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# COMPANIES BILL 2012

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*Unofficial version*

As amended in ~~Committee-Report~~ Stage (Seanad)  
on ~~17<sup>th</sup> June~~30<sup>th</sup> September 2014

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**Arthur Cox**

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## PART 9

### REORGANISATIONS, ACQUISITIONS, MERGERS AND DIVISIONS

#### Chapter 1

##### Schemes of Arrangement

###### **Interpretation (Chapter 1).**

[449]. (1) In this Chapter —

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

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

“new company” shall be read in accordance with *section [455](1)(b)(ii)*;

“old company” shall be read in accordance with *section [455](1)(b)(ii)*;

“scheme circular” shall be read in accordance with *section [452](1)(a)*;

“scheme meeting” means a meeting of creditors (or any class of creditors) or of members (or any class of members) for the purpose of their considering, and voting on, a resolution proposing that the compromise or arrangement concerned be agreed to;

“scheme order” means an order of the court under *section [453](2)(c)* sanctioning a compromise or arrangement referred to in *section [450]*;

“special majority” means a majority in number representing<sup>340</sup> at least 75 per cent in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the scheme meeting.

(2) A reference in this Chapter to a compromise or arrangement that is proposed between a company and its creditors (or any class of them) or its members (or any class of them) includes a reference to circumstances in which a compromise or arrangement is proposed between a company and both —

(a) its creditors (or any class of them); and

(b) its members (or any class of them),

and, accordingly, the powers under this Chapter are exercisable, and the duties under this Chapter are to be carried out, in the latter circumstances as in the former.

###### **Scheme meetings – convening of such by directors and court’s power to summon such meetings.**

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<sup>340</sup> Inserted by point 94 of Seanad Committee Amendments.

[450]. (1) Where a compromise or arrangement is proposed between a company and –

- (a) its creditors or any class of them; or
- (b) its members or any class of them,

the directors of the company may convene –

- (i) the appropriate scheme meetings of the creditors or the class concerned of them; or
- (ii) the appropriate scheme meetings of the members or the class concerned of them.

(2) References in *subsections (1) and (5)* to the appropriate scheme meetings of creditors or members, as the case may be, are references to either –

- (a) separate scheme meetings of the particular creditors or members (as appropriate) who fall into the separate classes that, under the general law, are required to be constituted for the purpose of voting on the proposals for the compromise or arrangement; or
- (b) where, under the general law, no such separate classes are required to be constituted for that purpose, a single scheme meeting of the creditors or members (as appropriate).

(3) Where a compromise or arrangement referred to in *subsection (1)* is proposed and the directors of the company do not exercise the powers under that subsection, the court may, on the application[, at any time,]<sup>341</sup> of any of the following persons, order a scheme meeting or scheme meetings of the creditors or members (or, as the case may be, the class of either of them concerned) to be summoned in such manner as the court directs.

(4) The persons referred to in *subsection (3)* are –

- (a) the company;
- (b) any creditor or member of the company;
- (c) in the case of a company being wound up, the liquidator.

(5) Without prejudice to the court’s jurisdiction under section [453](2)(c) to determine whether the scheme meetings that have been held comply with the general law referred to in *subsection (2)*, the court, in exercising its jurisdiction to summon meetings under *subsection (3)*, may, in its discretion, where it considers just and convenient to do so, give directions as to what are the appropriate scheme meetings that must be held in the circumstances concerned.

(6) If the compromise or arrangement is proposed between the company and a class of its creditors or members, then –

- (a) the reference in *subsection (2)* to creditors or members, where it first occurs, is a reference to that class of creditors or members, as appropriate (the “predicate class”); and
- (b) the references in *paragraphs (a) and (b)* of that subsection to separate classes of creditors or members are references to separate classes of creditors or members, as appropriate, who fall within the predicate class.

**Court’s power to stay proceedings or restrain further proceedings.**

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<sup>341</sup> Inserted by point 154 of Report Amendments.



[451]. (1) This section applies where one or more scheme meetings is convened under *section [450](1)* or an application is made under *section [450](3)* in relation to a company.

(2) Where this section applies the court may, on the application of any of the following persons, on such terms as seem just, stay all proceedings or restrain further proceedings against the company for such period as to the court [sees]<sup>342</sup> fit.

(3) The persons referred to in *subsection (2)* are –

- (a) the company;
- (b) the directors of the company;
- (b) any creditor or member of the company;
- (c) in the case of a company being wound up, the liquidator.

**Information as to compromises or arrangements with members and creditors.**

[452]. (1) Where a scheme meeting is convened or summoned under *section [450]* there shall—

- (a) with every notice convening or summoning the meeting which is sent to a creditor or member of the company concerned, be sent also a circular (in this section referred to as a “scheme circular”) —
  - (i) explaining the effect of the compromise or arrangement;
  - (ii) stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons;
  - (iii) where the compromise or arrangement affects the rights of debenture holders of the company, giving the like explanation in relation to the debenture trustees as it is required under *subparagraph (ii)* to give in relation to the company’s directors;
- (b) in every notice convening or summoning the meeting which is given by advertisement, be included the scheme circular or a notification of the place at which and the manner in which creditors or members entitled to attend the meeting may obtain copies of the scheme circular.

(2) Where a notice given by advertisement includes a notification that copies of the scheme circular can be obtained by creditors or members entitled to attend the scheme meeting, every such creditor or member shall, on making application in the manner indicated by the notice, be furnished by the company free of charge with a copy of the scheme circular.

(3) Each director and debenture trustee shall provide the company in writing with the information concerning such director or debenture trustee, as the case may be, that is required for the scheme circular.

(4) Subject to *subsection (6)*, if a company fails to comply with any requirement of this section, the company and any officer of it who is in default shall be guilty of a category 3 offence.

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<sup>342</sup> Substituted by point 95 of Seanad Committee Amendments.

(5) For the purpose of *subsection (4)*, any liquidator of the company and any debenture trustee of the company shall be deemed to be an officer of the company.

(6) In any proceedings against a person in respect of an offence under *subsection (4)*, it shall be a defence to prove that the default was due to the refusal of any other person, being a director or debenture trustee, to supply the necessary particulars as to his or her interests.

(7) References in this section to directors include references to shadow directors and to *de facto* directors.

**Circumstances in which compromise or arrangement becomes binding on creditors or members concerned.**

[453]. (1) If the following conditions are satisfied, a compromise or arrangement shall be binding, with effect from the date of delivery referred to in *section [454](1)*, on all the creditors or class of creditors referred to in *section [450](1)(a)* or all the members or class of members referred to in *section [450](1)(b)* (or both as the case may be) and also on –

(a) the company; or

(b) in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(2) The conditions referred to in *subsection (1)* are –

(a) a special majority at the scheme meeting, or, where more than one scheme meeting is held, at each of the scheme meetings, votes in favour of a resolution agreeing to the compromise or arrangement;

(b) notice –

(i) of the passing of such resolution or resolutions at the scheme meeting or scheme meetings; and

(ii) that an application will be made under *paragraph (c)* to the court in relation to the compromise or arrangement, is advertised once in at least 2 daily newspapers circulating in the district where the registered office or principal place of business of the company is situated; and

(c) the court, on application to it, sanctions the compromise or arrangement.

(3) *Section [192]* shall apply to any such resolution as is mentioned in *subsection (2)(a)* which is passed at any adjourned scheme meeting.

(4) Where a State authority is a creditor of the company, such authority shall be entitled to accept proposals under this section notwithstanding –

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

(b) any other enactment.

(5) In *subsection (4)* “State authority” means the State, a Minister of the Government, a local authority or the Revenue Commissioners.

**Supplemental provisions in relation to *section [453]*.**

[454]. (1) Where a scheme order is made, the company shall cause a copy of it to be delivered to the Registrar within 21 days after the date of making of the order; the scheme order shall take effect immediately upon such delivery of that copy.

(2) The company shall attach to every copy of the constitution of the company issued by it after the scheme order has been made a copy of that order.

(3) If default is made in complying with *subsection (1)* or *(2)*, the company concerned and any officer of it who is in default shall be guilty of a category 3 offence.

**Provisions to facilitate reconstruction and amalgamation of companies.**

[455]. (1) Where—

- (a) an application is made to the court for the sanctioning of a compromise or arrangement under *section [453](2)(c)*; and
- (b) it is shown to the court that—
  - (i) the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any 2 or more companies; and
  - (ii) under the scheme the whole or any part of the undertaking[, assets or liabilities]<sup>343</sup> of any company concerned in the scheme (in this section referred to as an “old company”) is to be transferred to another company (in this section referred to as the “new company”),

the court may, either by the scheme order or by any subsequent order, make provision for all or any of the matters set out in *subsection (2)*.

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

- (a) the transfer to the new company of the whole or any part of the undertaking[, assets or liabilities]<sup>344</sup> of any old company;
- (b) the allotting or appropriation by the new company of any shares, debentures, policies or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;
- (c) the continuation by or against the new company of any legal proceedings pending by or against any old company;
- (d) the dissolution, with or without winding up, of any old company;
- (e) the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement;
- (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

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

(4) Where provision of the kind set out[ in]<sup>345</sup> *subsection (2)* is made by –

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<sup>343</sup> Substituted by point 155 of Report Amendments.

<sup>344</sup> Substituted by point 156 of Report Amendments.

(a) the scheme order - every company in relation to which the order is made (other than the company the compromise or arrangement in relation to which has been sanctioned by the court); or

(b) a subsequent order - every company (without exception) in relation to which the order is made,

shall cause a copy of it to be delivered to the Registrar within 21 days after the date of making of the order.

(5) If default is made by a company in complying with *subsection (4)*, the company and any officer of it who is in default shall be guilty of a category 3 offence.

(6) In this section, “assets” includes property, rights and powers of every description, and “liabilities” includes duties.

## Chapter 2

### Acquisitions

#### Interpretation (*Chapter 2*).

[456]. (1) In this Chapter—

“assenting shareholder” means a holder of any of the shares affected in respect of which a scheme, contract or offer has become binding or been approved or accepted and *section [459](8)* supplements this definition;

“call notice” shall be read in accordance with *section [457](4)(a)*;

“dissenting shareholder” means a holder of any of the shares affected in respect of which the scheme, contract or offer has not become binding or been approved or accepted or who has failed or refused to transfer his or her shares in accordance with the scheme, contract or offer and *section [459](8)* supplements this definition;

“information notice” shall be read in accordance with *section [457](6)*;

“offeree company” shall be read in accordance with *section [457](1)*;

“offeror” shall be read in accordance with *section [457](1)*;

“relevant scheme, contract or offer” has the meaning assigned to it by *section [457](1)*;

“shares affected” means the shares the acquisition of the beneficial ownership of which by an offeror is involved in the scheme, contract or offer referred to in *section [457](1)*.

(2) The application of this Chapter is restricted, as was the position in the case of the corresponding provisions of the Act of 1963, by the regulations made under section 3 of the European Communities Act 1972 that are referred to in *paragraph 11 of Schedule 6*.

[...] <sup>346</sup>

**Right to buy out shareholders dissenting from scheme or contract approved by majority and right of such shareholders to be bought out.**

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<sup>345</sup> Inserted by point 96 of Seanad Committee Amendments.

[457]. (1) In this section “relevant scheme, contract or offer” means a scheme, contract or offer involving the acquisition by a person (in this Chapter referred to as the “offeror”) of the beneficial ownership of all the shares (other than the shares in which the offeror already has a beneficial interest) in the capital of a company (in this section referred to as the “offeree company”).

(2) This section applies where the relevant scheme, contract or offer –

(a) has become binding or been approved or accepted in respect of not less than 80 per cent in value of the shares affected; and

(b) has become so binding or been so approved or accepted not later than the date 4 months after the date of publication generally to the holders of the shares affected of the terms of such scheme, contract or offer,

but subject to *section [458]* as regards the right of the offeror under *subsection (3)* (offeror’s right of buy –out).

