtue of the issue of that certificate, become a company of the type described in the certificate; and
 - (b) any alterations in the constitution set out in the special resolution shall take effect accordingly.
- (7) A certificate of incorporation on re-registration issued to a company under Subhead (6) shall—
- (a) be conclusive evidence that the requirements of this Part as to re-registration and of matters precedent and incidental thereto have been complied with; and
 - (b) that the company is the company type which is set out in the certificate

and the law applicable to the destination company type shall thereafter apply to the company.
- (8) The re-registration of a company as another company type pursuant to this Part shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings which might have been continued or commenced against it in its former status may be continued or commenced against it in its new status.

Explanatory Note

Restatement of Section 9 of the Companies (Amendment) Act, 1983

The general re-registration provisions are taken in substance from Section 9 of the Companies (Amendment) Act, 1983 and applied to companies generally.

It is necessary to confine the re-registration provision to ensure that companies may only re-register as a company type, the formation of which is provided for under statute. This ought to ensure the continuity of the prohibition in Section 7 of the Companies (Amendment) Act, 1983 on the re-registration of a company as a public company limited by guarantee and having a share capital. Section 7 of the CAA, 1983 also provides that no company shall be formed as a public company limited by guarantee and having a share capital. The definition of CLG in Part B4, Head 1 provides that a CLG “means a company which does not have a share capital”.

It has been decided to have various prescribed forms to cater for the different source and destination company types.

Reference to “printed” copy of company constitution has been removed from Subsection (3)(b) to enable an electronic version of constitution to be supplied to CRO on re-registration to facilitate e-filing.

The replacement of a statutory declaration by a statement of compliance in Subhead (3)(c) will also facilitate e-filing. The UK are adopting a statement of compliance in their new Bill.

Requirements particular to PLCs are now placed in Chpt.3 of this Part.

Head 3 Form of statements required by company that is to have a share capital on its re-registration

- (1) A statement of initial shareholdings and a statement of share capital shall be delivered to the Registrar by a company which does not have a share capital but which is to have a share capital on its re-registration.

- (2) The statement of initial shareholdings required to be delivered in the case of a company that is to have a share capital on re-registration, must state with respect to each member of the company-
- (a) the number and nominal value of the shares to be allotted to him or her on re-registration; and
 - (b) the amount (if any) payable in respect of each share on re-registration, whether on account of the nominal value or by way of a premium.
- (3) The statement of share capital required to be delivered in the case of a company that is to have a share capital on re-registration must state with respect to the company’s share capital to be allotted on re-registration –
- (a) the total number of shares of the company;
 - (b) the aggregate nominal value of those shares;
 - (c) for each class of shares –
 - (i) the total number of shares of that class, and
 - (ii) the aggregate nominal value of shares of that class, and
 - (iii) the amount paid up and the amount (if any) unpaid on each share (whether on account of the nominal value of the share or by way of premium).

Explanatory Note

This provision is to cater for where a company which does not have a share capital wishes to re-register as a company having a share capital. This is information which would be supplied on the incorporation of a company having a share capital, so there should be a requirement that any company re-registering, that does not have a share capital but is to have a share capital after re-registration, supply this information to CRO in the context of the re-registration process. It replicates Section 111 of the UK Company Law Reform Bill. As it applies to all re-registrations as a company having a share capital from a company not having a share capital, it is located in Chapter 2.

Head 4 Application to Court to cancel special resolution of PLC to re-register as a private company or DAC

- (1) Where a special resolution by a PLC to be re-registered as a private company or a DAC has been passed, an application to the court for the cancellation of the resolution may be made -
- (a) by the holders of not less in the aggregate than 5 percent in nominal value of the company's issued share capital or any class of the company's issued share capital (disregarding any shares held by the company as treasury shares);
 - (b) if the company is not limited by shares, by not less than 5 percent of its members; or
 - (c) by not less than 50 of the company's members,

but any such application shall not be made by any person who has consented to or voted in favour of the resolution, and in any case where all the members of a PLC have consented to or voted in favour of the resolution, this head shall have no application to the company.

- (2) An application pursuant to Subhead (1) must be made within 28 days after the passing of the resolution and may be made on behalf of the persons entitled to make it by such one or more of their numbers as they may appoint in writing for the purpose.
- (3) If an application is made under Subhead (1), the company -
- (a) shall forthwith give notice of that fact to the Registrar; and
 - (b) within 15 days of the making of the court's order on the application, or such longer period as the court may at any time direct, the company must deliver to the Registrar an office copy of the order.

