

Summary approval procedure

by *Ciarán Bolger*, Partner and *Amy McDermott*, Associate, *Arthur Cox LLP*

Practice notes | **Maintained** | Ireland

Scope of this note

This note gives an outline of **summary approval procedure** (SAP) under Chapter 7 of Part 4 of the *Companies Act 2014* (CA 2014). The SAP is a streamlined approval process used to validate certain transactions which would otherwise be prohibited under the CA 2014. This note looks at what those restricted transactions are and who may use the SAP.

The note considers the steps involved in the SAP, the potential liability for directors and the statutory filings needed with the Registrar of Companies (Registrar) (also interchangeably referred to as the Companies Registration Office (CRO)).

What is the **summary approval procedure**?

The SAP is a streamlined process that was introduced by the CA 2014 and enables certain companies (depending on the company type) to carry out certain restricted activities that said companies would otherwise be prohibited from undertaking or, in some cases, would require the consent of the Irish High Court (High Court) (see *Practice note, Trading Vehicles in Ireland*).

The seven restricted activities (Restricted Activities) are outlined below.

No	Restricted Activity
1	The domestic merger of certain companies (<i>section 464, CA 2014</i>)
2	The reduction of share capital (<i>section 84, CA 2014</i>)
3	The variation of share capital on a re-organisation (<i>section 91, CA 2014</i>)
4	The provision of financial assistance by a company to acquire its shares or shares in its holding company (<i>section 82, CA 2014</i>)
5	The treatment of a subsidiary's pre-acquisition profits or losses in a holding company's financial statements as profits available for distribution (<i>section 118, CA 2014</i>)
6	The entry into certain transactions in favour of directors and connected persons (for example, loans, guarantees, security) (<i>section 239, CA 2014</i>)
7	The start of a members' voluntary winding up (<i>section 579, CA 2014</i>)

A court approval process may also be used instead of the SAP for the first three activities, however, the SAP is generally viewed as a more efficient and cost-friendly manner for companies to approve the relevant Restricted Activities.

Who may use the SAP?

The SAP can be used by private limited companies (LTDs), designated activity companies (DACs), companies limited by guarantee and unlimited companies (ULCs).

For more information on LTDs, DACs and ULCs, see Practice notes:

- [Main characteristics of private limited companies \(Ireland\)](#).
- [Main characteristics of unlimited companies \(Ireland\)](#).

Public limited companies (PLCs) may only use the SAP for the following activities:

- The treatment of a subsidiary's pre-acquisition profits or losses in a holding company's financial statements as profits available for distribution.
- The entry into certain transactions in favour of directors and connected persons.
- The start of a members' voluntary winding up.

(Section 1002(4), CA 2014.)

For more information on PLCs, see [Practice note, Main characteristics of public limited companies \(Ireland\)](#).

For all other Restricted Activities, a public limited company must obtain the approval of the High Court.

Carrying out the SAP

The exact procedure will be dependent on the particular Restricted Activity. However, there are certain key steps that will apply to the SAP, including the following:

- A declaration by the directors as to the solvency of the company is required for each Restricted Activity (Declaration of Solvency) ([section 201\(b\), CA 2014](#)) and the specific details to be included in the Declaration of Solvency will vary depending on the nature of the Restricted Activity (see [Details to be included in declaration of solvency: table](#)). The Declaration of Solvency must be made by all or a majority of the directors at a directors' meeting not more than 30 days before the members' resolution is passed authorising the Restricted Activity ([section 202\(6\), CA 2014](#)).
- An independent person's report is required in the prescribed form for certain Restricted Activities (namely, the reduction of share capital, the variation of share capital on a reorganisation, the treatment of a subsidiary's pre-acquisition profits and a members' voluntary winding up) and the independent person's report must confirm that the Declaration of Solvency provided is not unreasonable. An independent person is a person who is qualified to be appointed as the statutory auditor of the company. ([Section 208, CA 2014](#).)
- Save in the case of mergers, within 30 days of the making of the Declaration of Solvency, a special resolution (that is, a resolution which is passed by members holding not less than 75% of the votes cast at the meeting ([section 191\(2\), CA 2014](#))) must be made by the members of the company approving the Restricted Activity ([section 202\(1\)\(a\)\(i\), CA 2014](#)). For mergers, a unanimous resolution is required ([section 202\(1\)\(a\)\(ii\), CA 2014](#)). The Restricted Activity must then be started within 12 months of the passing of the resolution (this is reduced to 60 days (or in some cases 30 days) where the SAP is used to deal with pre-acquisition profits ([section 202\(3\), CA 2014](#))).

