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CHAPTER 6

Simplification: Shareholder Protection

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## 6.1 Introduction

- 6.1.1 The existing law regarding the protection of shareholders of a company is found both in the Companies Acts and in the common law. The 1963 Act sets out the basic law to do with shareholders in a logical sequence: first with matters associated with the incorporation of a company and the extent to which contracts are created between a company and its members and between member and member, with matters of share capital and variation of shareholders' rights. It then goes on to deal with management and administration of the company including details of records of members, meetings and proceedings involving members. The Act makes provision for a company to report to members through statements and accounts and sets out the extent to which members appoint and retain in office or remove the management of a company in the person of directors and other officers.
- 6.1.2 In this chapter the Review Group addresses the possibility of simplifying company law as it deals with the protection of shareholders, conscious of the need to balance the competing interests of shareholders, creditors and others and of the need to legislate for the orderly administration (whilst solvent and insolvent) of a company. Company law cannot always be simple, but its transparency and consistency can be improved.
- 6.1.3 The principle of shareholder protection set out at 3.4 of the Review Group's report formed the basis of our consideration of issues in this chapter.

## 6.2 Approach of the Review Group

- 6.2.1 The Review Group approached its task by examining sections of the Companies Acts from the perspective of shareholder protection. The Group decided on the merits of each case whether a provision should be amended or not. The Group considered the following issues (see chart). In many cases the Group came to the view that, while the law might benefit from some fresh wording, the actual law itself was sound and operated satisfactorily to reflect a fair balance between the interests of shareholders and directors. Therefore the Chapter refers only to those areas where either a recommendation to amend the law is made or where a recommendation to keep the law as it is at present is made, following submissions or arguments to amend.

- Objects – s 10 of the 1963 Act
- Liability – s 27 of the 1963 Act
- Video conferencing general meetings – s 134 of the 1963 Act
- Furnishings of abbreviated accounts to members in lieu of full accounts
- AGM to be held abroad
- Acquisition of own shares and shares in holding company – Part XI of the 1990 Act, s 206 to s 233
- Authority for market purchase: maximum/minimum price – s 215 of the 1990 Act
- Duration of authority granted by PLCs to purchase own shares – s 216 of the 1990 Act
- Notice to shareholders with regard to company buying back its own shares – s 213 of the 1990 Act
- Right of members to object – s 15 of the 1963 Act
- Percentage thresholds for acceptance of offer – s 204 of the 1963 Act
- Power of limited company to make liability of directors unlimited – s 198 of the 1963 Act
- Substantial property transactions involving directors and others – s 29 of the 1990 Act
- Meaning of "authorised minimum" (share capital) – s 19 of the 1983 Act
- Remedy in cases of oppression – s 205 of the 1963 Act
- Share transfers: obligation of director or secretary to notify interest in shares or debentures of company – s 53 of the 1990 Act
- Minimum number of PLC members – s 5 of the 1963 Act
- Minority Shareholdings

### 6.3 Shareholder consent in validation procedures

- 6.3.1 In order to protect the interests of minorities, a minimum level of consent for approval by shareholders is required when a company undertakes certain activities that may impact on the interests of shareholders. Examples of these are special resolutions required under s 60 of the 1963 Act and s 34 of the 1990 Act after the directors have made a statutory declaration of solvency. At 5.2 the Review Group proposes a rationalisation of these procedures by applying a standard validation procedure to the two examples referred to as well as to members' voluntary winding-up procedures.
- 6.3.2 Prior to the 2001 Act, s 60 validation procedures were undertaken in general meeting but following the enactment of s 89(b) of that Act they can now be effected by written resolution, so providing the opportunity for a minority to object by withholding their written consent.
- 6.3.3 The Review Group recommends that a common validation procedure is also desirable from the perspective of shareholder protection.

### 6.4 Alteration of memorandum of association

#### ***Objects – s 10 of the 1963 Act***

- 6.4.1 The 1963 Act gives the holders of 15% or more of the voting shares or voting rights (or of the holders of debentures) the right to apply to court in the event of a proposed alteration in objects to which they object. The removal of *ultra vires*, as proposed in Chapter 10 of this report, affects this as the effect of the abolition of *ultra vires* in private companies is to remove the requirement for the objects clause of the memorandum. It will, however, be possible for companies which wish to retain the *ultra vires* rule to do so by so providing in their memorandum or articles and renaming the company to add "dac"<sup>1</sup> to the name.