(3) Where this section applies, the offeror shall be entitled to acquire the beneficial ownership of all or any of the remaining shares affected from the dissenting shareholder or shareholders on –

(a) the same terms as have become binding or been approved or accepted as mentioned in *subsection (2)*; or

(b) where an application is made under *section [459]([5])(a)*, any different terms that the court specifies,

but only if, in either case, the following conditions are satisfied.

(4) Those conditions for such acquisition of the shares of a dissenting shareholder are -

(a) the offeror, at any time before the expiration of the period of 6 months after the date of the publication referred to in *subsection (2)(b)*, gives notice in the prescribed form to the dissenting shareholder that the offeror desires to acquire the beneficial ownership of his or her shares (which notice is referred to in this section as the “call notice”); and

(b) either –

(i) 30 days pass after the date that the call notice was given without an application being made to the court under *section [459]([5])(a)* by the dissenting shareholder or, following such an application to the court by the dissenting shareholder, the court nonetheless approves such acquisition; or

(ii) an application is made to the court under *section [459]([5])(a)* by the dissenting shareholder within that period but is withdrawn.

(5) Where the scheme, contract or offer provides that an assenting shareholder may elect between 2 or more sets of terms for the acquisition by the offeror of the beneficial ownership of the shares affected—

(a) the call notice shall be accompanied by, or embody, a notice stating the alternative sets of terms between which assenting shareholders are entitled to elect and specifying which of those sets of terms shall be applicable to the dissenting shareholder if he or she does not, before the expiration of 14 days after the date of the giving of the notice, notify to the offeror in writing his or her election as between such alternative sets of terms; and

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<sup>346</sup> Deleted by point 157 of Report Amendments.

- (b) the terms upon which the offeror shall under this section be entitled and bound to acquire the beneficial ownership of the shares of the dissenting shareholder shall be the set of terms which the dissenting shareholder shall so notify or, in default of such notification, the set of terms so specified as applicable, but subject, in either case, to *subsection (3)(b)*.

(6) Save where the offeror has given a call notice to the particular dissenting shareholder, the offeror shall, within 30 days after the date of the scheme, contract or offer becoming binding, approved or accepted, give notice of that fact in the prescribed manner to each of the dissenting shareholders (which notice is in this section referred to as an “information notice”).

(7) The offeror shall be bound to acquire the beneficial ownership of the remaining shares affected on the same terms as have become binding or been approved or accepted (or, where an application is made under *section [459]([5])(b)*, on any different terms that the court specifies) if—

(a) the offeror has become entitled to acquire the shares under *subsection (3)*; or

(b) save where *paragraph (a)* applies, the dissenting shareholder, at any time within 3 months after the date of the giving of the information notice to him or her, requires the offeror to acquire his or her shares.

(8) Where the consideration for the acquisition pursuant to *subsection (3)* or *(7)* of the share or shares of a person who is resident in the State is paid, wholly or partly, in cash by way of cheque that cheque shall, unless that person agrees otherwise, be one drawn upon an account operated with a clearing bank or such other credit institution as may be prescribed, being an account operated with that bank or other institution at a branch of it established in the State.

**Additional requirement to be satisfied, in certain cases, for right to buy out to apply.**

**[458].** (1) Unless the additional requirement in *subsection (3)* is satisfied, an offeror is not entitled, in the case set out in *subsection (2)*, to serve a call notice or to acquire the shares of a dissenting shareholder under *section [457](3)*; but this section does not affect the right of a dissenting shareholder under *section [457](7)* (right to be bought out).

(2) The case referred to in *subsection (1)* is one in which shares in the offeree company are, at the date of the publication mentioned in *section [457](2)(b)*, already in the beneficial ownership of the offeror to a value greater than 20 per cent of the aggregate value of those shares and the shares affected.

(3) The additional requirement referred to in *subsection (1)* is that the assenting shareholders, besides holding not less than 80 per cent in value of the shares affected, are not less than 50 per cent in number of the holders of those shares.

**Supplementary provisions in relation to sections [457] and [458] (including provision for applications to court).**

**[459].** (1) Subject to *subsections ([3])* and *([4])*, a call notice and an information notice shall—

(a) be signed by or on behalf of the offeror;

(b) be given to the shareholder—

(i) by delivering it to the shareholder; or

(ii) by leaving it at the address of the shareholder as entered in the register of members of the offeree company; or

(iii) by sending it by post in a prepaid letter—

(I) to the address of the shareholder as entered in the foregoing register; or

(II) to the address, if any, within the State supplied by the shareholder in writing to the offeree company for the giving of notices to him or[ her; or

(iv) if the conditions specified in *subsection (2)* are satisfied, by electronic means.

(2) The conditions referred to in *subsection (1)(b)(iv)* are—

(a) the shareholder has consented in writing to the offeror's using electronic means to give notices in relation to him or her,

(b) at the time the electronic means are used to give the notice or notices in relation to the shareholder, no notice in writing has been received by the offeror from the shareholder stating he or she has withdrawn the consent referred to in *paragraph (a)*, and

(c) the particular means used to give the notice or notices electronically are those that the shareholder has consented to.]<sup>347</sup>

([3]) Where there are several like call notices or information notices given, one or more of which has been signed by or on behalf of the offeror (being a body corporate), the call notices or the information notices not so signed shall, for the purposes of *subsection (1)(a)*, be deemed to be so signed if such unsigned call or information notices state the name of the director who has so signed at least one of those call or, as the case may be, information notices.

([4]) Call notices and information notices shall be deemed to be correctly given for the purposes of *subsection (1)(b)* —

(a) to the joint holders of a share, by giving the notice to the joint holder first named in the register of members in respect of the share;

(b) to the persons entitled to a share in consequence of the death or bankruptcy of a shareholder—

(i) by delivering it to the persons claiming to be so entitled; or

(ii) by leaving it at the address supplied to the offeree company by the persons claiming to be so entitled; or

(iii) by sending it by post in a prepaid letter to the persons claiming to be so entitled by name or by the title of representatives of the deceased or the assignee in bankruptcy or by any like description at the address supplied to the offeree company by the persons claiming to be so entitled; or

(iv) where such persons have not notified the company in writing of such death or bankruptcy—

(I) by leaving it at the address of the shareholder as entered in the register of members of the offeree company; or

(II) by sending it by post in a prepaid letter to —

(A) the address of the shareholder as entered in the foregoing register; or

(B) the address, if any, within the State supplied in writing by the shareholder to the offeree company for the giving of notices to him or her,

or

(c) to shareholders with addresses entered in the register of members of the offeree company or who have supplied in writing to the offeree company addresses for the giving of notices to them, being (in either case) addresses which are in jurisdictions outside the State whose laws regulate the communication into those jurisdictions of schemes, contracts or offers

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<sup>347</sup>Substituted by point 158 of Report Amendments.

to which this Chapter applies, by advertisement published in [*Iris Oifigiúil*].<sup>348</sup>

([5]) A dissenting shareholder may—

(a) following receipt of a call notice, apply to the court for an order permitting the shareholder to retain his or her shares or varying the terms of the scheme, contract or offer as they apply to that shareholder; or

(b) in a case where the offeror is bound to acquire his or her shares by virtue of [ *section [457](7)(a)* ]<sup>349</sup>, apply to the court for an order varying the terms of the scheme, contract or offer as they apply to that dissenting shareholder,

and the court may, on such an application, make such order as it thinks fit (including one providing for a variation such as to require payment to the dissenting shareholder of a cash consideration).

([6]) Where an offeror has become bound to acquire the shares of dissenting shareholders, the offeror shall[, within 30 days after the date on which the offeror becomes so bound or, if an application to the court by a dissenting shareholder is then pending, as soon as may be after that application is disposed of]<sup>350</sup>—

(a) deliver to the offeree company—

(i) a copy of the form of any call notice or information notice given;

(ii) a list of the persons served with any call notice or information notice and the number of shares affected held by them;

(iii) an instrument of transfer of the shares of the dissenting shareholders executed –

(I) on behalf of the dissenting shareholders as transferor by any person appointed by the offeror; and

(II) by the transferee (being either the offeror or a subsidiary of the offeror or a nominee of the offeror or of such a subsidiary);

(b) pay to or vest in the offeree company the amount or other consideration representing the price payable by the offeror for the shares, the beneficial ownership of which by virtue of this Chapter the offeror is entitled to acquire.

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

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

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

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

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<sup>348</sup> Substituted by point 81 of Committee Amendments.

<sup>349</sup> Substituted by point 159 of Report Amendments.

<sup>350</sup> Inserted by point 160 of Report Amendments.



therefor by the persons entitled thereto;

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

[18] Where the relevant scheme, contract or offer becomes binding on or is approved or accepted by a person in respect of a part only of the shares held by him or her, he or she shall be treated as an assenting shareholder as regards that part of his or her holding and as a dissenting shareholder as regards the remainder of his or her holding.

### **Construction of certain references in Chapter to beneficial ownership, application of Chapter to classes of shares, etc.**

[460]. (1) In the application of this Chapter to an offeree company, the share capital of which consists of 2 or more classes of shares, references in this Chapter to the shares in the capital of the offeree company shall be read as references to the shares in its capital of a particular class.

(2) For the purposes of this Chapter—

- (a) shares in the offeree company in the beneficial ownership of a subsidiary of the offeror shall be deemed to be in the beneficial ownership of the offeror; and

- (b) the acquisition of the beneficial ownership of shares in the offeree company by a subsidiary of the offeror shall be deemed to be the acquisition of such beneficial ownership by the offeror.

(3) Where a person agrees to acquire shares in an offeree company, such person shall be deemed, for the purposes of this Chapter, to have acquired the beneficial interest in those shares and it shall be immaterial that any other person has any interest in those shares.

(4) For the purposes of this Chapter, shares shall not be treated as not being in the beneficial ownership of the offeror merely by reason of the fact that—

- (a) those shares are or may become subject to a charge in favour of another person; or

- (b) those shares are the subject of a revocable or irrevocable undertaking on the part of their holder to accept an offer if such offer is made.

## **Chapter 3**

### **Mergers**

#### **Interpretation (Chapter 3).**

[461]. (1) In this Chapter—

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

“merger” means –

- (a) a merger by acquisition;

- (b) a merger by absorption; or

(c) a merger by formation of a new company,  
within, in each case, the meaning of *section [463]*;

“merging company” means—

(a) in relation to a merger by acquisition or a merger by absorption, a company that is, in relation to that merger, a transferor company or the successor company; and

(b) in relation to a merger by formation of a new company, a company that is, in relation to that merger, a transferor company;

“share exchange ratio” means the number of shares or other securities in any successor company that the common draft terms of merger provide to be allotted to members of any transferor company for a given number of their shares or other securities in the transferor company;

“successor company”, in relation to a merger, means the company to which assets and liabilities are to be, or have been, transferred from the transferor company or companies, by way of that merger;

“transferor company”, in relation to a merger, means a company, the assets and liabilities of which are to be, or have been, transferred to the successor company by way of that merger.

(2) References in this Chapter to the acquisition of a company are references to the acquisition of the assets and liabilities of the company by way of a merger under this Chapter.

**Requirements for Chapter to apply.**

[462]. This Chapter applies only if –

- (a) none of the merging companies is a public limited company; and
- (b) one, at least, of the merging companies is a private company limited by shares.

**Mergers to which Chapter applies – definitions and supplementary provision.**

[463]. (1) In this Chapter “merger by acquisition” means an operation in which a company acquires all the assets and liabilities of one or more other companies that is or are dissolved without going into liquidation in exchange for the issue to the members of that company or those companies of shares in the first-mentioned company, with or without any cash payment.

(2) In this Chapter “merger by absorption” means an operation whereby, on being dissolved and without going into liquidation, a company transfers all of its assets and liabilities to a company that is the holder of all the shares representing the capital of the first-mentioned company.