If the special resolution is passed by members holding 90% or less in nominal value of voting shares, the company must wait 30 days before proceeding with the Restricted Activity. During that time, it is open to the members who did not vote in favour of the special resolution to apply to the High Court for its cancellation.

(Section 211, CA 2014.)

Details to be included in declaration of solvency: table

Contents	Transaction/arrangement						
	Merger*	Share capital reduction	Capital variation	Financial assistance	Treatment of pre-acquisition profits	Transactions involving directors	Members' voluntary winding-up
Circumstances in which the transaction is to be entered into	No *See Note (A)	Yes	Yes	Yes	No	Yes	No
Nature of transaction or arrangement	No	Yes	Yes	Yes	No	Yes	No
Person(s) to or for whom the transaction or arrangement is to be made	No	Yes	Yes	Yes	No	Yes	No
Purpose of transaction or arrangement	No	No	No	Yes	No	Yes	No
Nature of benefit to accrue to the company	No	No	No	Yes	No	Yes	No
Declarants to state that they have made full enquiry into the affairs of the company and have formed an opinion that the company can pay its debts as they fall due for the following 12-month period	Yes	Yes	Yes	Yes	Yes* *See Note (B)	Yes	Yes
Total amount of assets/liabilities of the company at the latest practicable date not more than three months	Yes	Yes	Yes	No	Yes* *See Note (C)	No	Yes

before declaration							
Anticipated assets/ liabilities statement of the company after the Restricted Activity is carried out	No	Yes	Yes	No	No	No	No
State that the declarants do not have actual or constructive notice that the company will incur any material, extraordinary, future liability within the 12 months after making declaration	No	Yes	Yes	No	No	No	No
Amount of the profits or losses that will be subject to the alternative treatment and the amount so stated is referred as the "proposed distribution"	No	No	No	No	Yes	No	No
Note (A)	<p>In the case of a merger, the Declaration of Solvency shall have no effect unless it is accompanied by a document prepared by the declarants either:</p> <ul style="list-style-type: none"> • Confirming that the common draft terms of merger provide for such particulars of each relevant matter as will enable each of the prescribed effects provisions (as defined in the CA 2014) to operate without difficulty in relation to the merger. • Specifying such particulars of each relevant matter as will enable each of those effects provisions to operate without difficulty in relation to the merger. <p>(Section 209(1), CA 2014.)</p>						
Note (B)	<p>Declarants to state that they have made full enquiry into the affairs of the company and have formed an opinion that, if the company were to make the proposed distribution within two months after the date of the making of the declaration, the company would be able to pay its debts as they fall due during the 12-month period after the date of that distribution (section 205(1)(c), CA 2014).</p>						

Note (C)	Total amount of assets and liabilities of the company are as stated in the company's last statutory financial statements or interim financial statements at the latest practicable date not more than three months before declaration (<i>section 205(1)(b), CA 2014</i>).
----------	--

Director's liability

Directors must ensure that they have reasonable grounds for making the confirmation as to solvency of the company. Where a Declaration of Solvency has been made without reasonable grounds for doing so, it is open to the High Court, on application by a liquidator, creditor, Director of Corporate Enforcement, member or contributory of the company, to declare that each director who made the Declaration of Solvency is personally liable without limitation for all the debts and liabilities of that company.

A director is presumed to have made the confirmation as to solvency contained in the Declaration of Solvency without reasonable grounds for doing so where the company is wound up in the 12 months following the making of the Declaration of Solvency and the debts of the company were not discharged or provided for in full within that period.

(*Section 210, CA 2014.*)

Filing requirements

Chapter 7 of Part 4 of the CA 2014 requires the Declaration of Solvency to be delivered to the Registrar not later than 21 days after the start of the Restricted Activity. A failure to deliver the Declaration of Solvency will result in it being invalid and any transaction entered into as part of the Restricted Activity is voidable at the instance of the company against any person (whether a party to the transaction or not) who had notice of the facts which constitute that contravention. However, an out of time filing may be cured by an application to the High Court.

The special resolution must be delivered to the Registrar within 15 days of the date on which it is passed (*section 198(1), CA 2014*). A failure to file the special resolution within 15 days is a category 4 offence (as more particularly set out in the CA 2014) for the company and any officer who is in default. A person guilty of a category 4 offence shall be liable, on summary conviction, to a Class A fine, which is currently a fine not exceeding EUR5,000 (*section 198(5), CA 2014*).

END OF DOCUMENT