#### ***Liability – s 27 of the 1963 Act***

- 6.4.2 This section provides that no member of a company shall be bound by an alteration made in the memorandum or the articles of association after the date on which he became a member, if the alteration requires him to subscribe for more shares than the number held by him at the date on which the alteration is made or in any way increases his liability to the company. The Review Group decided against recommending any change to existing provisions, noting a 1999 Australian case,<sup>2</sup> which, following a comprehensive review of the law on this point, upheld the rights of a company member in this situation.

### 6.5 Communications from the company to the member

- 6.5.1 The legal status of electronic communications is set out in s 12 of the ECA 2000. In summary, an electronic communication is lawful and of equivalent effect to a written communication, provided a recipient agrees to the receipt of the communication by electronic means. Section 21(2) of the ECA 2000 provides:

Where the addressee of an electronic communication has designated an information system for the purpose of receiving electronic communications, then, unless otherwise agreed between the originator and the addressee or the law otherwise provides, the electronic communication is taken to have been received when it enters that information system.

1 designated activity company; see further 10.9.11

2 *Ding v. Sylvania Waterways* [1999] New South Wales Supreme Court 58 (15 February 1999)

The 1963 Act provides at s 25(1):

Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants by each member to observe all the provisions of the memorandum and of the articles.

- 6.5.2 It is clear therefore, where the technical requirements set out in the ECA 2000 are met, electronic communications by a company to its members are permitted and valid provided either: (a) each shareholder to whom an electronic communication is sent has individually agreed to the receipt of the communication; or (b) provision for the communication is made in the articles, in which event under s 25(1) of the 1963 Act it will "bind the members".
- 6.5.3 Because of the global provision in the ECA 2000 and the effect of s 25 of the 1963 Act it might be argued that there is no need to make a specific statutory provision to enable a company to communicate with its members electronically. However, the Review Group considers that the establishment of legal certainty regarding communications is an important first principle. There is, moreover, a general public policy interest in facilitating the transition to electronic communication by existing companies, to obviate the necessity for existing companies to alter their articles of association. Accordingly, the Group came to the conclusion that the Companies Acts should be amended to provide for electronic communication between a company and its members as if it were specified in the articles of association.
- 6.5.4 The Review Group then considered whether general company law provisions on the protection of shareholders are sufficient to protect their interests or whether specific provision should be made with regard to electronic communications. The combined effect of the ECA 2000 and s 25 of the 1963 Act is that it allows a company to impose electronic communications on members who may not have the capacity to receive them. The ECA 2000 is broad enough to cover any form of electronic communication. For example, a company could place information on a website or send individual e-mails. The obvious point arises, particularly for PLCs, that some shareholders may not even have a communications device. The Group recognized that it was important to protect the right of persons who were not electronically literate or who did not have facilities to access electronic communications readily. The Review Group recommends that any member should be able to opt out of receiving communications electronically, without resorting to the protection of s 205 of the 1963 Act. The Group also recommends that the Minister should have the power to make regulations to take account of technological developments and of possible abuses emerging.

***Videoconferencing general meetings – s 134 of the 1963 Act***

- 6.5.5 Generally, the Review Group is of the view that the Companies Acts should recognise and facilitate the use of current widely available technology, subject to protections for shareholders. It is thought that this should lead to efficiencies of both time and expenditure, particularly in the case of PLCs and of private companies with overseas members. The use of videoconferencing would be less for domestic CLSs. The Group believes that companies should be permitted to make use of videoconferencing in holding annual general meetings and extraordinary general meetings, subject to a reasonableness test on the opportunity of persons to participate. Sections 249S and 1322(3A) of the Corporations Act 2001 in Australia provide the model for this recommendation. Section 249S provides:

"A company may hold a meeting of its members at 2 or more venues using any technology that gives the members as a whole a reasonable opportunity to participate."<sup>3</sup>

6.5.6 Section 1322(3A) provides:

"If a member does not have a reasonable opportunity to participate in a meeting of members, or part of a meeting of members, held at 2 or more venues, the meeting will only be invalid on that ground if the Court is of the opinion that:

- (a) a substantial injustice has been caused or may be caused; and the injustice cannot be remedied by any order of the Court; and
- (b) the Court declares the meeting (or that part of it) invalid."

The Review Group recommends that s 134 of the 1963 Act should be amended to provide that a company should be able to hold a meeting at two or more venues using any technology which gives the members as a whole a reasonable opportunity to participate.