(3) In this Chapter “merger by formation of a new company” means an operation in which one or more companies, on being dissolved without going into liquidation, transfers all its or their assets and liabilities to a company that it or they form – the “other company” – in exchange for the issue to its or their members of shares representing the capital of the other company, with or without any cash payment.

(4) Where a company is being wound up it may become a party to a merger by acquisition, a merger by absorption or a merger by formation of a new company, provided that the distribution of its assets to its shareholders has not begun at the date, under *section [466](5)*, of the common draft terms of merger.

**Merger may not be put into effect save in accordance with the relevant provisions of this Act.**

[464]. (1) A merger may not be put into effect save under and in accordance with –

- (a) the Summary Approval Procedure and the appropriate provisions of this Chapter where such procedure is employed;
- or
- (b) in the absence of the Summary Approval Procedure being employed for that purpose, the relevant provisions of this Chapter,

but this is without prejudice to the alternative of proceeding under *Chapter 1* to achieve the same or a similar result to that which can be achieved by such an operation.

(2) The reference in *subsection (3)* to a merger taking effect under this Chapter or in *section [465]* to proceeding under this Chapter includes a reference to a case in which the Summary Approval Procedure and the appropriate provisions of this Chapter are employed for that purpose.

(3) A merger shall not take effect under this Chapter (or any operation to the same or similar effect under *Chapter 1*) in the absence of the approval, authorisation or other consent, if any, that is required by any other enactment or a Community act for the merger to take effect.

**Chapters 1 and 3: mutually exclusive modes of proceeding to achieve merger.**

[465]. All the elements of the operation constituting a merger shall be effected by proceeding either under this Chapter or under *Chapter 1* and not by proceeding partly, as regards some of its elements, under one of those Chapters and partly, as regards other of its elements, under the other of those Chapters.

**Common draft terms of merger.**

[466]. (1) Where a merger is proposed to be entered into, the directors of the merging companies shall draw up common draft terms of merger and approve those terms in writing.

(2) The common draft terms of merger shall state, at least—

(a) in relation to each of the transferor companies—

- (i) its name;
- (ii) its registered office; and
- (iii) its registered number;

(b) in relation to the successor company—

(i) where the successor company is an existing company, the particulars specified in *subparagraphs (i) to (iii) of paragraph (a)*; or

(ii) where the successor company is a new company yet to be formed, what are proposed as the particulars specified in *subparagraphs (i) and (ii) of that paragraph*;

(c) except in the case of a merger by absorption—

(i) the proposed share exchange ratio and amount of any cash payment;

(ii) the proposed terms relating to allotment of shares or other securities in the successor company; and

(iii) the date from which the holding of shares or other securities in the successor company will entitle the holders to participate in profits and any special conditions affecting that entitlement;

(d) the date from which the transactions of the transferor company or companies are to be treated for accounting purposes as being those of the successor company;

(e) the rights, if any, to be conferred by the successor company on members of the transferor company or companies enjoying special rights or on holders of securities other than shares representing a transferor company's capital, and the measures proposed concerning them;

(f) any special advantages granted to—

(i) any director of a merging company; or

(ii) any person appointed under *section [468]*;

(g) the successor company's constitution;

(h) information on the evaluation of the assets and liabilities to be transferred to the successor company; and

(i) the dates of the financial statements of every merging company which were used for the purpose of preparing the common draft terms of merger.

(3) The common draft terms of merger may include such additional terms as are not inconsistent with this Chapter.

(4) The common draft terms of merger shall not provide for any shares in the successor company to be exchanged for shares in a transferor company held either—

(a) by the successor company itself or its nominee on its behalf; or

(b) by the transferor company itself or its nominee on its behalf.

(5) The date of the common draft terms of merger shall, for the purposes of this Chapter, be the date when the common draft terms of merger are approved in writing under *subsection (1)* by the boards of directors of the merging companies; where the dates on which

those terms are so approved by each of the boards of directors are not the same, then, for the foregoing purposes, the date shall be the latest date on which those terms are so approved by a board of directors.

**Directors' explanatory report.**

[467]. (1) Except in the case of a merger by absorption and subject to *subsection (4)*, a separate written report (the "explanatory report") shall be prepared in respect of each of the merging companies by the directors of each such company.

(2) The explanatory report shall at least give particulars of, and explain—

(a) the common draft terms of merger; and

(b) the legal and economic grounds for and implications of the common draft terms of merger with particular reference to the proposed share exchange ratio, organisation and management structures, recent and future commercial activities and the financial interests of the holders of the shares and other securities in the company.

(3) On the explanatory report being prepared in relation to a company, the board of directors of it shall approve the report in writing.

(4) This section shall not apply if the following condition is, or (as appropriate) the following 2 conditions are, satisfied –

(a) other than in a case falling within *paragraph (b)*, all of the holders of shares conferring the right to vote at general meetings of each of the merging companies have agreed that this section shall not apply; or

(b) where a requirement for the taking effect of a vote (whether a vote generally or of the type to which this subsection applies) by holders of shares of any of the merging companies is that a holder of securities of the company has consented thereto –

(i) the agreement mentioned in *paragraph (a)* exists; and

(ii) all of the holders of securities of the company or companies in respect of which the requirement mentioned in this paragraph operates have agreed that this section shall not apply.

**Expert's report.**

[468]. (1) Subject to *subsection (2)*, there shall, in accordance with this section, be appointed one or more persons to –

(a) examine the common draft terms of merger; and

(b) make a report on those terms to the shareholders of the merging companies.

(2) *Subsection (1)* shall not apply where –

(a) the merger is a merger by absorption;

(b) the merger is a merger in which the successor company (not being a company formed for the purposes of the merger) holds 90 per cent or more (but not all) of the shares carrying the right to vote at a general meeting of the transferor company or at general meetings of each of the transferor companies; or

(c) every member of every merging company agrees that such report is not necessary.

(3) The functions referred to in *subsection (1)(a)* and *(b)* shall be performed either –

(a) in relation to each merging company, by one or more persons appointed for that purpose in relation to the particular company by its directors (and the directors of each company may appoint the same person or persons for that purpose);  
or

(b) in relation to all the merging companies, by one or more persons appointed for that purpose by the court, on the application to it of all of the merging companies.

(4) The person so appointed, or each person so appointed, is referred to in this Chapter as an “expert” and a reference in this Chapter to a report of an expert or other action (including an opinion) of an expert shall, in a case where there are 2 or more experts, be read as reference to a joint report or joint other action (including an opinion) of or by them.

(5) A person shall not be appointed an expert unless the person is a qualified person.

(6) A person is a qualified person for the purposes of this section if the person -

(a) is a statutory auditor; and

(b) is not—

(i) a person who is or, within the period of 12 months before the date of the common draft terms of merger has been, an officer or employee of any of the merging companies;

(ii) except with the leave of the court, a parent, spouse, civil partner, brother, sister or child of an officer of any of the merging companies (and a reference in this subparagraph to a child of an officer shall be deemed to include a child of the officer’s civil partner who is ordinarily resident with the officer and the civil partner); or

(iii) a person who is a partner, or in the employment, of an officer or employee of any of the merging companies.

(7) The report of the expert shall be made available not less than 30 days before the date of the passing of the resolution referred to in *section [202](1)(a)(ii) or [473]*, as the case may be, by each of the merging companies, shall be in writing and shall—

(a) state the method or methods used to arrive at the proposed share exchange ratio;

(b) give the opinion of the expert as to whether the proposed share exchange ratio is fair and reasonable;

(c) give the opinion of the expert as to the adequacy of the method or methods used in the case in question;

(d) indicate the values arrived at using each such method;

(e) give the opinion of the expert as to the relative importance attributed to such methods in arriving at the values decided on;

and

(f) specify any special valuation difficulties which have arisen.

(8) The expert may –

(a) require each of the merging companies and their officers to give to the expert such information and explanations (whether oral or in writing); and

(b) make such enquiries,

as the expert thinks necessary for the purposes of making the report.

(9) If a merging company fails to give to the expert any information or explanation in the power, possession or procurement of that company, on a requirement being made of it under *subsection (8)(a)* by the expert, that company and any officer of it who is in default shall be guilty of a category 2 offence.

(10) If a merging company makes a statement (whether orally or in writing), or provides a document, to the expert that conveys or purports to convey any information or explanation the subject of a requirement made of it under *subsection (8)(a)* by the expert and -

(a) that information is false or misleading in a material particular; and

(b) the company knows it to be so false or misleading or is reckless as to whether it is so false or misleading,

the company and any officer of it who is in default shall be guilty of a category 2 offence.

(11) If a person appointed an expert under *subsection (3)(a)* or *(b)* ceases to be a qualified person, that person—

(a) shall immediately cease to hold office; and

(b) shall give notice in writing of the fact of the person's ceasing to be a qualified person to each merging company and (in the case of an appointment under *subsection (3)(b)*) to the court within 14 days after the date of that cessation,

but without prejudice to the validity of any acts done by the person under this Chapter before that cessation.

(12) A person who purports to perform the functions of an expert (in respect of the merger concerned) under this Chapter after ceasing to be a qualified person (in respect of that merger) shall be guilty of a category 2 offence.

### **Merger financial statement.**

[469]. (1) Where –

(a) the latest statutory financial statements of any of the merging companies relate to a financial year ended more than 6 months before the date of the common draft terms of merger; and

(b) the Summary Approval Procedure is not being employed to effect the merger,

then, subject to *subsection (6)*, if that company is availing itself of the exemption from the requirement to hold a general meeting provided by *section [473](6)*, that company shall prepare a merger financial statement in accordance with the provisions of this section.

(2) The merger financial statement shall be drawn up —

(a) in the format of the last annual balance sheet, if any, of the company and in accordance with the provisions of *Part 6*; and

(b) as at a date not earlier than the first day of the third month preceding the date of the common draft terms of merger.

(3) Valuations shown in the last annual balance sheet, if any, shall, subject to the exceptions provided for under *subsection (4)*, only be altered to reflect entries in the accounting records of the company.

(4) Notwithstanding *subsection (3)*, the following shall be taken into account in preparing the merger financial statement—

(a) interim depreciation and provisions; and

(b) material changes in actual value not shown in the accounting records.

(5) The provisions of *Part 6* relating to the statutory auditor's report on the last statutory financial statements of the company concerned shall apply, with any necessary modifications, to the merger financial statement required of the company by *subsection (1)*.

(6) This section shall not apply to a merging company if the following condition is, or (as appropriate) the following 2 conditions are, satisfied

—

(a) other than in a case falling within *paragraph (b)*, all of the holders of shares conferring the right to vote at general meetings of the company have agreed that this section shall not apply; or

- (b) where a requirement for the taking effect of a vote (whether a vote generally or of the type to which this subsection applies) by holders of shares of the company is that a holder of securities of the company has consented thereto –
- (i) the agreement mentioned in *paragraph (a)* exists; and
  - (ii) all of the holders of securities in respect of which the requirement mentioned in this paragraph operates have agreed that this section shall not apply.

**Registration and publication of documents.**

[470]. (1) Subject to [subsections (4)(a) and (5)]<sup>351</sup>, each of the merging companies shall deliver to the Registrar —

- (a) a copy of the common draft terms of merger as approved in writing by the boards of directors of the companies; and
- (b) a notice, in the prescribed form, specifying -
  - (i) its name;
  - (ii) its registered office;
  - (iii) its legal form; and
  - (iv) its registered number.

(2) Notice of delivery of the common draft terms of merger to the Registrar shall be published:

- (a) by the Registrar, in the CRO Gazette; and
- (b) by each merging company, in one national daily newspaper.