- (4) On the hearing of an application under Subhead (1), the court shall make an order either cancelling or confirming the resolution and-
- (a) may make that order on such terms and conditions as it thinks fit, and may if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the court for the purchase of the interests of dissentient members; and
 - (b) may give such directions and make such order as it thinks expedient for facilitating or carrying into effect any such arrangement.
- (5) The court's order may, if the court thinks fit-
- (a) provide for the purchase, by the company, of the shares of any of its members and for the reduction accordingly of the company's capital; and
 - (b) make such alteration in the company's constitution as may be required in consequence of that provision.
- (6) Where an order under this head requires the company not to make any, or any specified, alterations in its constitution, then, notwithstanding anything in this Bill, the company shall not have power without the leave of the court to make any such alteration in breach of that requirement.
- (7) Any alteration in the constitution of the company made by virtue of an order under this head, other than one made by resolution of the company, shall be of the same effect as if duly made by resolution of the company, and the provisions of this Bill shall apply to the constitution as so altered accordingly.
- (8) A company which fails to comply with Subhead (3) and any officer of the company who is in default shall be guilty of a category three offence.

Explanatory Note

This is a restatement of Section 15 of the C(A)A 1983 which applies to a PLC applying to re-register as a private company. The Steering Group was of the view that the cancellation provision should apply to a PLC applying to re-register as private company or as DAC and that it ought to be confined to such re-registrations.

Head 5 Re-registration upon reduction of share capital of a PLC

- (1) A court making an order confirming a reduction of the capital of a PLC which has the effect of bringing the nominal value of the company's allotted share capital below the authorised minimum, may authorise the PLC to be re-registered as another form of company without its having passed a special resolution and, where the court so authorises a PLC, the court shall specify in the order the alterations in the PLC's constitution to be made in connection with that re-registration.
- (2) In its application to a PLC that applies to be re-registered as another company type in pursuance of an authority given under Subhead (1), Part B6, Head 2 shall have effect with the following modifications—
 - (a) references to the special resolution of the PLC shall have effect as references to the order of the court under Subhead (1) hereof;
 - (b) Part B6, Head 2 (1) (a) and (2), and in the event of an application to re-register the PLC as a private company, Part B6, Head 6 (1) (b) shall not apply, and in the event of an application to re-register the PLC as a DAC, Head 10 (1) (b) shall not apply; and
 - (c) Part B6, Head 2 (5) shall be read as if the words— “ If on an application for re-registration of a company as another type of company under Subhead (1), the Registrar is satisfied that a company is entitled to be so re-registered, he shall”- were deleted and the following words substituted therefor “On receipt of an application for re-registration under this head made in pursuance of an order of the court under Part B6, Head 5 (1), the Registrar shall”.

Explanatory Note

This is a restatement of Section 17(4) and (5) of the C(A)A, 1983 which applies to PLCs re-registering as another company type on foot of a court order confirming a reduction of capital below the authorised minimum and authorising the company on that basis to be re-registered as another company type without the need to pass a special resolution. It applies to re-registrations generally and so is appropriately located in this Chapter.

Chapter 3

Special Requirements for Re-registration

Head 6 Particular Requirements for conversion to a private company

- (1) A company may be re-registered as a private company if, in addition to compliance with Part B6, Head 2 (1), (2) and (3), it also complies with the following -
- (a) If the company is a company to which Part B6, Head 4 applies, a special resolution that it should be so-registered complying with Part B6, Head 2 (2) is passed and the resolution has not been cancelled by the court under Part B6, Head 4;
 - (b) if the company is a company to which Part B6, Head 4 applies, the period during which an application for the cancellation of the resolution under Part B6, Head 4 has expired without any such application having been made or where such an application has been made, the application has been withdrawn or an order has been made under Part B6, Head 4 confirming the resolution and a copy of that order has been delivered to the Registrar;
 - (c) if the company is an unlimited company, the special resolution required by Part B6, Head 2 (1) must state that the liability of the members is to be limited by shares and what the share capital of the company is to be; and
 - (d) if the company does not already have a share capital,
 - (i) a statement of initial shareholdings, and
 - (ii) a statement of share capitalin the form laid down by Part B6, Head 3, are delivered to the Registrar.

- (2) The resolution must make such alterations in the company's constitution as are requisite in the circumstances and in particular in such a manner that they include the provisions which under Part A2 Head 2 (4) [equivalent of Section 33(1) of the Companies Act, 1963] are required to be included in the constitution of a company in order that it be constituted a private company.

Explanatory Note

This includes a restatement of Section 14 of the C(A)A 1983 as to re-registration of a PLC as a private company. It also sets out the requirements where the company re-registering as a private company is not currently a limited company and/or where it does not currently have a share capital.

If the company is a PLC where all members have consented to or voted in favour of the resolution to re-register as a private company or DAC, Head 4 (cancellation provision) has no application which means that the resolution to re-register can take effect immediately and there is no need to wait for the 28 day period under Head 4 to expire before the conversion can be implemented by the CRO.

Subhead(2) cross-refers to the provision in Part A1 which defines a private company.