***AGM to be held abroad***

6.5.7 The Review Group considered whether it should be possible generally to permit a company to hold general meetings abroad but concluded that there should be no change proposed to the provisions as set out in s 140 and Table A of the 1963 Act, i.e. that meetings should be held in the State unless the articles of association provide otherwise or a decision to hold the annual general meeting outside the State has been taken at the previous annual general meeting or by all the members.

***Furnishing of abbreviated accounts to members in lieu of full accounts***

6.5.8 A number of submissions were received proposing that companies ought to be permitted to furnish abbreviated accounts rather than the full accounts to which shareholders are entitled under the existing law. The points made in support of this argument were:

- (i) the expense to the company;
- (ii) the limited interest on the part of certain shareholders in full accounting information;
- (iii) the ability to clarify important points of substance when abbreviating the information.

6.5.9 The Review Group noted that the law in the UK was amended in 1995<sup>4</sup> to facilitate delivery of abbreviated accounts, subject to the members' right at all times to request delivery of full accounts. The Review Group recommends that consideration should be given to the appropriate form and content of such abbreviated accounts as part of its action proposed at 1.11.1(viii).

6.5.10 The Review Group recommends that companies be entitled to deliver abbreviated financial information, subject to the right of any individual member at any time to request delivery to him of full accounts on an occasional or permanent basis.

**6.6 Communications from the member to the company**

6.6.1 Although formal communications might be relatively infrequent in private companies they are more common in the case of PLCs. A shareholder may communicate with a company for a number of reasons, a summary of which, by no means exhaustive, includes:

- Notification of a change of address.
- Notification of a change of name.
- Notification of particulars of a dividend mandate or changes thereof.
- Notification of an election for a scrip dividend.
- Lodgement of a form of proxy for a general meeting.

- Request for duplicate share certificates.
- Lodgement of stock transfer forms in respect of a purchase or disposal of shares.
- Notification of the death of a shareholder, lodgement of a death certificate and grant of probate in respect of a deceased shareholder.
- Notification of an election in respect of a rights issue.

6.6.2 Clearly, there are many occasions on which a shareholder may communicate with the secretary of a company. In cases where the register of members is of any significant size, the volume of paper being processed at any one time may be considerable. It would appear therefore that electronic communication offers considerable scope for savings both in terms of costs to the company and in speed and convenience for shareholders.

6.6.3 Of all the forms of communication outlined, the greatest scope for electronic communication arises with regard to the lodgement of the form of proxy for general meetings. The articles of association of a company and the Companies Acts provide the legal support for many of the practices of company officers in dealing with these matters. The Review Group is here concerned with the lodgement of electronic proxy forms rather than electronic voting as such. Such communications are generally governed by the ECA 2000 as specified earlier in this chapter.<sup>5</sup> A number of important issues arise with regard to the privacy, authority and integrity of such communications but in the view of the Review Group these are more appropriate to conformity with best practice rather than being enshrined in primary legislation.

6.6.4 It is interesting to see how the issue has been addressed in the UK where the Companies Act (Electronic Communications) Order 2000<sup>6</sup> amends Regulation 115 of Table A (when notices are deemed to be given) by the inclusion of the following:

"Proof that a notice contained in an electronic communication was sent in accordance with guidance issued by the Institute of Chartered Secretaries and Administrators (ICSA) shall be conclusive evidence that notice was given."

6.6.5 The guidance referred to is contained in the ICSA's publication *Electronic Communications with Shareholders – a Guide to Recommended Best Practice*. The Review Group urges the Minister to encourage production of a similar guide in Ireland.

## 6.7 Acquisition of own shares

### ***Acquisition of own shares and shares in holding company - Part XI of the 1990 Act, s 206 to s 233***

6.7.1 The Review Group is not proposing major changes to this Part. It was noted that any proposals for change would have to take into account obligations under the Second Company Law Directive.<sup>7</sup>

### ***Authority for market purchase: maximum/minimum price – s 215 of the 1990 Act***

6.7.2 This section outlines the conditions on the basis of which a company can make a market purchase of its own shares. The authority for such a purchase, conferred at a general meeting, should determine both the maximum and minimum prices which may be paid for the shares. This is determined by the Second Company Law Directive<sup>8</sup> also and no change is proposed.

### ***Duration of authority granted by PLCs to purchase own shares – s 216 of the 1990 Act***

6.7.3 This section provides that such authority expires not later than 18 months after the resolution granting authority is passed. This is determined by the Second Directive and no change is proposed.