(3) The notice published in accordance with *subsection (2)* shall include -

- (a) the date of delivery of the documentation under *subsection (1)*;
- (b) the matters specified in *subsection (1)(b)*;
- (c) a statement that copies of the common draft terms of merger, the directors' explanatory report, the statutory financial statements referred to in *section [471](1)* and the expert's report (where relevant) are available for inspection by the respective members of each merging company at each company's registered office; and
- (d) a statement that a copy of the common draft terms of merger can be obtained from the Registrar.

[4] With regard to *subsections (1) and (2)*—

- (a) compliance with those subsections is not required in a case where the Summary Approval Procedure is employed to effect the merger; and
- (b) subject to that, those subsections shall be complied with by each of the merging companies at least 30 days before the date of the passing of the resolution on the common draft terms of merger by each such company in accordance with *section [473].*<sup>352</sup>

(5) This section shall not apply in relation to a merging company if the company –

- (a) publishes, free of charge on its website for a continuous period of at least 2 months, commencing at least 30 days before the

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<sup>351</sup> Substituted by point 82 of Committee Amendments.



date of the general meeting which, by virtue of *section [473]*, is to consider the common draft terms of merger and ending at least 30 days after that date, a copy of the common draft terms of merger, approved pursuant to *section [466](1)*; and (b) causes to be published in the CRO Gazette and once at least in [1 daily newspaper ]<sup>353</sup> circulating in the district in which the registered office or principal place of business of the company is situate notice of publication on its website of the common draft terms of merger.

(6) Where, in the period referred to in *subsection (5)(a)*, access to the company's website is disrupted for a continuous period of at least 24 hours or for separate periods totalling not less than 72 hours, the period referred to in *subsection (5)(a)* shall be extended for a period corresponding to the period or periods of disruption.

### **Inspection of documents.**

**[471].** (1) Subject to *subsection (5)*, each of the merging companies shall, in accordance with *subsection (3)*, make available for inspection free of charge by any member of the company at its registered office during business hours—

(a) the common draft terms of merger;

(b) subject to *subsection (2)*, the statutory financial statements for the preceding 3 financial years of each company (audited, where required by that Part, in accordance with *Part 6*);

(c) except in the case of a merger by absorption[ or in any other case where such a report is not required to be prepared by that section]<sup>354</sup>, the explanatory report relating to each of the merging companies referred to in *section [467]*;

(d) if such a report is required to be prepared by that section, the expert's report relating to each of the merging companies referred to in *section [468]*; and

(e) each merger financial statement, if any, in relation to one or, as the case may be, more than one of the merging companies, required to be prepared by *section [469]*.

(2) For the purposes of *paragraph (b)* of *subsection (1)* –

(a) if any of the merging companies has traded for less than 3 financial years before the date of the common draft terms of merger, then, as respects that company, that paragraph is satisfied by the statutory financial statements for those financial years for which the company has traded (audited, where required by that Part, in accordance with *Part 6*) being made available as mentioned in that subsection by each of the merging companies; or

(b) if, by reason of its recent incorporation, the obligation of any of the foregoing companies to prepare its first financial statements under *Part 6* had not arisen as of the date of the common draft terms of merger, then the reference in that paragraph to the financial statements of that company shall be disregarded.

(3) The provisions of *subsection (1)* shall apply in the case of each of the merging companies for a period of 30 days before the date of the passing of –

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<sup>352</sup> Substituted by point 83 of Committee Amendments.

<sup>353</sup> Substituted by point 84 of Committee Amendments.

(a) where the Summary Approval Procedure is employed to effect the merger, the resolution referred to in *section*

*[202](1)(a)(ii)* by each such company; and

(b) where that procedure is not employed for that purpose, the resolution on the common draft terms of merger by each such company in accordance with *section [473]*.

(4) *Section [127](1)* (access to documents during business hours) shall apply in relation to *subsection (1)* as it applies in relation to the relevant provisions of *Part 4*.

(5) ~~[Subject to *subsection (6)*, *subsection (1)*~~*Subsection (1)*<sup>355</sup> shall not apply in relation to a merging company if it publishes free of charge on its website the documents specified in that subsection for a continuous period of at least 2 months, commencing at least 30 days [ before—

(a) where the Summary Approval Procedure is employed to effect the merger, the date of the resolution referred to in *section [202](1)(a)(ii)* of the company; and

(b) where that procedure is not employed for that purpose, the date of the general meeting of the company which, by virtue of *section [473]*, is to consider the common draft terms of merger,

and ending at least 30 days after that date]<sup>356</sup>

[...] <sup>357</sup>

(16) Where, in the period referred to in *subsection (5)*, access to the company's website is disrupted for a continuous period of at least 24 hours or for separate periods totalling not less than 72 hours, the period referred to in *subsection (5)* shall be extended for a period corresponding to the period or periods of disruption.

(17) A reference in this section to statutory financial statements shall be deemed to include a reference to a directors' report and a reference to auditing shall, in the case of such a report, be read as a reference to the operation referred to in *section [336](5)*.

**Non-application of subsequent provisions of Chapter where Summary Approval Procedure employed and effect of resolution referred to in *section [202](1)(a)(ii)*.**

**[472].** (1) Without prejudice to *subsections (2)* and *(3)*, the subsequent sections of this Chapter apply unless the Summary Approval Procedure is employed by the merging companies to effect the merger.

(2) Where the Summary Approval Procedure is employed for that purpose then, as provided for in *Chapter 7 of Part 4*, on the passing of the resolution referred to in *section [202](1)(a)(ii)* by each of the merging companies, the merger shall, in accordance with the common draft terms of merger and any supplemental document, take effect on the date specified in those terms or in that supplemental document and *section [480](3)* shall apply as regards the effects of that merger with any necessary modifications.

(3) Notwithstanding that the Summary Approval Procedure is employed by the merging companies to effect the merger, then, in addition to the application of *section [480](3)* by virtue of *subsection (2)* –

[*(a) section [479]* (preservation of rights of holders of securities),]<sup>358</sup>

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<sup>354</sup> Inserted by point 85 of Committee Amendments.

<sup>355</sup> [Inserted by point 55 of Seanad Report Amendments.](#)

<sup>356</sup> Substituted by point 86 of Committee Amendments.

([b]) *section [483]* (civil liability of directors and experts), and

([c]) *section [484]* (criminal liability for untrue statements in merger documents),

shall apply where that procedure is employed.

(4) In this section “supplemental document” means the document referred to in *section [209](1)*.

#### **General meetings of merging companies.**

[473]. (1) In this section a reference to a general meeting, without qualification, is a reference to a general meeting referred to in *subsection (2)*.

(2) Subject to *subsection (6)*, the subsequent steps under this Chapter in relation to the merger shall not be taken unless the common draft terms of merger have been approved by a special resolution passed at a general meeting of each of the merging companies, being a meeting held not earlier than 30 days after the date of the publication by the company of the notice referred to in *section [470](2)(b)* or, as the case may be, the notice in the daily newspapers referred to in *section [470](5)(b)*.<sup>359</sup>

(3) Subject to *section [474](2)*, the notice convening that meeting shall contain a statement of every shareholder’s entitlement to obtain on request, free of charge, full or, if so desired, partial copies of the documents referred to in *section [471](1)* (and, accordingly, every shareholder has, subject to the foregoing provision, that entitlement).

(4) The directors of each transferor company shall inform—

(a) the general meeting of that company; and

(b) as soon as practicable, the directors of the successor company,

of any material change in the assets and liabilities of that transferor company between the date of the common draft terms of merger and the date of that general meeting.

(5) The directors of the successor company shall inform the general meeting of that company of all changes of which they have been informed pursuant to *subsection (4)*.

(6) Approval, by means of a special resolution, of the common draft terms of merger is not required—

(a) in the case of any transferor company in a merger by absorption; or

(b) in the case of the successor company in a merger by acquisition, if the conditions specified in *subsection (7)* have been satisfied.

(7) The conditions referred to in *subsection (6)(b)* are the following:

(a) the notice required to be published under *section [470](2)(b)* was published in accordance with *section [470](2)(b)* in respect of the successor company before the commencement of the period (in this subsection referred to as the “notice period”) of 30 days before the date of the passing by the transferor company of the resolution referred to in this section (or, where there is more than one transferor company and the dates on which each of them has passed such a resolution are not the same, the earliest date on which such a resolution was passed by one of them);

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<sup>357</sup> Deleted by point 97 of Seanad Committee Amendments.

<sup>358</sup> Inserted by point 161 of Report Amendments.

<sup>359</sup> Inserted by point 87 of Committee Amendments.

(b) the members of the successor company were entitled, during the notice period—

(i) to inspect, at the registered office of the successor company, during ordinary hours of business, copies of the documents referred to in *section [471](1)*; and

(ii) to obtain copies of those documents or any part of them on request;

(c) the right, conferred by *subsection (8)*, to requisition a general meeting has not been exercised during the notice period.

(8) One or more members of the successor company who hold or together hold not less than 5 per cent of the paid-up capital of the company which carries the right to vote at general meetings of the company (excluding any shares held as treasury shares) may require the convening of a general meeting of the company to consider the common draft terms of merger, and *section [178](3) to (7)* apply, with any necessary modifications, in relation to the requisition.

**Electronic means of making certain information available for purposes of *section [473]*.**

[474]. (1) For the purposes of *section [473]*, but subject to *subsection (2)*, where a shareholder has consented to the use by the company of electronic means for conveying information, the copies of the documents referred to in *section [471](1)* may be provided, by electronic mail, to that shareholder by the company and the notice convening the general meeting referred to in *section [473](2)* shall contain a statement to that effect.

(2) The entitlement referred to in *section [473](3)* shall not apply where, for the period specified in *subsection (3)*, copies of the documents referred to in *section [471](1)* are available to download and print, free of charge, from the company's website by shareholders of the company.

(3) The period referred to in *subsection (2)* is a continuous period of at least 2 months, commencing at least 30 days before the date of the general meeting which, by virtue of *section [473]*, is to consider the common draft terms of merger and ending at least 30 days after that date.

**Meetings of classes of shareholders.**

[475]. (1) Where the share capital of any of the merging companies is divided into shares of different classes the provisions referred to in *subsection (2)*, with the exclusions specified in *subsection (3)*, shall apply with respect to the variation of the rights attached to any such class that is entailed by the merger.

(2) Those provisions are the provisions of *Chapter 4 of Part 3* on the variation of the rights attached to any class of shares in a company.

(3) There is excluded the following from the foregoing provisions: *sections [88](9) and [89]*.

**Purchase of minority shares.**

[476]. (1) Where the special resolution referred to in *section [473]* has been passed by each of the merging companies (or such of

them as [are]<sup>360</sup> required by that section to pass such a resolution), a minority shareholder in a transferor company may, not later than 15 days after the relevant date, request the successor company in writing to acquire his or her shares in the transferor company for cash.

(2) Where a request is made by a minority shareholder in accordance with *subsection (1)*, the successor company shall purchase the shares of the minority shareholder at a price determined in accordance with the share exchange ratio set out in the common draft terms of merger and the shares so purchased by the successor company shall be treated as treasury shares within the meaning of *section [106]*.

(3) Nothing in this section limits the power of the court to make any order necessary for the protection of the interests of a dissenting minority in a merging company.

(4) In this Chapter—

“minority shareholder”, in relation to a transferor company, means—

(a) in a case where the successor company (not being a company formed for the purpose of the merger) holds 90 per cent or more (but not all) of the shares carrying the right to vote at general meetings of the transferor company, any other shareholder in the company; or

(b) in any other case, a shareholder in the company who voted against the special resolution;

“relevant date” means—

(a) in relation to a minority shareholder referred to in *paragraph (a)* of the definition of “minority shareholder” in this subsection, the date of publication of the notice of delivery of the common draft terms of merger under *section [470](2)(b)*; or

(b) in relation to a minority shareholder referred to in *paragraph (b)* of that definition of “minority shareholder”, the date on which the resolution of the transferor company was passed.