Head 7 Particular requirements for conversion to PLC

- (1) A company may be re-registered as a PLC if, in addition to compliance with Part B6, Head 2 (1), (2) and (3) and the requirements of Part B6, Head 8 as to share capital, it also delivers the following documents to the Registrar -
- (a) a copy of a balance sheet prepared as at a date not more than seven months before the date on which the application is received by the Registrar;
 - (b) an [unqualified] report by the company's auditor on that balance sheet;
 - (c) a copy of a written statement by the auditors of the company that, in their opinion, at the balance sheet date the amount of the company's net assets was not less than the aggregate of its called-up share capital and undistributable reserves;
 - (d) a copy of any report prepared under Subhead (5)(b);

- (e) a statement of compliance which also confirms that, between the balance sheet date and the application of the company for re-registration, there has been no change in the financial position of the company that has resulted in the amount of the company's net assets becoming less than the aggregate of its called-up share capital and undistributable reserves;
- (f) If the company applying for re-registration as a plc is an unlimited company, the special resolution required by Part B6, Head 2 (1) includes a statement that the liability of the members is to be limited by shares and what the share capital of the company is to be; and
- (g) If the company does not already have a share capital,
- (i) a statement of initial shareholdings and
- (ii) a statement of share capital
- in the form laid down by Part B6, Head 3.
- (2) The Registrar shall not issue a certificate of incorporation under Part B6, Head 2 (6) if it appears to him that the court has made an order confirming a reduction of the PLC's capital, which has the effect of bringing the nominal value of the PLC's allotted share capital below the authorised minimum.
- (3) A qualification shall be treated for the purposes of the definition of an unqualified report in Subhead (5) as being not material in relation to any balance sheet if, but only if, the person making the report states in writing that the thing giving rise to the qualification is not material for the purposes of determining, by reference to that balance sheet, whether at the balance sheet date the amount of the company's net assets was not less than the aggregate of its called-up share capital and undistributable reserves. *[In the context of qualifications to auditors reports and in relation to Part B6, Head 7(1)(b), the impact of S.I. 116 of 2005 must be looked at].*
- (4) For the purposes of the making, in relation to the balance sheet of a company, of a report falling within the definition in Part B6, Head 7 (6) of an unqualified report, Part A6, Head 13 [equivalent of Section 149 and the 6th Schedule to the Companies Act, 1963] shall be deemed to have effect in relation to that balance sheet, with such modifications as are necessary by reason of the fact that that balance sheet is prepared otherwise than in respect of a financial year.
- (5) In this head—
- “undistributable reserves”** has the same meaning as in Part B2, Head 57 (2);
- “unqualified report”** means, in relation to the balance sheet of a company, a report stating without material qualification—
- (a) that, in the opinion of the person making the report, the balance sheet complies with the requirements of Part A6, Heads 13 and 36, [equivalent of Sections 149 and 156 of the Companies Act, 1963]; and
- (b) without prejudice to paragraph (a) that, except where the company is entitled to avail itself, and has availed itself, of the benefit of any of the provisions of Part A6, Schedule 1, [equivalent of Part III of the Sixth Schedule to the Companies Act, 1963], in the opinion of that person, the balance sheet gives a true and fair view of the state of the company's affairs as at the balance sheet date.

Explanatory Note

General re-registration provision taken in substance from Section of the 9 Companies (Amendment) Act, 1983 and applied to companies generally. This head is comprised of those requirements in Section 9 of the 1983 Act which are particular to PLCs.

Some elements of section 11 CAA 1983 have also been included. Section 11(2) provides that the special resolution required by section 9(1) must—

(a) state that the liability of the members is to be limited by shares and what the share capital of the company is to be; (this is included in Part B6, Head 7(1)(f) above); and

(b) make such alterations in the company's memorandum as are necessary to bring it in substance and in form into conformity with the requirements of the Companies Acts with respect to the memorandum of a Public limited company. (This has been included in the general re-registration provision at Part B6, Head 2(2).

Head 8 Requirements as to share capital of a company applying to re-register as a PLC.

- (1) Subject to Subhead (2), a company shall not be re-registered under this Part as a PLC unless, at the time the special resolution that the company should be re-registered as a PLC is passed—
- (a) the nominal value of the company's allotted share capital is not less than the authorised minimum;
 - (b) each of its allotted shares is paid up at least as to one-quarter of the nominal value of that share and the whole of any premium on it;
 - (c) where any share in the company or any premium payable on it has been fully or partly paid up by an undertaking given by any person that he or another should do work or perform services for the company or another, the undertaking has been performed or otherwise discharged; and
 - (d) where shares have been allotted as fully or partly paid up to their par value or any premium payable on them otherwise than in cash and the consideration for the allotment consists of or includes an undertaking (other than one to which paragraph (c) applies) to the company either—
 - (i) that undertaking has been performed or otherwise discharged; or
 - (ii) there is a contract between the company and any person pursuant to which that undertaking must be performed within five years from that time.
- (2) Subject to Subhead (3), any share allotted by the company—
- (a) which was allotted prior to 13 October 1986; or
 - (b) which was allotted in pursuance of an employees' share scheme and by reason of which the company would, but for this subhead, be precluded under Subhead (1) (b), but not otherwise, from being re-registered as a public limited company,

may be disregarded for the purpose of determining whether Subhead (1)(b) to (d) is complied with in relation to the company, and a share so disregarded shall be treated for the purposes of Subhead (1) (a) as if it were not part of the allotted share capital of the company.