5 See 6.5

6 The Companies Act (Electronic Communications) Order 2000 came into force on 22 December 2000 (SI 2000 No 3373).

7 77/91/EEC of 13 December 1976.

8 77/91/EEC of 13 December 1976

***Notice to shareholders with regard to company buying back its own shares – s 213 of the 1990 Act***

- 6.7.4 The Review Group considered whether it would make sense for smaller and private companies to shorten the 21-day period of notice for exhibiting the proposed contract of purchase or if it should be possible to allow shareholders generally to waive the need to exhibit the contract 21 days before its consideration by the members. The Group came to the conclusion that, in accordance with the rationale identified in Chapter 3 and 6.3.1 above whereby shareholders should themselves be able to abridge the period for inspection, it should be possible to shorten this period for all companies by agreement through unanimous written consent. Accordingly, the Review Group recommends that s 213 should be amended to allow all the members of any company to shorten or waive by unanimous written agreement the 21-day period of notice for exhibiting the proposed contract of purchase.
- 6.7.5 There is one anomaly in the procedures for purchase of own shares in the case of single member companies. Section 213(3) of the 1990 Act provides that a special resolution authorising the purchase of own shares is not effective "if any member holding shares to which the resolution relates exercises the voting rights carried by any of these shares in voting on the resolution and the resolution would not have been passed if he had not done so". Accordingly, single member companies cannot pass such resolutions. The Review Group recommends that s 213(3) should not apply where the company has one member only.

**6.8 Alteration of articles of association*****Right of members to object – s 15 of the 1963 Act***

- 6.8.1 Section 15 of the 1963 Act allows a company to alter its articles of association where the members so resolve by special resolution. Throughout company law the binding of the minority by 75% is an established principle. On consideration, the Review Group decided against proposing to change the threshold from 75% on the basis that this correctly balances the interests of all parties.
- 6.8.2 In certain circumstances the law allows a minority shareholder to object or seek redress in the courts, e.g. the right of shareholders holding 15% of the voting shares or voting rights under s 10 of the 1963 Act to object to amendments to objects clause.<sup>9</sup> However, the Group notes that any abuse may be proceeded against under s 205 of the 1963 Act which provides redress for minority shareholders in the event that the affairs of a company are being conducted in a manner oppressive to them and does not propose that a statutory percentage should be inserted.

**6.9 Minority rights in takeovers – s 204 of the 1963 Act*****Percentage thresholds for acceptance of offer***

- 6.9.1 Section 204 facilitates the compulsory acquisition of shares held by dissenting shareholders in a takeover. The section contains a number of provisions requiring and regulating percentage holdings:
- (i) shareholders holding 80% in nominal value of issued shares must accept an offer, in order to compel the acquisition of the remaining shares;
  - (ii) where an offeror is a subsidiary and the bidder holds shares, these shares are excluded from the shares of which 80% must accept;
  - (iii) where a holding company of an offeror holds shares, these shares are included in the shares of which 80% must accept;
  - (iv) where an offeror holds 20% or more of the shares, then 80% in value and 75% in number of the shareholders other than the offeror (or subsidiary of the offeror) must accept the offer.

- 6.9.2 The Review Group noted that it can be difficult to reach the level of 80% assent from which to acquire the beneficial ownership of the remaining shares. If this were to be increased to 90%, as in the UK, it would be likely to make takeovers very difficult to achieve and have an adverse effect on competition. The 80% threshold to be exceeded is of the "free" shares, i.e. the shares other than those held by the bidding company and any subsidiary of the bidding company. However, shares held by a holding company or sister company of a bidder, or of a company controlled by shareholders of the bidder can be included. This makes it possible for existing shareholders to coalesce in a new entity in order to make a bid for their company.<sup>10</sup> It appears to the Review Group that this is anomalous and it is appropriate that shares of persons with a material interest in a bidder ought to be excluded from consideration.
- 6.9.3 Where a bidder and its subsidiaries have 20% or more of the shares being bid for, then the bidder must obtain acceptances from 75% in number of the shareholders as well as 80% in nominal value of the shares of accepting shareholders for compulsory purchase procedures to be triggered.
- 6.9.4 The Review Group considered the above percentages and requirements and recommends, subject to EU developments:
- (i) that the 80% value threshold for triggering compulsory acquisition entitlements should remain;
  - (ii) the continued exclusion of an offeror's subsidiaries' shares from the 80% of shares accepting the offer which triggers the compulsory acquisition right;
  - (iii) the exclusion of shares held by (a) a holding company of an offeror and (b) existing shareholders who alone or in concert hold 33<sup>1</sup>/<sub>3</sub>% or more of the voting shares of an offeror. This 33<sup>1</sup>/<sub>3</sub>% interest tallies with the provisions of s 54(5) and s 72(2) of the 1990 Act in relation to attribution of interests which should accept the offer. Although this amendment to the imputation of ownership of shares by a bidder is less extensive than in the UK, the Review Group considers this aspect of its recommendation as being fair and comprehensible and has the advantage of using pre-existing principles of drafting from existing legislation and therefore is in harmony with the simplification objective of the Group;
  - (iv) the 75% of shareholders number threshold (which applies where an offeror is interested in 20% or more of the shares of the target company) should be reduced to 50%;
  - (v) an offeror, which at present must be a company in order to obtain rights under s 204, should be capable of being an individual or partnership.