#### **Application for confirmation of merger by court.**

[477]. (1) An application under this section to the court for an order confirming a merger shall be made jointly by all the merging companies.

(2) That application shall be accompanied by a statement of the size of the shareholding of any shareholder who has requested the purchase of his or her shares under *section [476]* and of the measures which the successor company proposes to take to comply with the shareholder’s request.

#### **Protection of creditors.**

[478]. A creditor of any of the merging companies who, at the date of publication of the notice under *section [470](2)(b)* is entitled to any debt or claim against the company, shall be entitled to be heard in relation to the confirmation by the court of the merger under *section [480]*.

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<sup>360</sup> Substituted by point 98 of Seanad Committee Amendments.

**Preservation of rights of holders of securities.**

[479]. (1) Subject to *subsection (2)*, holders of securities, other than shares, in any of the companies being acquired to which special rights are attached shall be given rights in the successor company at least equivalent to those they possessed in the company being acquired.

(2) *Subsection (1)* shall not apply—

(a) where the alteration of the rights in the acquiring company has been approved—

- (i) by a majority of the holders of such securities at a meeting held for that purpose; or
- (ii) by the holders of those securities individually;

or

(b) where the holders of those securities are entitled under the terms of those securities to have their securities purchased by the successor company.

**Confirmation order.**

[480]. (1) Where an application is made under *section [477]* to the court for an order confirming a merger this section applies.

(2) The court, on being satisfied that—

- (a) the requirements of this Chapter have been complied with;
- (b) proper provision has been made for—

- (i) any minority shareholder in any of the merging companies who has made a request under *section [476]*; and
- (ii) any creditor of any of the merging companies who objects to the merger in accordance with *section [478]*;

(c) the rights of holders of securities other than shares in any of the companies being acquired are safeguarded in accordance with *section [479]*; and

(d) where applicable, the relevant provisions of *Chapter 4 of Part 3* on the variation of the rights attached to any class of shares in any of [ the]<sup>361</sup> merging companies have been complied with,

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

(3) The order of the court confirming the merger shall, from the effective date, have the following effects—

- (a) all the assets and liabilities of the transferor company or companies are transferred to the successor company;
- (b) in the case of a merger by acquisition or a merger by formation of a new company, where no request has been made by minority shareholders under *section [476]*, all remaining members of the transferor company or companies except the successor company (if it is a member of a transferor company) become members of the successor company;
- (c) the transferor company or companies is or are dissolved;
- (d) all legal proceedings pending by or against any transferor company shall be continued with the substitution, for the transferor company, of the successor company as a party;

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<sup>361</sup> Inserted by point 99 of Seanad Committee Amendments.

(e) the successor company is obliged to make to the members of the transferor company or companies any cash payment required by the common draft terms of merger;

(f) every contract, agreement or instrument to which a transferor company is a party shall, notwithstanding anything to the contrary contained in that contract, agreement or instrument, be read and have effect as if—

(i) the successor company had been a party thereto instead of the transferor company;

(ii) for any reference (however worded and whether express or implied) to the transferor company there were substituted a reference to the successor company; and

(iii) any reference (however worded and whether express or implied) to the directors, officers, representatives or employees of the transferor company, or any of them -

(I) were, respectively, a reference to the directors, officers, representatives or employees of the successor company or to such director, officer, representative or employee of the successor company as the successor company nominates for that purpose; or

(II) in default of such nomination, were, respectively, a reference to the director, officer, representative or employee of the successor company who corresponds as nearly as may be to the first-mentioned director, officer, representative or employee;

(g) every contract, agreement or instrument to which a transferor company is a party becomes a contract, agreement or instrument between the successor company and the counterparty with the same rights, and subject to the same obligations, liabilities and incidents (including rights of set-off), as would have been applicable thereto if that contract, agreement or instrument had continued in force between the transferor company and the counterparty;

(h) any money due and owing (or payable) by or to a transferor company under or by virtue of any such contract, agreement or instrument as is mentioned in *paragraph (g)* shall become due and owing (or payable) by or to the successor company instead of the transferor company; and

(i) an offer or invitation to treat made to or by a transferor company before the effective date shall be read and have effect, respectively, as an offer or invitation to treat made to or by the successor company.

[\[\(4\) The following provisions have effect for the purposes of subsection \(3\)—](#)

[\(a\) “instrument” in that subsection includes—](#)

[\(i\) a lease, conveyance, transfer, charge or any other instrument relating to real property \(including chattels real\); and](#)

[\(ii\) an instrument relating to personalty;](#)

[\(b\) paragraph \(f\)\(ii\) of that subsection applies in the case of references to the transferor company and its successors and assigns as it applies in the case of references to the transferor company personally;](#)

[\(c\) paragraph \(g\) of that subsection applies in the case of rights, obligations and liabilities mentioned in that paragraph whether they are expressed in the contract, agreement or instrument concerned to be personal to the transferor company or to benefit or bind \(as appropriate\) the transferor company and its successors and assigns.\]<sup>362</sup>](#)

<sup>362</sup> [Inserted by point 56 of Seanad Report Amendments.](#)

[54] [The Without prejudice to subsections (6) and (7), the]<sup>363</sup> successor company shall comply with registration requirements and any other special formalities required by law and as directed by the court for the transfer of the assets and liabilities of the transferor company or companies to be effective in relation to other persons.

[(6) There shall be entered by the keeper of any register in the State—

(a) upon production of a certified copy of the order under subsection (2); and

(b) without the necessity of there being produced any other document (and, accordingly, any provision requiring such production shall, if it would otherwise apply, not apply), the name of the successor company in place of any transferor company in respect of the information, act, ownership or other matter in that register and any document kept in that register.

(7) Without prejudice to the generality of subsection (6), the Property Registration Authority, as respects any deed (within the meaning of section 32 of the Registration of Deeds and Title Act 2006) registered by that Authority or produced for registration by it, shall, upon production of the document referred to in subsection (6)(a) but without the necessity of there being produced that which is referred to in subsection (6)(b), enter the name of the successor company in place of any transferor company in respect of such deed.

(8) Without prejudice to the application of subsection (6) to any other type of register in the State, each of the following shall be deemed to be a register in the State for the purposes of that subsection:

(a) the register of members of a company referred to in section 169;

(b) the register of holders of debentures of a public limited company kept pursuant to section 1121;

(c) the register kept by a public limited company for the purposes of sections ~~[1050-1048]~~ to ~~[1055-1053]~~;

(d) the register of charges kept by the Registrar pursuant to section 414;

(e) the Land Registry;

(f) any register of shipping kept under the Mercantile Marine Act 1955.<sup>364</sup>

[95] If the taking effect of the merger would fall at a time (being the time ascertained by reference to the general law and without regard to this subsection) on the particular date appointed under subsection (2) that is a time that would not, in the opinion of the court, be suitable having regard to the need of the parties to co-ordinate various transactions, the court may, in appointing a date under subsection (2) with respect to when the merger takes effect, specify a time, different from the foregoing, on that date when the merger takes effect and, where such a time is so specified –

- (a) the merger takes effect on that time of the date concerned; and
- (b) references in this section to the effective date shall be read accordingly.

#### **Certain provisions not to apply where court so orders.**

**[481].** Where the court makes an order confirming a merger under this Chapter, the court may, if it sees fit for the purpose of enabling the merger properly to have effect, include in the order provision permitting –

- (a) the giving of financial assistance which may otherwise be prohibited under section [82];

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<sup>363</sup> Substituted by point 57 of Seanad Report Amendments (as substituted by No 116b of 2012).



(b) a reduction in company capital which may otherwise be restricted under *section [84]*.

#### **Registration and publication of confirmation of merger.**

[482]. (1) If the court makes an order confirming a merger, a certified copy of the order shall forthwith be sent to the Registrar by such officer of the court as the court may direct.

(2) Where the Registrar receives a certified copy of the order of the court in accordance with *subsection (1)*, the Registrar shall -

- (a) on, or as soon as practicable after, the effective date - register in the register that certified copy and the dissolution of the transferor company or companies; and
- (b) within 14 days after the date of that delivery - cause to be published in the CRO Gazette notice that a copy of an order of the court confirming the merger has been delivered to him or her.

#### **Civil liability of directors and experts.**

[483]. (1) Any shareholder of any of the merging companies who has suffered loss or damage by reason of misconduct in the preparation or implementation of the merger by a director of any such company or by the expert, if any, who has made a report under *section [468]* shall be entitled to have such loss or damage made good to him or her by—

- (a) in the case of misconduct by a person who was a director of that company at the date of the common draft terms of merger — that person;
- (b) in the case of misconduct by any expert who made a report under *section [468]* in respect of any of the merging companies — that person.

(2) Without prejudice to the generality of *subsection (1)*, any shareholder of any of the merging companies who has suffered loss or damage arising from the inclusion of any untrue statement in any of the following, namely :

- (a) the common draft terms of merger;
- (b) the explanatory report, if any, referred to in *section [467]*;
- (c) the expert's report, if any, under *section [468]*;
- (d) the merger financial statement, if any, prepared under *section [469]*,

shall, subject to *subsections (3) and (4)*, be entitled to have such loss or damage made good to him or her –

- (i) in the case of the document or report referred to in *paragraph (a), (b) or (d)* - by every person who was a director of that company at the date of the common draft terms of merger; or
- (ii) in the case of the report referred to in *paragraph (c)* - by the person who made that report in relation to that company.

(3) A director of a company shall not be liable under *subsection (2)* if he or she proves—

- (a) that the document or report referred to in *subsection (2)(a),(b) or (d)*, as the case may be, was issued without his or her knowledge or consent and that, on becoming aware of its issue, he or she forthwith informed the shareholders of that company that it was issued without his or her knowledge or consent; or

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<sup>364</sup> [Inserted by point 58 of Seanad Report Amendments.](#)

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

(4) A person who makes a report under *section [468]* in relation to a company shall not be liable in the case of any untrue statement in the report if he or she proves—

(a) that, on becoming aware of the statement, he or she forthwith informed that company and its shareholders of the untruth; or

(b) that he or she was competent to make the statement and that he or she had reasonable grounds for believing and did up to the time the merger took effect believe that the statement was true.

#### **Criminal liability for untrue statements in merger documents.**

[484]. (1) Where any untrue statement has been included in –

(a) the common draft terms of merger;

(b) the explanatory report, if any, referred to in *section [467]*; or

(c) the merger financial statement, if any, prepared under *section [469]*,

the following –

(i) each of the persons who was a director of any of the merging companies at the date of the common draft terms of merger or, in the case of the foregoing explanatory report or merger financial statement, at the time of the report's or statement's preparation; and

(ii) any person who authorised the issue of the document,

shall be guilty of a category 2 offence.

(2) Where any untrue statement has been included in the expert's report prepared under *section [468]*, the expert and any person who authorised the issue of the report shall be guilty of a category 2 offence.

(3) In any proceedings against a person in respect of an offence under *subsection (1) or (2)*, it shall be a defence to prove that, having exercised all reasonable care and skill, the defendant had reasonable grounds for believing and did, up to the time of the issue of the document concerned, believe that the statement concerned was true.

## **Chapter 4**

### **Divisions**

#### **Interpretation (Chapter 4).**

[485]. (1) In this Chapter —

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

“division” means –

(a) a division by acquisition; or

(b) a division by formation of new companies,

within, in each case, the meaning of *section [487]*;

“share exchange ratio” means the number of shares or other securities in any of the successor companies that the draft terms of division provide to be allotted to members of the transferor company for a given number of their shares or other securities in the transferor company;

“successor company” shall be read in accordance with *section [487](1)*;

“transferor company” shall be read in accordance with *section [487](1)*.

(2) A reference in this Chapter to a company involved in a division shall –

(a) in the case of a division by acquisition, be read as a reference to a company that is, in relation to that division, the transferor company or a successor company (other than a new company formed for the purpose of the acquisition concerned);

(b) in the case of a division by formation of new companies, be read as a reference to a company that is, in relation to that division, the transferor company.