- (3) A share shall not be disregarded by virtue of Subhead (2)(a) if the aggregate in par value of that share and the other shares which it is proposed so to disregard is more than one-tenth of the par value of the company's allotted share capital (not including any share disregarded by virtue of Subhead (2)(b)).

Explanatory Note

Restatement of Section 10 of the Companies (Amendment) Act, 1983. The "general transitional period" ran from 13 October 1983 to 12 October 1986 inclusive, so the reference to "before the end of the general transitional period" has been replaced with "prior to 13 October 1986".

Section 53(6) and (7) of the C(A)A, 1983 are currently applied to re-registration of unlimited companies as PLC's by Section 11(4) of the C(A)A, 1983. Section 56(7) is dealt with in the context of the general provisions as to re-registration in Chapter 2, at Part B6, Head 2(9).

Note that as a re-registered PLC meets the requirements under Section 6 of the 1983 Act in relation to a trading certificate, there is no need to require a re-registered PLC to apply to the Registrar for same before it can do business or exercise any borrowing powers and that account should be taken of this in Part B2, Head 7.

Head 9 Shares allotted by company applying to re-register as PLC between balance sheet date and passing of special resolution to re-register

- (1) Where shares are allotted by a company applying to re-register as a PLC between the balance sheet date and the passing of the special resolution as fully or partly paid up as to their par value or any premium on them otherwise than in cash, the company shall not make an application for re-registration as a PLC under this Part unless before the making of the application—

- (a) the consideration for that allotment has been valued in accordance with the provisions of Part B2, Head 21 [equivalent of Section 30 of the Companies (Amendment) Act, 1983] applied by this subhead and Part B2, Head 22 [equivalent of Section 31 of the Companies (Amendment) Act, 1983]; and
- (b) a report with respect to its value has been made to the company in accordance with those provisions during the six months immediately preceding the allotment of the shares,

and Subheads (2) to (8) and (12) to (14) of Part B2, Head 21 [equivalent of Section 30 of the Companies (Amendment) Act, 1983] shall apply for the purposes of this subhead as they apply for the purposes of that head and as if the references to Part B2, Head 21 (1) were references to this subhead.

- (2) Subject to Subhead (3), Heads 17, 19 to 22, 25, 26 and 30 of Part B2 [equivalent of Sections 26, 28 to 31 and 34 to 36 of the Companies (Amendment) Act, 1983] shall apply to a joint stock company (within the meaning of Head 22 of Part B8 [equivalent of Section 329 of the Companies Act, 1963]) which has passed and not revoked a resolution that the company be a PLC as those heads apply to a PLC.

- (3) Head 17 and Heads 19 to 22 of Part B2 [equivalent of Section 26 and Sections 28 to 31 of the Companies (Amendment) Act, 1983] of shall not apply to the allotment of shares by a company, other than a PLC registered as such on its original incorporation, where the contract for their allotment was entered into-

- (a) except in a case falling within paragraph (b), before the end of the general transitional period;
- (b) in the case of a company re-registered or registered as a PLC in pursuance of a resolution of any description mentioned in Subhead(1) that is passed before the end of that period, before the date on which that resolution is passed.

Explanatory Note

This head is a re-enactment of Section 9 (5) of the Companies (Amendment) Act, 1983. It has been removed from the general provisions as to re-registration since it applies only to companies applying to register as a PLC.

Subheads (2) and (3) are amended re-enactments of Section 37(1)-(2) of the Companies (Amendment) Act, 1983.

Head 10 Power of unlimited company to provide for reserve share capital on re-registration

An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Bill, do either or both of the following things -

- (a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the increased capital shall be capable of being called up, except in the event and for the purposes of the company being wound up;
- (b) provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up.

Explanatory Note

This head re-enacts Section 71 of the Companies Act, 1963.

Head 11 Particular requirements for conversion of a limited to an unlimited company

- (1) A company may be re-registered as unlimited if all the members of the company have assented to its being so re-registered and if, in addition to compliance with Part B6, Head 2 (1), (2) and (3), the following documents are delivered to the Registrar -
 - (a) the prescribed form of assent to the company's being registered as unlimited, subscribed to by or on behalf of all members of the company;

- (b) the statement of compliance includes confirmation by the directors of the company that the persons by whom or on whose behalf the form of assent is subscribed constitute the whole membership of the company and, if any of the members have not subscribed that form themselves, that the directors have taken all reasonable steps to satisfy themselves that each person who subscribed it on behalf of a member was lawfully empowered to do;
- (c) an annual return pursuant to Part A6, Head 52 [equivalent of Section 125 of the Companies Act, 1963] made up to a date no earlier than 14 days prior to the date of the application to re-register and annexed accounts pursuant to Part A6, Heads 55 and 56 [equivalent of Section 7 of the Companies (Amendment) Act, 1986] the financial year end of which accounts predate the effective date of the annual return by no more than nine months;