#### **Unclaimed consideration**

- 6.9.5 The Review Group is aware that unclaimed consideration in respect of shares compulsorily acquired as a result of the exercise of the provisions of s 204 can remain on trust for dissenting shareholders. The Review Group recommends that the unclaimed consideration, whether moneys or shares,<sup>11</sup> should be held on trust for at longest 7 years, and then given to the Exchequer. Moneys remaining unclaimed should be paid into the Exchequer on the same basis as that applying to the Companies Liquidation Account<sup>12</sup> and shares should be sold (where possible) and the funds paid into the Exchequer on this basis also. The Minister for Finance should indemnify the company against any future claims. The company should provide a schedule of moneys and the names of beneficial owners (where known) to the Minister for Finance.<sup>13</sup>

10 This was the case in *Re Fitzwilliam Public Limited Company, Duggan V. Stoneworth Investment Limited* [2002] 1 IR 566

11 Section 204(6) of the 1963 act provides: Any sums received by the transferor company under this section shall be paid into a separate bank account and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

12 See s 307 of the 1963 Act which provides: (1) Where a company has been wound up voluntarily and is about to be dissolved, the liquidator shall lodge to an account to be known as The Companies Liquidation Account in the Bank of Ireland in such manner as may be prescribed by rules of court the whole unclaimed dividends admissible to proof and unapplied or undistributable balances. (2) The Companies Liquidation Account shall be under the control of the court. (3) Any application by a person claiming to be entitled to any payment or dividend or payment out of a lodgment made in pursuance of subsection (1), and any payment out of such lodgment in satisfaction of such claim, shall be made in a manner prescribed by rules of court. (4) At the expiration of 7 years from the date of any lodgment made in pursuance of subsection (1), the amount of the lodgment remaining unclaimed shall be paid into the Exchequer, but where the court is satisfied that any person claiming is entitled to any dividend or payment out of the moneys paid into the Exchequer, it may order payment of the same and the Minister for Finance shall issue such sum as may be necessary to provide for that payment.

13 It is proposed that unclaimed dividends should be considered in the context of shares and share capital, in the Group's second work programme.

**Terminology in Act**

- 6.9.6 The Review Group noted the complexity of descriptions applying to takeovers. The Companies Acts use the terms transferor and transferee, the Irish Takeover Panel Act 1997 – and the proposed EU 13th Company Law Directive – use the terms offeror and offeree, and the Stamp Duty Act uses the terms acquirer and target. The terms acquirer and target are the clearest of such terms and in principle should ideally replace transferor and transferee in the Companies Acts. In view of the use by the proposed European Directive, the Irish Takeover Panel Act 1997 and the Rules under that Act (as well as the London City Code on which it is based), it appears the most practical recommendation to make is that the expressions "offeror" and "offeree" be used.
- 6.9.7 In the absence of a European clearing system, the Review Group noted that where consideration is paid in the form of cheques drawn on a bank outside the State's clearing bank system, bank charges in clearing these cheques can reduce the amount per cheque receivable below that which would be received if a cheque from an Irish clearing bank were used. The advent of the euro will not change this possibility, in view of the separate banking systems. The draft EU Prospectus Directive gives Member States the right to require locally-based paying agents in public share issues to deal with this issue. The Review Group recommends that cash consideration for acquisition of securities of an Irish-incorporated PLC to members with a registered address in the State should be drawn on a bank in the State, unless such member agrees otherwise.