(3) References in this Chapter to the acquisition of a company are references to the acquisition of the assets and liabilities of the company by way of a division under this Chapter.

#### **Requirements for Chapter to apply.**

[486]. This Chapter applies only if –

(a) none of the companies involved in the division is a public limited company; and

(b) one, at least, of the companies involved in the division is a private company limited by shares.

#### **Divisions to which this Chapter applies – definitions and supplementary provisions.**

[487]. (1) In this Chapter “division by acquisition” means an operation consisting of the following :

(a) 2 or more companies (each of which is referred to in this Chapter as a “successor company”), of which one or more but not all may be a new company, acquire between them all the assets and liabilities of another company that is dissolved without going into liquidation (referred to in this Chapter as the “transferor company”); and

(b) such acquisition is –

(i) in exchange for the issue to the shareholders of the transferor company of shares in one or more of the successor companies, with or without any cash payment; and

(ii) with a view to the dissolution of the transferor company.

(2) In this Chapter “division by formation of new companies” means an operation consisting of the same elements as a division by acquisition (as defined in *subsection (1)*) consists of save that the successor companies have been formed for the purposes of the acquisition of the assets and liabilities referred to in that subsection.

(3) Where a company is being wound up it may become a party to a division by acquisition or a division by formation of new companies, provided that the distribution of its assets to its shareholders has not begun at the date, under *section [490](7)*, of the

common draft terms of division.

**Division may not be put into effect save under and in accordance with this Chapter.**

[488]. (1) A division may not be put into effect save under and in accordance with the provisions of this Chapter but this is without prejudice to the alternative of proceeding under *Chapter 1* to achieve the same or a similar result to that which can be achieved by such an operation.

(2) A division shall not take effect under this Chapter (or any operation to the same or similar effect under *Chapter 1*) in the absence of the approval, authorisation or other consent, if any, that is required by any other enactment or a Community act for the division to take effect.

**Chapters 1 and 4: mutually exclusive modes of proceeding to achieve division.**

[489]. All the elements of the operation constituting a division shall be effected by proceeding either under this Chapter or under *Chapter 1* and not by proceeding partly, as regards some of its elements, under one of those Chapters and partly, as regards other of its elements, under the other of those Chapters.

**Common draft terms of division.**

[490]. (1) Where a division is proposed to be entered into, the directors of the companies involved in the division shall draw up common draft terms of division and approve those terms in writing.

(2) The common draft terms of division shall state, at least—

- (a) in relation to the transferor company—
  - (i) its name;
  - (ii) its registered office; and
  - (iii) its registered number;
- (b) in relation to each of the successor companies—
  - (i) where any of those is an existing company, the particulars specified in *subparagraphs (i) to (iii) of paragraph (a)*; or
  - (ii) where any of those is a new company yet to be formed, what are proposed as the particulars specified in *subparagraphs (i) and (ii) of that paragraph*;
- (c) the proposed share exchange ratio and amount of any cash payment;
- (d) the proposed terms relating to allotment of shares or other securities in the successor companies;
- (e) the date from which the holding of shares or other securities in the successor companies will entitle the holders to participate in profits and any special conditions affecting that entitlement;
- (f) the date from which the transactions of the transferor company are to be treated for accounting purposes as being those of any of the successor companies;
- (g) the rights, if any, to be conferred by the successor companies on members of the transferor company enjoying special rights or on holders of securities other than shares representing the transferor company's capital, and the measures proposed

concerning them;

(h) any special advantages granted to—

(i) any director of a company involved in a division; or

(ii) any person appointed under *section [492]*;

(i) the constitution of each of the successor companies;

(j) information on the evaluation of the assets and liabilities to be transferred to successor companies; and

(k) the dates of the financial statements, if any, of every company involved in the division which were used for the purpose of preparing the common draft terms of division.

(3) The common draft terms of division may include such additional terms as are not inconsistent with this Chapter.

(4) The common draft terms of division shall not provide for any shares in the any of the successor companies to be exchanged for shares in the transferor company held either—

(a) by the successor companies themselves or their nominees on their behalf; or

(b) by the transferor company or its nominee on its behalf.

(5) Without prejudice to *subsection (6)*, where –

(a) an asset of the transferor company is not allocated by the common draft terms of division; and

(b) it is not possible, by reference to an interpretation of those terms, to determine the manner in which it is to be allocated,

the asset or the consideration therefor shall be allocated to the successor companies in proportion to the share of the net assets allocated to each of those companies under the common draft terms of division.

(6) If provision is not made by the common draft terms of division for the allocation of an asset acquired by, or otherwise becoming vested in, the transferor company on or after the date of those draft terms then, subject to any provision the court may make in an order under *section [503]*, the asset or the consideration therefor shall be allocated in the manner specified in *subsection (5)*.

(7) The date of the common draft terms of division shall, for the purposes of this Chapter, be the date when the common draft terms of division are approved in writing under *subsection (1)* by the boards of directors of the companies involved in the division; where the dates on which those terms are so approved by each of the boards of directors are not the same, then, for the foregoing purposes, the date shall be the latest date on which those terms are so approved by a board of directors.

**Directors' explanatory report.**

[491]. (1) Subject to *subsections (4)* and *(5)*, a separate written report (the “explanatory report”) shall be prepared in respect of each of the companies involved in the division by the directors of each such company.

(2) The explanatory report shall at least give particulars of, and explain—

(a) the common draft terms of division; and

(b) the legal and economic grounds for and implications of the common draft terms of division with particular reference to the proposed share exchange ratio, organisation and management structures, recent and future commercial activities and the financial interests of holders of the shares and other securities in the company.

- (3) On the explanatory report being prepared in relation to a company, the board of directors of it shall approve the report in writing.
- (4) This section shall not apply if the following condition is, or (as appropriate) the following 2 conditions are, satisfied –
- (a) other than in a case falling within *paragraph (b)*, all of the holders of shares conferring the right to vote at general meetings of each of the companies involved in the division have agreed that this section shall not apply; or
  - (b) where a requirement for the taking effect of a vote (whether a vote generally or of the type to which this subsection applies) by holders of shares of any of the companies involved in the division is that a holder of securities of the company has consented thereto –
    - (i) the agreement mentioned in *paragraph (a)* exists; and
    - (ii) all of the holders of securities of the company or companies in respect of which the requirement mentioned in this paragraph operates have agreed that this section shall not apply.
- (5) This section shall not apply in relation to a company involved in a division by formation of new companies where the shares in each of the acquiring companies are allocated to the shareholders of the transferor company in proportion to their rights in the capital of that company.

**Expert's report.**

- [492]. (1) Subject to *subsections (2) and (13)*, there shall, in accordance with this section, be appointed one or more persons to –
- (a) examine the common draft terms of division; and
  - (b) make a report on those terms to the shareholders of the companies involved in the division.
- (2) *Subsection (1)* shall not apply where –
- (a) the division is a division in which one of the successor companies (not being a company formed for the purposes of the division) holds 90 per cent or more (but not all) of the shares carrying the right to vote at a general meeting of the transferor company; or
  - (b) every member of every company involved in the division agrees that such report is not necessary.
- (3) The functions referred to in *subsection (1)(a) and (b)* shall be performed either –
- (a) in relation to each company involved in the division, by one or more persons appointed for that purpose in relation to the particular company by its directors (and the directors of each company may appoint the same person or persons for that purpose); or
  - (b) in relation to all the companies involved in the division, by one or more persons appointed for that purpose by the court, on the application to it of all of the companies so involved.
- (4) The person so appointed, or each person so appointed, is referred to in this Chapter as an “expert” and a reference in this Chapter to a report of an expert or other action (including an opinion) of an expert shall, in a case where there are 2 or more experts, be read as reference to a joint report or joint other action (including an opinion) of or by them.
- (5) A person shall not be appointed an expert unless the person is a qualified person.
- (6) A person is a qualified person for the purposes of this section if the person -
- (a) is a statutory auditor; and

(b) is not—

- (i) a person who is or, within the period of 12 months before the date of the common draft terms of division has been, an officer or employee of any of the companies involved in the division;
- (ii) except with the leave of the court, a parent, spouse, civil partner, brother, sister or child of an officer of any of the companies involved in the division (and a reference in this subparagraph to a child of an officer shall be deemed to include a child of the officer's civil partner who is ordinarily resident with the officer and the civil partner); or
- (iii) a person who is a partner, or in the employment, of an officer or employee of any of the companies involved in the division.

(7) The report of the expert shall be made available not less than 30 days before the date of the passing of the resolution referred to in *section [496]* by each of the companies involved in the division, shall be in writing and shall—

- (a) state the method or methods used to arrive at the proposed share exchange ratio;
  - (b) give the opinion of the expert as to whether the proposed share exchange ratio is fair and reasonable;
  - (c) give the opinion of the expert as to the adequacy of the method or methods used in the case in question;
  - (d) indicate the values arrived at using each such method;
  - (e) give the opinion of the expert as to the relative importance attributed to such methods in arriving at the values decided on;
- and
- (f) specify any special valuation difficulties which have arisen.

(8) The expert may –

- (a) require each of the companies involved in the division and their officers to give to the expert such information and explanations (whether oral or in writing); and
- (b) make such enquiries,

as the expert thinks necessary for the purposes of making the report.

(9) If a company involved in the division fails to give to the expert any information or explanation in the power, possession or procurement of that company, on a requirement being made of it under *subsection (8)(a)* by the expert, that company and any officer of it who is in default shall be guilty of a category 2 offence.

(10) If a company involved in the division makes a statement (whether orally or in writing), or provides a document, to the expert that conveys or purports to convey any information or explanation the subject of a requirement made of it under *subsection (8)(a)* by the expert and -

- (a) that information is false or misleading in a material particular; and
- (b) the company knows it to be so false or misleading or is reckless as to whether it is so false or misleading,

the company and any officer of it who is in default shall be guilty of a category 2 offence.

(11) If a person appointed an expert under *subsection (3)(a)* or *(b)* ceases to be a qualified person, that person—

- (a) shall immediately cease to hold office; and
- (b) shall give notice in writing of the fact of the person's ceasing to be a qualified person to each company involved in the

division and (in the case of an appointment under *subsection (3)(b)*) to the court within 14 days after the date of that cessation,

but without prejudice to the validity of any acts done by the person under this Chapter before that cessation.

(12) A person who purports to perform the functions of an expert (in respect of the division concerned) under this Chapter after ceasing to be a qualified person (in respect of that division) shall be guilty of a category 2 offence.

(13) This section shall not apply in relation to a company involved in a division by formation of new companies where the shares in each of the successor companies are allocated to the shareholders of the transferor company in proportion to their rights in the capital of that company.

### **Division financial statement.**

[493]. (1) Subject to *subsection (6)*, where -

- (a) the latest statutory financial statements of any of the companies involved in the division relate to a financial year ended more than 6 months before the date of the common draft terms of division; and
- (b) that company is availing itself of the exemption from the requirement to hold a general meeting provided by *section [496](6)*,

then that company shall prepare a division financial statement in accordance with the provisions of this section.

(2) The division financial statement shall be drawn up—

- (i) in the format of the last annual balance sheet, if any, of the company and in accordance with the provisions of *Part 6*; and
- (ii) as at a date not earlier than the first day of the third month preceding the date of the common draft terms of division.

(3) Valuations shown in the last annual balance sheet, if any, shall, subject to the exceptions provided for under *subsection (4)*, only be altered to reflect entries in the accounting records of the company.

(4) Notwithstanding *subsection (3)*, the following shall be taken into account in preparing the division financial statement—

- (a) interim depreciation and provisions; and
- (b) material changes in actual value not shown in the accounting records.