For the purposes of this subhead:

- (i) subscription to a form of assent by the legal personal representative of a deceased member of a company shall be deemed to be subscription by him;
- (ii) a trustee in bankruptcy of a person who is a member of a company shall, to the exclusion of that person, be deemed to be a member of the company.
- (2) Where the prescribed form of assent to the company being re-registered as an unlimited company has been supplied, subscribed to by or on behalf of all members of the company, the company is not obliged to lodge a special resolution to re-register as an unlimited company pursuant to Part B6, Head 2 (1).
- (3) Where a company is re-registered as an unlimited company, a person who, at the time when the application for it to be re-registered was delivered to the Registrar, was a past member of the company and did not thereafter again become a member thereof shall not, in the event of the company's being wound up, be liable to contribute to the assets of the company more than he would have been liable to contribute thereto had it not been so-registered.

Explanatory Note

Modelled on Section 52 of the Companies (Amendment) Act, 1983, re-registration of limited company as unlimited. The statutory declaration of the directors as to the completion of the assent by all members has been replaced by inclusion of this confirmation in the statement of compliance in order to facilitate e-filing.

New requirement that a limited company becoming unlimited is required to file an up to date annual return with annexed accounts with the application to re-register. This is designed to prevent companies, on an annual basis, re-registering as unlimited shortly prior to their ARD/annual return filing deadline, and thereafter re-registering as a limited company, purely in order to avoid the accounts filing obligation which attaches to limited companies, but which does not apply to unlimited companies. At present this is not open to a company which re-registers as unlimited under Section 52 of the 1983 Act as such company is debarred under Section 53 from re-registering as limited. If there is no restriction, the option being given to companies to re-register without restriction is open to abuse. Companies would be free to opt to re-register annually as unlimited in advance of the date on which they are due to file their annual return, such that they were unlimited on that date and so have no obligation to attach accounts to their annual return, with no bar to the companies concerned lodging an application to re-register as limited as soon as the annual return has been delivered to CRO. Such companies are in substance limited companies, and it would be undesirable to allow them to become unlimited for a short period to coincide with their annual return filing obligation and then to revert to being limited after the return has been filed. This can be avoided if an annual return with accounts is required to be delivered in the context of the application for re-registration from limited to unlimited. There is no unfairness as the accounts are historic and relate to a period during which the company will have been a limited liability company.

The restatement of Subsections (3) to (8) of Section 35 of the CA, 1963, inserted by C(A)A 1983 Sch 1 para 6, has been removed from the draft heads. A company re-registering as an unlimited company of course would have to comply with any obligations under the Prospectus Directive.

The CLRG has taken the view that where an assent from all the members to the re-registration is supplied, there is no need to file a special resolution as 100 percent of the members are consenting to the conversion.

Head 12 Particular Requirements for conversion to CLG

- (1) A company may be re-registered as a CLG if, in addition to compliance with Part B6, Head 2 (1), (2) and (3), a statement of guarantee is delivered to the Registrar; and where the company is a company with a share capital -
- (a) the prescribed form of assent to the company being re-registered as a CLG is delivered to the Registrar subscribed to, by or on behalf of all members of the company;
 - (b) the statement of compliance includes confirmation by the directors of the company that the persons by whom or on whose behalf the form of assent is subscribed, constitute the whole membership of the company and, if any of the members have not subscribed that form themselves, that the directors have taken all reasonable steps to satisfy themselves that each person who subscribed it on behalf of a member was lawfully empowered to do;
 - (c) the court has sanctioned the re-registration and given directions as to what is to be done with the company's share capital, except where the issued shares are not paid-up and the liability of the members to contribute to the company's debts on a winding-up per the statement of guarantee remains the same as if the shares were still in issue, in which case it shall not be necessary to apply to the court to sanction the re-registration.

For the purposes of this subhead:

- (i) subscription to a form of assent by the legal personal representative of a deceased member of a company shall be deemed to be subscription by him,
- (ii) a trustee in bankruptcy of a person who is a member of a company shall, to the exclusion of that person, be deemed to be a member of the company.

- (2) Where the prescribed form of assent to the company being re-registered as an unlimited company has been supplied subscribed to by or on behalf of all members of the company, the company is not obliged to lodge a special resolution to re-register as a CLG pursuant to Part B6, Head 2 (1).

Explanatory Note

At present, the Companies Acts do not provide for conversion to a Guarantee company, so this is a new provision.