**6.10 Schemes of arrangement with shareholders and creditors**

- 6.10.1 The Review Group examined the procedures for effecting a scheme of arrangement under s 201 of the 1963 Act. Section 201 enables companies to reorganise their shareholders' holdings and/or rights and/or their creditors' rights. Whilst schemes of arrangement under this section have become rare, if non-existent, in the case of creditors' arrangements,<sup>14</sup> schemes of arrangement involving reductions of capital and takeovers of companies continue to be utilised.
- 6.10.2 The procedures for bringing forward a scheme of arrangement are contained in Order 75 of the Rules of the Superior Courts 1986, as amended, and to that extent, many procedures can be amended by statutory instrument rather than by statute. However, s 201 expressly provides for two distinct involvements on the part of the court, which has the result of adding to the court time involved as well as to the timescale of any scheme timetable. Added to that are certain entrenched procedures which further complicate and prolong the procedures.
- 6.10.3 A typical<sup>15</sup> procedure followed in a scheme of arrangement is as follows:

Stage	Legal basis
Obtain court approval to convene the meeting of shareholders to approve scheme	s 201(1)
Hold the meeting of shareholders and/or of creditors and pass resolution(s) approving scheme	s 201(3)
Issue petition to approve scheme	s 201(3), Rules of the Superior Courts, Order 75
Apply to court for directions as to how to advertise the approval of the scheme and the petition for court approval of the scheme	Rules of the Superior Courts, Order 75 rule 6

<sup>14</sup> Because of the examinership procedures under the 1990 Amendment Act, as amended.

<sup>15</sup> There are variations in complex schemes, depending on their component parts: for example, where there is to be a reduction of share capital as part of the scheme with a return of capital to members, then procedures under s 73(3) of the 1963 Act would also need to be followed.

Obtain court approval of scheme	s 201(3)
Register Order approving scheme with Registrar	s 201(5)

6.10.4 There are two principal shortcomings in the above procedure:

- (i) the initiation of two separate legal proceedings – one under s 201(1), by Originating Notice of Motion, to convene the Scheme meeting(s) of shareholders (and creditors) and the other under s 201(3) to approve the Scheme; and
- (ii) the bringing of the matter before the court three times
  - (a) to convene the meeting
  - (b) to advertise the petition and
  - (c) to approve the Scheme.

6.10.5 The Review Group recommends 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. As matters now stand, it is established law that the court will not give pre-approval of the classification of shareholders and creditors at this hearing – the court reserves its discretion at (what is now) the third court hearing to disapprove a Scheme where such classification is defective. Therefore, there appears little virtue in retaining the court's involvement. Such an amendment would remove one of the two sets of proceedings as well as one of the court hearings. It would preserve the right of a member or creditor of a company to apply to court to convene such a meeting.

6.10.6 The Review Group recommends also that (what is now) the second court hearing – to approve the notification of /advertisement to the participants in the scheme of the passing of the scheme resolution and presentation of petition – should be removed in most cases, by providing that any requirement to notify/advertise should be satisfied by advertising in two daily national newspapers, as at present, along the lines of s 266(2)<sup>16</sup> of the 1963 Act. 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 resolution(s). The courts appear to recognise this, and such an amendment would remove what appears to be an otiose procedure.

## 6.11 Directors' duties

### ***Power of limited company to make liability of directors unlimited – s 198 of the 1963 Act***

6.11.1 The rationale for inclusion of this section in the 1963 Act appears to be because it was in the 1908 Act, and due to historical accretion. In addition, it predates the introduction of specific liabilities of directors. As such it can be assumed to be redundant and should be deleted from the Act. The Review Group recommends repeal of s 198 of the 1963 Act on grounds of obsolescence.

### ***Substantial property transactions involving directors and others – s 29 of the 1990 Act***

6.11.2 The Review Group is of the opinion that, in principle, the thresholds above which approval in general meeting is required – £50,000 (€63,486.9) or 10% of the amount of the company's relevant assets<sup>17</sup> if these amount to less than £50,000 (€63,486.9) – were too low. Because of this the process of compliance with this section could be unnecessarily burdensome, particularly for small companies.

<sup>16</sup> The company shall cause notice...to be advertised once at least in 2 daily newspapers circulating in the district where the registered office or principal place of business of the company is situate.

<sup>17</sup> The amount of a company's relevant assets is defined as the value of its net assets determined by reference to the accounts prepared and laid in accordance with the requirements of s 148 of the Principal Act in respect of the last preceding financial year in respect of which such accounts were so laid. Where no accounts have been so prepared and laid the amount of the relevant assets is the amount of the company's called-up share capital.