(5) The provisions of *Part 6* relating to the statutory auditor's report on the last statutory financial statements of the company concerned shall apply, with any necessary modifications, to the division financial statement required of the company by *subsection (1)*.

(6) This section shall not apply to a company involved in a division if the following condition is, or (as appropriate) the following 2 conditions are, satisfied –

- (a) other than in a case falling within *paragraph (b)*, all of the holders of shares conferring the right to vote at general meetings of the company have agreed that this section shall not apply; or
- (b) where a requirement for the taking effect of a vote (whether a vote generally or of the type to which this subsection applies) by holders of shares of the company is that a holder of securities of the company has consented thereto –

(i) the agreement mentioned in *paragraph (a)* exists; and

(ii) all of the holders of securities in respect of which the requirement mentioned in this paragraph operates



have agreed that this section shall not apply.

**Registration and publication of documents.**

[494]. (1) Subject to *subsection (5)*, each of the companies involved in the division shall deliver to the Registrar—

(a) a copy of the common draft terms of division as approved in writing by the board of directors of the companies;

and

(b) a notice, in the prescribed form, specifying -

(i) its name;

(ii) its registered office;

(iii) its legal form; and

(iv) its registered number.

(2) Notice of delivery of the common draft terms of division to the Registrar shall be published:

(a) by the Registrar, in the CRO Gazette; and

(b) by each company involved in the division, in one national daily newspaper.

(3) The notice published in accordance with *subsection (2)* shall include -

(a) the date of delivery of the documentation under *subsection (1)*;

(b) the matters specified in *subsection (1)(b)*;

(c) a statement that copies of the common draft terms of division, the directors' explanatory report, the statutory financial statements referred to in *section [495](1)* and the expert's report (where relevant) are available for inspection by the respective members of each company involved in the division at each company's registered office; and

(d) a statement that a copy of the common draft terms of division can be obtained from the Registrar.

(4) *Subsections (1)* and *(2)* shall be complied with by each of the companies involved in the division at least 30 days before the date of the passing of the resolution on the common draft terms of division by each such company in accordance with *section [496]*.

(5) This section shall not apply in relation to a company involved in the division if the company –

(a) publishes, free of charge on its website for a continuous period of at least 2 months, commencing at least 30 days before the date of the general meeting which, by virtue of *section [496]*, is to consider the common draft terms of division and ending at least 30 days after that date, a copy of the common draft terms of division, as approved pursuant to *section [490](1)*; and

(b) causes to be published in the CRO Gazette and once at least in 2 daily newspapers circulating in the district in which the registered office or principal place of business of the company is situate notice of publication on its website of the common draft terms of division.

(6) Where, in the period referred to in *subsection (5)(a)*, access to the company's website is disrupted for a continuous period of at least 24 hours or for separate periods totalling not less than 72 hours, the period referred to in *subsection (5)(a)* shall be extended for a period corresponding to the period or periods of disruption.

## Inspection of documents.

[495]. (1) Subject to *subsection (5)*, each of the companies involved in the division shall, in accordance with *subsection (3)*, make available for inspection free of charge by any member of the company at its registered office during business hours —

- (a) the common draft terms of division;
- (b) subject to *subsection (2)*, the statutory financial statements for the preceding 3 financial years of each company (audited, where required by that Part, in accordance with *Part 6*);
- (c) the explanatory report relating to each of the companies involved in the division referred to in *section [491]*;
- (d) if such a report is required to be prepared by that section, the expert's report relating to each of the companies involved in the division referred to in *section [492]*;
- (e) each division financial statement, if any, in relation to one or, as the case may be, more than one of the companies involved in the division, required to be prepared by *section [493]*.

(2) For the purposes of *paragraph (b) of subsection (1)* —

- (a) if any of the companies involved in the division has traded for less than 3 financial years before the date of the common draft terms of division, then, as respects that company, that paragraph is satisfied by the statutory financial statements for those financial years for which the company has traded (audited, where required by that Part, in accordance with *Part 6*) being made available as mentioned in that subsection by each of the companies involved in the division; or
- (b) if, by reason of its recent incorporation, the obligation of any of the foregoing companies to prepare its first financial statements under *Part 6* had not arisen as of the date of the common draft terms of division, then the reference in that paragraph to the financial statements of that company shall be disregarded.

(3) The provisions of *subsection (1)* shall apply in the case of each of the companies involved in the division for a period of 30 days before the date of the passing of the resolution on the common draft terms of division by each such company in accordance with *section [496]*.

(4) *Section [127](1)* (access to documents during business hours) shall apply in relation to *subsection (1)* as it applies in relation to the relevant provisions of *Part 4*.

(5) ~~Subject to *subsection (6)*, *subsection (1)*~~*Subsection (1)*<sup>365</sup> shall not apply in relation to a company involved in a division if it publishes free of charge on its website the documents specified in that subsection for a continuous period of at least 2 months, commencing at least 30 days before the date of the general meeting which, by virtue of *section [496]*, is to consider the common draft terms of division and ending at least 30 days after that date.

[...] <sup>366</sup>

(16) Where, in the period referred to in *subsection (5)*, access to the company's website is disrupted for a continuous period of at least

<sup>365</sup> [Substituted by point 59 of Seanad Report Amendments.](#)

<sup>366</sup> Deleted by point 100 of Seanad Committee Amendments.

24 hours or for separate periods totalling not less than 72 hours, the period referred to in *subsection (5)* shall be extended for a period corresponding to the period or periods of disruption.

([7]) A reference in this section to statutory financial statements shall be deemed to include a reference to a directors' report and a reference to auditing shall, in the case of such a report, be read as a reference to the operation referred to in *section [336](5)*.

**General meetings of companies involved in a division.**

[496]. (1) In this section –

- (a) a reference to a general meeting, without qualification, is a reference to a general meeting referred to in *subsection (2)*;
- (b) a reference to a successor company does not include a reference to a new such company formed for the purposes of the division.

(2) Subject to *subsection (6)*, the subsequent steps under this Chapter in relation to the division shall not be taken unless the common draft terms of division have been approved by a special resolution passed at a general meeting of each of the companies involved in the division, being a meeting held not earlier than 30 days after the date of the publication by the company of the notice referred to in *section [494](2)(b)*.

(3) Subject to *section [497](2)*, the notice convening that meeting shall contain a statement of every shareholder's entitlement to obtain on request, free of charge, full or, if so desired, partial copies of the documents referred to in *section [495](1)* (and, accordingly, every shareholder has, subject to the foregoing provision, that entitlement).

(4) The directors of the transferor company shall inform—

- (a) the general meeting of that company; and
- (b) as soon as practicable, the directors of the successor companies,

of any material change in the assets and liabilities of the transferor company between the date of the common draft terms of division and the date of that general meeting.

(5) The directors of the successor companies shall inform the general meetings of those companies of all changes of which they have been informed pursuant to *subsection (4)*.

(6) Approval, by means of a special resolution, of the common draft terms of division is not required in the case of a particular successor company in a division by acquisition if the conditions specified in *subsection (7)* have been satisfied in relation to that successor company (the "particular successor company").

(7) The conditions referred to in *subsection (6)* are the following:

- (a) the notice required to be published under *section [494](2)(b)* was published in accordance with *section [494](2)(b)* in respect of the particular successor company before the commencement of the period (in this subsection referred to as the "notice period") of 30 days before the date of the passing by the transferor company of the resolution referred to in this section;
- (b) the members of the particular successor company were entitled, during the notice period—
  - (i) to inspect, at the registered office of that successor company, during ordinary hours of business, copies of the documents referred to in *section [495](1)*; and

(ii) to obtain copies of those documents or any part of them on request;

(c) the right, conferred by *subsection (8)*, to requisition a general meeting has not been exercised during the notice period.

(8) One or more members of the particular successor company who hold or together hold not less than 5 per cent of the paid-up capital of the company which carries the right to vote at general meetings of the company (excluding any shares held as treasury shares) may require the convening of a general meeting of the company to consider the common draft terms of division, and *section [178](3) to (7)* apply, with any necessary modifications, in relation to the requisition.

**Electronic means of making certain information available for purposes of *section [496]*.**

[497]. (1) For the purposes of *section [496]*, but subject to *subsection (2)*, where a shareholder has consented to the use by the company of electronic means for conveying information, the copies of the documents referred to in *section [495](1)* may be provided, by electronic mail, to that shareholder by the company and the notice convening the general meeting referred to in *section [496](2)* shall contain a statement to that effect.

(2) The entitlement referred to in *section [496](3)* shall not apply where, for the period specified in *subsection (3)*, copies of the documents referred to in *section [495](1)* are available to download and print, free of charge, from the company's website by shareholders of the company.

(3) The period referred to in *subsection (2)* is a continuous period of at least 2 months, commencing at least 30 days before the date of the general meeting which, by virtue of *section [496]*, is to consider the common draft terms of merger and ending at least 30 days after that date.

(4) Where, in the period referred to in *subsection (3)*, access to the company's website is disrupted for a continuous period of at least 24 hours or for separate periods totalling not less than 72 hours, the period referred to in *subsection (3)* shall be extended for a period corresponding to the period or periods of disruption.

**Meetings of classes of shareholder.**

[498]. (1) Where the share capital of any of the companies involved in the division is divided into shares of different classes the provisions referred to in *subsection (2)*, with the exclusions specified in *subsection (3)*, shall apply with respect to the variation of the rights attached to any such class that is entailed by the division.

(2) Those provisions are the provisions of *Chapter 4 of Part 3* on the variation of the rights attached to any class of shares in a company.

(3) There is excluded the following from the foregoing provisions: *sections [88](9) and [89]*.

**Purchase of minority shares.**

[499]. (1) Where the special resolution referred to in *section [496]* has been passed by each of the companies involved in the division

(or such of them as [are]<sup>367</sup> required by that section to pass such a resolution), a minority shareholder in the transferor company may, not later than 15 days after the relevant date, request the successor companies in writing to acquire his or her shares in the transferor company for cash.

(2) Where a request is made by a minority shareholder in accordance with [subsection(1)]<sup>368</sup>, the successor companies (or such one, or more than one of them, as they may agree among themselves) shall purchase the shares of the minority shareholder at a price determined in accordance with the share exchange ratio set out in the common draft terms of division and the shares so purchased by any successor company shall be treated as treasury shares within the meaning of *section [106]*.

(3) Nothing in this section limits the power of the court to make any order necessary for the protection of the interests of a dissenting minority in a company involved in a division.

(4) In this Chapter—

“minority shareholder”, in relation to the transferor company, means—

- (a) in a case where a successor company (not being a company formed for the purpose of the division) holds 90 per cent or more (but not all) of the shares carrying the right to vote at general meetings of the transferor company, any other shareholder in the company; or
- (b) in any other case, a shareholder in the company who voted against the special resolution;

“relevant date” means—

- (a) in relation to a minority shareholder referred to in *paragraph (a)* of the definition of “minority shareholder” in this subsection, the date of publication of the notice of delivery of the common draft terms of division under *section [494](2)(b)*; or
- (b) in relation to a minority shareholder referred to in *paragraph (b)* of that definition of “minority shareholder”, the date on which the resolution of the transferor company was passed.

#### **Application for confirmation of division by court.**

[500]. (1) An application under this section to the court for an order confirming a division shall be made jointly by all the companies involved in the division.

(2) The application shall be accompanied by a statement of the size of the shareholding of any shareholder who has requested the purchase of his or her shares under *section [499]* and of the measures which the successor companies propose to take to comply with the shareholder’s request.

#### **Protection of creditors and allocation of liabilities.**

[501]. (1) A creditor of any of the companies involved in a division who, at the date of publication of the notice under *section [494](2)(b)* is entitled to any debt or claim against the company, shall be entitled to be heard in relation to the confirmation by the court of the division under *section [503]*.

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<sup>367</sup> Substituted by point 101 of Seanad Committee Amendments.