*NOTE: A CLG cannot have a share capital so provision must be made for a procedure whereby a company with a share capital can divest itself of its share capital in the event that it wishes to convert to CLG. What is proposed is that all shareholders in a company limited by shares must consent to the conversion to CLG, and that the Court must also sanction the re-registration and the consequent reduction in issued share capital and give directions as to what is to happen with the issued share capital of which the company is divesting itself, save and except where the issued shares are not paid up **and** the liability of the members of the CLG to contribute to the company's liabilities on a winding-up is to remain the same as if the shares were still in issue. For instance, if a company has two €1 shares, neither of which is paid up, and it wishes to convert to a CLG, and the liability of the members under the statement of guarantee is to be €1 each, there is no need for court approval of this conversion, as there is no capital to be repaid and each member's statement of guarantee will replace the uncalled-for share capital amounts.*

Head 13 Particular requirements for conversion to a DAC

- (1) A company may be re-registered as a DAC if, in addition to compliance with Part B6, Head 2 (1), (2) and (3), it also complies with the following-
- (a) If the company is a company to which Part B6, Head 4 applies, a special resolution that it should be so registered, complying with Part B6, Head 2 (2), is passed and the resolution has not been cancelled by the court under Part B6, Head 4;

- (b) if the company is a company to which Part B6, Head 4 applies, the period during which an application for the cancellation of the resolution under Part B6, Head 4 has expired without any such application having been made or, where such an application has been made, the application has been withdrawn or an order has been made under Part B6, Head 4 confirming the resolution and a copy of that order has been delivered to the Registrar;
 - (c) if the company is an unlimited company, the special resolution required by Part B6, Head 2 (1) must state that the liability of the members is to be limited by shares and what the share capital of the company is to be; and
 - (d) if the company does not already have a share capital —
 - (i) a statement of initial shareholdings, and
 - (ii) a statement of share capital,in the form laid down by Part B6, Head 3 are delivered to the Registrar;
 - (e) where the destination company type is a DAC, being a private company limited by guarantee having a share capital, a statement of guarantee is delivered to the Registrar.
- (2) The resolution must make such alterations in the company's constitution as are requisite in the circumstances and in such a manner that they include the provisions which under Part A2 Head 2 (4) [equivalent of Section 33(1) of the Companies Act, 1963] are required to be included in the constitution of a company in order to constitute it a private company.

Explanatory Note

This provision has many similarities to Part B6, Head 6 on conversion to a private company.

It includes a restatement of section 14 of the C(A)A 1983 as to re-registration of a PLC as a private company. It also sets out the requirements where the company re-registering as a DAC is not currently a limited company and/or where it does not currently have a share capital. Where the company is becoming a guarantee company, it must in addition supply a statement of guarantee.

Subhead (2) cross-refers to the provision in Part A1 which defines a private company, which provision is to be redrawn.

Chapter 4

Continuance

Head 14 Continuance by a body corporate as a PLC

Subject to Part B6, Head 15, a body which is incorporated outside the State may apply, under Part B6, Head 16, to the Registrar for the issue to it of a certificate that it continues as a company incorporated under this Part, if it is immediately before such continuance registered in an EU Member State or authorised to make such an application by the laws of the jurisdiction under which it is incorporated outside the State.

Explanatory Note

Head 11 to 21 give effect to the 14th Directive and therefore regard must be had to the end product to ensure consistency with the Directive. They are modeled on Jersey's continuance provisions.

Head 15 Restrictions on continuance

- (1) An application may not be made under Part B6, Head 16 by a body corporate if—
 - (a) it is in liquidation or in examinership or is subject to proceedings under a scheme of arrangement Part A9, Head 2 [equivalent to Section 201 of the Companies Act, 1963];
 - (b) it is unable to pay its debts as they fall due within the meaning of Part A11, Head 11 [equivalent of Section 214 of the Companies Act, 1963];
 - (c) a receiver, manager or administrator (by whatever name any such person is called) has been appointed, whether by a court or in some other manner, in respect of any property of that body corporate or company;
 - (d) it has entered into a compromise or arrangement with a creditor (not being a compromise or arrangement approved by the Registrar) and that compromise or arrangement is in force; or

- (e) an application is pending before a court for the liquidation or examinership of that body corporate or company, or to have it declared insolvent, or for the appointment of such a receiver, manager or administrator or for the approval of such a compromise or arrangement.

- (2) For the purposes of Subhead (1), the jurisdiction in which—

- (a) the body corporate is in liquidation or in examinership;
- (b) the receiver, manager or administrator has been appointed or the compromise or arrangement has been entered into; or
- (c) the application before a court is pending, is immaterial.

Head 16 Application to Registrar for continuance within State

- (1) An application to the Registrar under this head, by a body incorporated outside the State, for continuance as a PLC incorporated under this Part, shall be in the prescribed form and accompanied by—
 - (a) a copy (certified, in a manner approved by the Registrar, to be a true copy) of the memorandum and articles, or of the law or other instrument constituting or defining the constitution of the body corporate;
 - (b) a constitution which complies with Part B2, Head 4;
 - (c) a statement of status and solvency in the prescribed form;
 - (d) the name under which it is proposed to continue the body corporate as a PLC incorporated under this Part;
 - (e) in relation to every person who is a director of the body corporate at the date of the application under this head or is to be a director of it upon its continuance as a company incorporated under this Part, the particulars specified in Part A4, Head 19 (6) [equivalent of Section 195(6) of the Companies Act, 1963];