- 6.11.3 For PLCs the Group considered this issue in the overall context of the Irish Stock Exchange listing rules. The ISE regulates in this area, applying a number of criteria in its listing rules. These vary according to the size and profits of the company. This is a more flexible test than that applied under s 29 and the Group considered whether instead of a threshold figure it might have a more proportionate test by comparing the size of the transaction with, e.g. a proportion of net asset value. The Group concluded that this was indeed a more reasonable test and accordingly recommends removing the threshold of £50,000 (€63,486.9) for PLCs, only applying a 10% of net asset value test. However, the Review Group concluded also that the existing test should remain for private companies limited by shares as the existence of a clear limit will help with the determination of whether or not the section applies to particular transactions. The Review Group notes that approval for the purposes of s 29 is frequently effected by written resolution under s 141(8) of the 1963 Act.
- 6.11.4 The Group reflected also on the appropriate duration of the "reasonable period" referred to at s 29(3). The Review Group recommends that that period should be subject to ratification taking place at the next annual general meeting and in any event not later than 15 months, unless all the members at any time unanimously consent in writing to the transactions involved. This recommendation applies to all companies. The Group further believes that s 29(7)(a) should be amended to identify a "wholly owned subsidiary" as per s 150(5) of the 1963 Act. Subsection (7) should further be amended by the addition of a third exemption (c) regarding the disposal of a company's assets by a receiver as the Review Group believes that s 316A of the 1963 Act gives adequate protection to the company and its shareholders.
- 6.11.5 The Review Group noted that a number of concerns about transactions involving directors are addressed in Part IX (ss 75 to 79) of the 2001 Act.

## 6.12 Further shareholder safeguards

### *Meaning of "authorised minimum" (share capital) – s 19 of the 1983 Act*

- 6.12.1 The Review Group is of the opinion that these provisions are satisfactory. Accordingly, no change is recommended.

### *Remedy in cases of oppression – s 205 of the 1963 Act*

- 6.12.2 This section provides for any member of a company, who complains that the affairs of the company are being conducted in a manner oppressive to him or in disregard of his interests, to make an application to court for an order. The court may make any order it deems fit for the circumstances. The Review Group noted that there is considerable jurisprudence on this section with the rights of members and the role of the High Court properly defined. Accordingly, no change is recommended.

### *Share transfers – obligation of director or secretary to notify interest in shares or debentures of company – s 53 of the 1990 Act*

- 6.12.3 This issue is dealt with in Chapter 11. See 11.10.8 for recommendations on this issue.

## 6.13 Other issues raised in discussion

### *Minimum number of plc members – s 5 of the 1963 Act*

- 6.13.1 The distinctive characteristic of public as opposed to private companies is the right to issue shares to the public and the unfettered right to transfer shares, rather than the minimum number of shareholders. The minimum of seven members originated in the early life of company law and has survived without analysis or review rather than as a consequence of analysis and review. The Review Group noted that in most EU countries the minimum number of members for a PLC is lower than the seven currently applying in Ireland. The UK sets a minimum of

two and in some jurisdictions only one member is required. The Review Group recommends the reduction of the current minimum from seven to two as the Group believes a PLC should have at least two members.

***Minority shareholdings***

- 6.13.2 The Review Group addressed the issue as to whether valuation criteria or rules could or should be provided for in the Companies Acts to regulate the price for or compensation for cancellation of minority shares in cases where minority shareholders were exiting a company further to proceedings under s 205 of the 1963 Act. Currently, the value of a minority shareholding can in practice be discounted substantially from what it would in principle be worth as a proportion of the total value of the business operation. For the Review Group, the issue was whether there was any merit in proposing a statutory mechanism to measure the quantum, e.g. a proportion of net tangible assets related to the proportion of the minority interest, in the event of the minority shareholder not being able to reach agreement with the other members of the company on the value of the stock being disposed of. In considering this, the Group is conscious that it does not wish to constrain the forces that regulate the free market or what is just in any particular circumstances.
- 6.13.3 The Review Group recognised that serious issues arise here: a good example is a private company which may control substantial assets although the immediate return to the members may be small. If a member then sells his minority shareholding the market value realised is less than that proportion of the business that it is in fact worth. The Group noted that there are two conflicting principles at issue: the protection of minority rights and whether or not this proposal would be in the best interests of the company. A core principle arising is that a change could mean the imposition of a legislative norm over privately agreed mechanisms. The Group considers that an attempt to define the standard for valuing minority shareholders might mean that this standard would become a norm rather than the intended default position, in effect worsening the position of many minority shareholders. For these reasons, the Group decided not to recommend a change in the law in this area.<sup>19</sup>

18 In addition, the fixing of an exit price might conflict with the equitable jurisdiction of the court under s 205 to make "such order as it thinks fit" with a view to bringing to an end the matters complained of.