(2) Without prejudice to *subsection (3)*, where –

- (a) a liability of the transferor company is not allocated by the common draft terms of division; and
- (b) it is not possible, by reference to an interpretation of those terms, to determine the manner in which it is to be allocated,

the liability shall become, jointly and severally, the liability of the successor companies.

(3) If provision is not made by the common draft terms of division for the allocation of a liability incurred by, or which otherwise becomes attached to, the transferor company on or after the date of those draft terms then, subject to any provision the court may make in an order under *section [503]*, the liability shall become, jointly and severally, the liability of the successor companies.

**Preservation of rights of holders of securities.**

[502]. (1) Subject to *subsection (2)*, holders of securities, other than shares, in the transferor company to which special rights are attached shall be given rights in one or more of the successor companies at least equivalent to those they possessed in the transferor company.

(2) *Subsection (1)* shall not apply—

(a) where the alteration of the rights in an successor company has been approved—

- (i) by a majority of the holders of such securities at a meeting held for that purpose; or
- (ii) by the holders of those securities individually;

or

(b) where the holders of those securities are entitled under the terms of those securities to have their securities purchased by a successor company.

**Confirmation order.**

[503]. (1) Where an application is made under *section [500]* to the court for an order confirming a division this section applies.

(2) The court, on being satisfied that—

(a) the requirements of this Chapter have been complied with;

(b) proper provision has been made for—

- (i) any minority shareholder in any of the companies involved in the division who has made a request under *section [499]*; and
- (ii) any creditor of any of the companies who objects to the division in accordance with *section [501]*;

(c) the rights of holders of securities other than shares in the transferor company are safeguarded in accordance with *section [502]*; and

(d) where applicable, the relevant provisions of *Chapter 4 of Part 3* on the variation of the rights attached to any class of shares in any of the companies involved in the division have been complied with,

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<sup>368</sup> Substituted by point 102 of Seanad Committee Amendments.

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

(3) In the case of an asset or liability (including any contractual right or obligation or the obligation to make any cash payment), references in subsequent provisions of this section to the relevant successor company or companies are references to such one or (as the case may be) more than one of the successor companies –

- (a) as provided for in respect of the matter concerned by the common draft terms of division; or
- (b) in the cases or circumstances specified in whichever of the following is applicable, namely, *section*

*[490](5)*

or *(6)* or *section [501](2)* or *(3)* –

- (i) subject to where it permits such provision by an order of the court, as provided for in that applicable provision (including, where relevant, as regards the nature of the joint liability) ; or
- (ii) as provided for in an order of the court under this section.

(4) The order of the court confirming the division shall, from the effective date, have the following effects—

- (a) each asset and liability of the transferor company is transferred to the relevant successor company or companies;
- (b) where no request has been made by minority shareholders under *section [499]*, all remaining members of the transferor company except any successor company (if it is a member of the transferor company) become members of the successor companies or any of them as provided by the common draft terms of division;
- (c) the transferor company is dissolved;
- (d) all legal proceedings pending by or against the transferor company shall be continued with the substitution, for the transferor company, of the successor companies or such of them as the court before which the proceedings have been brought may order;
- (e) the relevant successor company or companies is or are obliged to make to the members of the transferor company any cash payment required by the common draft terms of division;
- (f) every contract, agreement or instrument to which the transferor company is a party shall, notwithstanding anything to the contrary contained in that contract, agreement or instrument, be read and have effect as if—
  - (i) the relevant successor company or companies had been a party or parties thereto instead of the transferor company;
  - (ii) for any reference (however worded and whether express or implied) to the transferor company there were substituted a reference to the relevant successor company or companies; and
  - (iii) any reference (however worded and whether express or implied) to the directors, officers, representatives or employees of the transferor company, or any of them -
    - (I) were, respectively, a reference to the directors, officers, representatives or employees of the relevant successor company or companies or to such director, officer, representative or employee of that company or those companies as that company nominates or, as the case may be, those companies nominate for that purpose; or
    - (II) in default of such nomination, were, respectively, a reference to the director, officer, representative or

employee of the relevant successor company or companies who corresponds as nearly as may be to the first-mentioned director, officer, representative or employee;

(g) every contract, agreement or instrument to which the transferor company is a party becomes a contract, agreement or instrument between the relevant successor company or companies and the counterparty with the same rights, and subject to the same obligations, liabilities and incidents (including rights of set-off), as would have been applicable thereto if that contract, agreement or instrument had continued in force between the transferor company and the counterparty;

(h) any money due and owing (or payable) by or to the transferor company under or by virtue of any such contract, agreement or instrument as is mentioned in *paragraph (g)* shall become due and owing (or payable) by or to the relevant successor company or companies instead of the transferor company; and

(i) an offer or invitation to treat made to or by the transferor company before the effective date shall be read and have effect, respectively, as an offer or invitation to treat made to or by the relevant successor company or companies .

[5) The following provisions have effect for the purposes of subsection (4)—

(a) “instrument” in that subsection includes—

(i) a lease, conveyance, transfer or charge or any other instrument relating to real property (including chattels real); and

(ii) an instrument relating to personalty;

(b) paragraph (f)(ii) of that subsection applies in the case of references to the transferor company and its successors and assigns as it applies in the case of references to the transferor company personally;

(c) paragraph (g) of that subsection applies in the case of rights, obligations and liabilities mentioned in that paragraph whether they are expressed in the contract, agreement or instrument concerned to be personal to the transferor company or to benefit or bind (as appropriate) the transferor company and its successors and assigns.]<sup>369</sup>

[65) ~~Such~~ Without prejudice to subsections (7) and (8), such]<sup>370</sup> of the successor companies as is or are appropriate shall comply with registration requirements and any other special formalities required by law and as directed by the court for the transfer of the assets and liabilities of the transferor company to be effective in relation to other persons.

[7) There shall be entered by the keeper of any register in the State—

(a) upon production of a certified copy of the order under subsection (2); and

(b) without the necessity of there being produced any other document (and, accordingly, any provision requiring such production shall, if it would otherwise apply, not apply), the name of the relevant successor company (or, as appropriate, the names of the relevant successor companies) in place of the transferor company in respect of the information, act, ownership or other matter in that register and any document kept in that register.

<sup>369</sup> Inserted by point 60 of Seanad Report Amendments.

<sup>370</sup> Substituted by point 61 of Seanad Report Amendments (as substituted by No 116b of 2012).



(8) Without prejudice to the generality of subsection (7), the Property Registration Authority, as respects any deed (within the meaning of section 32 of the Registration of Deeds and Title Act 2006) registered by that Authority or produced for registration by it, shall, upon production of the document referred to in subsection (7)(a) but without the necessity of there being produced that which is referred to in subsection (7)(b), enter the name of the relevant successor company (or, as appropriate, the names of the relevant successor companies) in place of the transferor company in respect of such deed.

(9) Without prejudice to the application of subsection (7) to any other type of register in the State, each of the following shall be deemed to be a register in the State for the purposes of that subsection:

(a) the register of members of a company referred to in section 169;

(b) the register of holders of debentures of a public limited company kept pursuant to section 1121;

(c) the register kept by a public limited company for the purposes of sections ~~[10501048]~~ to ~~[10551053]~~;

(d) the register of charges kept by the Registrar pursuant to section 414;

(e) the Land Registry;

(f) any register of shipping kept under the Mercantile Marine Act 1955.<sup>371</sup>

(106) If the taking effect of the division would fall at a time (being the time ascertained by reference to the general law and without regard to this subsection) on the particular date appointed under subsection (2) that is a time that would not, in the opinion of the court, be suitable having regard to the need of the parties to co-ordinate various transactions, the court may, in appointing a date under subsection (2) with respect to when the division takes effect, specify a time, different from the foregoing, on that date when the division takes effect and, where such a time is so specified –

(a) the division takes effect on that time of the date concerned; and

(b) references in this section to the effective date shall be read accordingly.

#### **Certain provisions not to apply where court so orders.**

**[504].** Where the court makes an order confirming a division under this Chapter, the court may, if it sees fit for the purpose of enabling the division properly to have effect, include in the order provision permitting –

(a) the giving of financial assistance which may otherwise be prohibited under section [82];

(b) a reduction in company capital which may otherwise be restricted under section [84].

#### **Registration and publication of confirmation of division.**

**[505].** (1) If the court makes an order confirming a division, a certified copy of the order shall forthwith be sent to the Registrar by such officer of the court as the court may direct.

(2) Where the Registrar receives a certified copy of the order of the court in accordance with subsection (1), the Registrar shall –

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<sup>371</sup> Inserted by point 62 of Seanad Report Amendments.

- (a) on, or as soon as practicable after, the effective date - register that certified copy and the dissolution of the transferor company; and
- (b) within 14 days after the date of that delivery - cause to be published in the CRO Gazette notice that a copy of an order of the court confirming the division has been delivered to him or her.

**Civil liability of directors and experts.**

[506]. (1) Any shareholder of any of the companies involved in the division who has suffered loss or damage by reason of misconduct in the preparation or implementation of the division by a director of any such company or by the expert, if any, who has made a report under *section [492]* shall be entitled to have such loss or damage made good to him or her by—

- (a) in the case of misconduct by a person who was a director of that company at the date of the common draft terms of division — that person;
- (b) in the case of misconduct by any expert who made a report under *section [492]* in respect of any of the companies involved in the division — that person.

(2) Without prejudice to the generality of *subsection (1)*, any shareholder of any of the companies involved in the division who has suffered loss or damage arising from the inclusion of any untrue statement in any of the following, namely :

- (a) the common draft terms of division;
- (b) the explanatory report referred to in *section [491]*;
- (c) the expert's report, if any, under *section [492]*;
- (d) the division financial statement, if any, prepared under *section [493]*,

shall, subject to *subsections (3) and (4)*, be entitled to have such loss or damage made good to him or her –

- (i) in the case of the document or report referred to in *paragraph (a), (b) or (d)* - by every person who was a director of that company at the date of the common draft terms of division; or
- (ii) in the case of the report referred to in *paragraph (c)* - by the person who made that report in relation to that company.

(3) A director of a company shall not be liable under *subsection (2)* if he or she proves—

- (a) that the document or report referred to in *subsection (2)(a),(b) or (d)*, as the case may be, was issued without his or her knowledge or consent and that, on becoming aware of its issue, he or she forthwith informed the shareholders of that company that it was issued without his or her knowledge or consent; or
- (b) that as regards every untrue statement he or she had reasonable grounds, having exercised all reasonable care and skill, for believing and did, up to the time the division took effect, believe that the statement was true.

(4) A person who makes a report under *section [492]* in relation to a company shall not be liable in the case of any untrue statement in the report if he or she proves—

- (a) that, on becoming aware of the statement, he or she forthwith informed that company and its shareholders of the untruth; or
- (b) that he or she was competent to make the statement and that he or she had reasonable grounds for believing and did up to the time the merger took effect believe that the statement was true.

**Criminal liability for untrue statements in division documents.**

[507]. (1) Where any untrue statement has been included in –

- (a) the common draft terms of division;
- (b) the explanatory report referred to in *section [491]*; or
- (c) the division financial statement, if any, prepared under *section [493]*,

the following –

- (i) each of the persons who was a director of any of the companies involved in the division at the date of the common draft terms of division or, in the case of the foregoing explanatory report or division financial statement, at the time of the report's or statement's preparation; and
- (ii) any person who authorised the issue of the document,

shall be guilty of a category 2 offence.

(2) Where any untrue statement has been included in the expert's report prepared under *section [492]*, the expert and any person who authorised the issue of the report shall be guilty of a category 2 offence.

(3) In any proceedings against a person in respect of an offence under *subsection (1) or (2)*, it shall be a defence to prove that, having exercised all reasonable care and skill, the defendant had reasonable grounds for believing and did, up to the time of the issue of the document concerned, believe that the statement concerned was true.