- (f) in relation to each person who is a secretary of the body corporate at the date of the application under this Chapter or is to be its secretary upon its continuance as a company incorporated under this Part, the particulars specified in Part A4, Head 19 (6) [equivalent of Section 195(6) of the 1963 Act] and his qualifications;
 - (g) such other information as the Registrar would require on an application to register the body corporate as a PLC under this Part;
 - (h) such other documents and information as are prescribed or as the Registrar may require in respect of a particular application under this head; and
 - (i) such application fee as may be prescribed.
- (2) The application under this head shall also be accompanied by evidence, satisfactory to the Registrar, of the following matters—
- (a) that the body corporate is authorised, by the laws of the jurisdiction under which it is incorporated, to make the application to the Registrar;
 - (b) where the constitution of the body corporate or the law of that jurisdiction requires that any authorisation be given for the application to the Registrar, that it has been given;
 - (c) that if a certificate of continuance is issued under this law pursuant to the application under this head, the body will thereupon cease to be incorporated under the other jurisdiction;
 - (d) that if a certificate of continuance is so issued, the interests of the members and the creditors of the body corporate will not be unfairly prejudiced; and
 - (e) that the body corporate is not prevented by Part B6, Head 15 from making the application under this head.

Explanatory Note

Subsections (2)(a) may not be relevant in light of 14th Directive

Subheads (3) & (4) are now generally provided for in Head 4(3) & (4) of Part A2.

Head 17 Constitution on continuance

The constitution of the body corporate shall be such as is necessary to conform to the laws of the State, and shall, subject to such compliance, contain all provisions of the constitutive documents of such body corporate, as amended.

Explanatory Note

Part A2, Head 7(4) is amended to provide for this.

Head 18 Determination of application to Registrar for continuance within State

- (1) If the Registrar, on an application under Part B6, Head 15 for continuance as a PLC incorporated under this Part—
- (a) is satisfied that the application complies with that head and with Part B6, Head 14;
 - (b) is satisfied that all other approvals and consents required by the law of the State for the issue of a certificate of continuance to the applicant have been given,

and, in addition to the applicant having paid the application fee (if any), the Registrar may grant the application.

- (2) If the application is granted, the applicant shall thereupon inform the Registrar and deliver to him the documents which accompanied the application.
- (3) On determining the application, the Registrar shall issue a certificate of incorporation.
- (4) If so required by the applicant, the Registrar shall furnish it, within fourteen days, with a statement in writing of the reasons for its decision.
- (5) An applicant may, within one month after being informed of a decision by the Registrar to refuse its application, appeal to the court on the ground that the decision of the Registrar was unreasonable having regard to all the circumstances of the case.

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- (6) In hearing the appeal, the court -
 - (a) may confirm or reverse the decision of the Registrar; and
 - (b) may make such order as to the costs of the appeal as it thinks fit.
- (b) the PLC is subject to all criminal and civil liabilities, and all contracts, debts and other obligations, to which the body corporate was subject immediately before the certificate of continuance is issued; and
- (c) all actions and other legal proceedings which, immediately before the issue of the certificate of continuance, were pending by or against the body corporate may be continued by or against the PLC.

Head 19 Issue of certificate of continuance within State

- (1) When the Registrar has granted an application for a certificate of continuance as a PLC incorporated under this Part, he shall register the application and those documents.
- (2) On registration, the Registrar shall immediately issue to the applicant a certificate of continuance.
- (3) When the Registrar issues a certificate of continuance, he shall also forthwith send a copy of it (electronically or by some other means of instantaneous transmission) to the appropriate official or public body in the jurisdiction to which Part B6, Head 16 (2) (a) refers.
- (3) A certificate of continuance is conclusive evidence of the following matters—
 - (a) that the PLC is incorporated under this Part;
 - (b) that the requirements of this Part have been complied with in respect of the continuance of the PLC under this Part.

Head 20 Effect of issue of certificate of continuance within State

- (1) Upon the issue of the certificate of continuance by the Registrar—
 - (a) the body corporate becomes a PLC incorporated under this Part, to which this Part applies accordingly; and
 - (b) the memorandum and articles, or the instrument constituting or defining the constitution of the body corporate, as amended in accordance with its articles of continuance, become the constitution of the continued PLC.
- (2) When a body corporate is continued as a PLC incorporated under this Part—
 - (a) all property and rights to which the body corporate was entitled immediately before the certificate of continuance is issued are the property and rights of the PLC;

Chapter 5

Migration of a Company

Head 21 Approval by company and members of proposal for continuance overseas

A proposal by a company to apply in another jurisdiction for continuance there must be approved by the validation procedure in Part A4, Head 71.