# sixsummary

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6.14 Summary of Recommendations

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### 6.15 Summary of recommendations

- The Companies Acts should be amended to acknowledge the validity of electronic communication between a company and its members as if it were specified in the articles of association. **(6.5.3)**
- Any member should be able to opt out of receiving communications electronically, without resorting to the protection of s 205 of the 1963 Act. **(6.5.4)**
- The Minister should have the power to make regulations to take account of technological developments and possible abuses emerging. **(6.5.4)**
- Section 134 of the 1963 Act should be amended to provide that a company should be able to hold a meeting at two or more venues using any technology that gives the members as a whole a reasonable opportunity to participate. **(6.5.6)**
- Companies should be entitled to deliver abbreviated financial information, subject to the right of members to request delivery of full accounts. **(6.5.10)**
- Section 213 of the 1990 Act should be amended to allow all the members of any company to shorten or waive by unanimous written agreement the 21-day period of notice for exhibiting the proposed contract of purchase. **(6.7.4)**
- Section 213(3) of the 1990 Act should not apply where the company has one member only. **(6.7.5)**
- Subject to EU developments the following recommendations are made regarding the law related to the compulsory acquisition of shares as allowed by s 204 of the 1963 Act:
  - (i) that the 80% value threshold for triggering compulsory acquisition entitlements should remain;
  - (ii) the continued exclusion of an offeror's subsidiaries' shares from the 80% of shares accepting the offer which triggers the compulsory acquisition right;
  - (iii) the exclusion of shares held by
    - (a) a holding company of an offeror and
    - (b) existing shareholders who alone or in concert hold 33% or more of the voting shares of an offeror;
  - (iv) the 75% of shareholders number threshold (which applies where an offeror is interested in 20% or more of the shares of the target company) should be reduced to 50%;
  - (v) an offeror, which at present must be a company in order to obtain rights under s 204, should be capable of being an individual or partnership. **(6.9.4)**
- Unclaimed consideration in respect of shares compulsorily acquired as a result of the exercise of the provisions of s 204, whether moneys or shares, should be held on trust for at longest 7 years, and then given to the Exchequer. Moneys remaining unclaimed should be paid into the Exchequer on the same basis as that applying to the Companies Liquidation Account and shares should be sold and the funds paid into the Exchequer on this basis also. **(6.9.5)**
- The terms offeror and offeree should replace transferor and transferee in the Companies Acts. **(6.9.6)**

- Cash consideration for acquisition of securities of an Irish-incorporated PLC to members with a registered address in the State should be drawn on a bank in the State, unless such member agrees otherwise. **(6.9.7)**
- Court approval should no longer be required to convene scheme of arrangement meetings of shareholders or creditors, where the proposed meetings are convened by the board of directors. **(6.10.5)**
- What is now the second court hearing – to approve the notification of advertisement to the participants in the scheme of arrangement of the passing of the scheme resolution and presentation of petition – should be removed in most cases, by providing that any requirement to notify/advertise should be satisfied by advertising in two daily national newspapers, as at present, along the lines of s 266(2) of the 1963 Act. **(6.10.6)**
- Section 198 of the 1963 Act should be repealed. **(6.11.1)**
- Section 29 of the 1990 Act should be amended to remove the threshold of £50,000 (≈63,486.90) for PLCs, only applying a 10% of net asset value test. **(6.11.3)**
- The "reasonable period" at s 29(3) of the 1990 Act should be subject to ratification taking place at the next annual general meeting and in any event not later than 15 months; this to apply to all companies. **(6.11.4)**
- Section 29(7)(a) of the 1990 Act should be amended to define what is meant by a "wholly owned subsidiary" as per s 150(5) of the 1963 Act. **(6.11.4)**
- Section 29(7) of the 1990 Act should be amended by the addition of a third exemption (c) regarding the disposal of a company's assets by a receiver. **(6.11.4)**
- The current minimum number of members of a PLC should be reduced from 7 to 2. **(6.13.1)**