Head 22 Notice to creditors of application to Registrar for authorisation to seek continuance overseas

- (1) At least 30 days before making an application under Part B6, Head 23 to the Registrar for authorisation to seek continuance in another jurisdiction, a company shall give notice to its creditors in accordance with Subhead (2).
- (2) The notice—
 - (a) shall state that the company intends to make the application to the Registrar, and shall specify the jurisdiction in which it proposes to seek continuance;
 - (b) shall be sent in writing to each creditor of the company;
 - (c) shall be published once in a newspaper circulating in the State or in such other manner as the court may on application direct; and
 - (d) shall state that any creditor of the company who objects to the application may within 30 days of the date of the advertisement give notice of his objection to the company.
- (3) A creditor who gives notice in accordance with paragraph (d) of Subhead (2) and whose claim against the company has not been discharged may, within 30 days after the date of the notice, apply to the court for an order restraining the application by the company under Part B6, Head 23, to the Registrar.

- (4) On the creditor's application, the court, if satisfied that the interests of the creditor would be unfairly prejudiced by the proposed continuance, may make an order (subject to such terms, if any, as it may think fit) restraining the application by the company under Part B6, Head 23, to the Registrar.

Head 23 Application to Registrar for authorisation to seek continuance overseas

- (1) An application to the Registrar under this head for authorisation to seek continuance in another jurisdiction shall be accompanied by copies of the declaration and report, required by Part A4, Head 71 in accordance with Part B6, Head 21.
- (2) The application under this head shall also be accompanied by evidence of the following matters—
 - (a) that the laws of the jurisdiction in which the company proposes to continue, allow its continuance there as a body corporate;
 - (b) that those laws provide that upon the continuance of the company as a body corporate in that jurisdiction—
 - (i) all property and rights of the company will become the property and rights of the body corporate,
 - (ii) the body corporate will become subject to all criminal and civil liabilities, and all contracts, debts and other obligations, to which the company is subject, and
 - (iii) all actions and other legal proceedings which are pending by or against the company may be continued by or against the body corporate;

- (c) that notice has been given to the creditors of the company in accordance with Part B6, Head 22 of the application to the Registrar under this head, and either—
- (i) no creditor has applied to the court for an order restraining the application made to the Registrar under this Head, or
 - (ii) the application of every creditor who has so applied to the court has been determined by the court in a way which does not prevent the Registrar from granting the application made to it under this head;
- (d) that the company has complied with such other conditions as may be prescribed; and
- (e) that the company is not prevented by Part B6, Head 15 from making the application.
- (5) An applicant may, within one month after being informed of a decision by the Registrar to refuse its application, or to grant it subject to a condition (not being a condition specified in Subhead (2)), appeal to the court on the ground that the decision of the Registrar was unreasonable having regard to all the circumstances of the case.
- (6) On hearing the appeal, the court—
- (a) may confirm, reverse or vary the decision of the Registrar; and
 - (b) may make such order as to the costs of the appeal as it thinks fit.

Head 24 Determination of application to Registrar for authorisation to seek continuance overseas

- (1) On an application under Part B6, Head 23, the Registrar may grant the application on the condition specified in paragraph (2) and on such other conditions as it may specify.
- (2) It shall be a condition of the grant of any application made under Part B6, Head 23 that the applicant will ensure—
- (a) that the Registrar is informed of the date on which continuance will be or is granted in the other jurisdiction; and
 - (b) that a copy of the instrument of continuance in the other jurisdiction, certified to be a true copy, is delivered to the Registrar,
- in sufficient time to enable the Registrar to comply with Part B6, Head 25.
- (3) On determining the application, the Registrar shall inform the applicant of its decision.
- (4) If so required by the applicant, the Registrar shall furnish it within 14 days, with a statement in writing of the reasons for its decision.

Head 25 Effect of continuance overseas

When a company is, in accordance with the terms of authorisation of the Registrar under Part B6, Head 24, continued as a body corporate under the laws of the other jurisdiction to which the authorisation relates—

- (a) it thereupon ceases to be a company incorporated under this Bill; and
- (b) the Registrar shall, on that date, record that by virtue of paragraph (a) of this head, it has ceased to be so incorporated.

Head 26 Orders relating to continuance

- (1) The Minister may by order, prescribe for the purposes of this Part—
- (a) any document or information which is to be provided on applications relating to continuance within or outside the State;
 - (b) the manner in which applicants are to verify documents or information so provided;
 - (c) application fees;
 - (d) conditions to be complied with in respect of applications under Part B6, Head 24 to the Registrar for authorisation to seek continuance under the laws of other jurisdictions; and

- (e) the manner in which records are to be kept by the Registrar, of bodies which have ceased under Part B6, Head 24 to be companies incorporated under this Bill.
- (2) Without prejudice to the generality of Subhead (1), conditions to which sub-paragraph (e) of that paragraph refers—
- (a) may relate to matters to be complied with on or before the making of such applications to the Registrar, or after the grant of such applications; and
 - (b) may require applicants to appoint and maintain authorised representatives in the State for such periods, whether before or after their applications to the Registrar are determined, as may be prescribed.

Chapter 6

Cross-Border Mergers

To be inserted