LAW SOCIETY SUBMISSION

LAW SOCIETY OF IRELAND

FURTHER COMMENTARY AND PROPOSALS FOR AMENDMENTS TO THE COMPANIES ACT 2014 (SUBMISSION NO. 2)

DEPARTMENT OF JOBS, ENTERPRISE AND INNOVATION

JUNE 2016

1. Introduction

1.1 The Law Society of Ireland (the “Law Society”) wishes to make the following submissions in the interests of clarifying some of the provisions, and removing technical anomalies, in the Companies Act 2014 (‘the Act’).

1.2 Recommendations and proposals within this submission include:

- Buyback of shares by an Irish PLC listed on the UK Alternative Investment Market.
- Absence of a provision similar to subsection (2) of section 62 of the Companies Act 1963 (permitted use of share premium account).
- Disapplication of Section 161(7) and 162 of the Act to Companies Limited by Guarantee (“CLG’s”).
- Distributions and Reductions of Capital.
- Section 82 (6)(h).
- Section 275 of the Act.
- Section 459(7), Schedule 6 para (11)2(a) and SI 295/2006 reg 25.

2. Buyback of shares by an Irish PLC listed on the UK Alternative Investment Market

2.1 The Issue

2.1.1 It has come to the Law Society’s attention that there is an anomaly in the Act concerning the proper classification of a buy-back of shares by an Irish-incorporated PLC, with a listing only on the Alternative Investment Market in the UK (AIM), or which is listed on AIM and another securities market, and which, in either case, wishes to effect the buy-back on the AIM.

2.1.2 AIM is a dedicated growth market for small and medium-sized companies, established in 1995 as part of London Stock Exchange. It is recognised internationally as a leading market specifically designed to help growing companies to access capital from the public market. According to the London Stock exchange, AIM includes companies operating in more than 100 countries and with a combined market capitalisation of over £70 billion.

2.1.3 AIM is, like its Irish equivalent, the Enterprise Securities Market (ESM), not an EU/EEA "regulated market", but is rather a "multilateral trading facility", or MTF.

2.1.4 A sizeable number of Irish-incorporated PLCs are listed on AIM. Some of these also have listings on other stock exchanges.

2.1.5 The problem for such companies is that a buy-back of shares by an Irish-incorporated PLC, with a listing only on AIM, or which is listed on AIM and another securities market but which wishes to effect the buy-back on AIM (e.g. because there is greater liquidity in the shares on that market), would appear to be neither:

(1) An "overseas market purchase" as defined by Section 1072(2) of the Act,
(2) A "market purchase" as defined by Section 1072(1) (b), nor
(3) An "off-market purchase" as defined by Section 1072(1)(a).

2.1.6 Such a purchase would not be an "overseas market purchase", because the shares would not be purchased on a "regulated market", as defined by s. 1000 of the Act (as AIM is not a "regulated market"), or on another market recognised for the purposes of Section 1072, because AIM has not been recognised by S.I. 214 of 2015, although it is a well-recognised and significant stock market outside the State. That S.I. recognises only The LSE- Regulated Market, the NYSE and NASDAQ. AIM, which is not a regulated market but is rather a "multilateral trading facility", or MTF, has not been so recognised by any other S.I. for s 1072 purposes.

2.1.7 Such a purchase would also not be a "market purchase" because the shares would not be purchased on a "securities market", as defined, within the State.

2.1.8 Finally, such a purchase would not appear to be an "off-market purchase" because, although in our example, the shares would be purchased by the PLC on a "securities market" as defined by Section 1072 (as AIM is a MTF), those shares would normally be subject to a marketing arrangement on that securities market, as they would be listed on AIM (see s. 1072(1) (a) and the definition of a "marketing arrangement" in s 1072(3).

2.2 Consequences for Irish companies

2.2.1 The above position is highly anomalous because Chapter 5 of Part 17, and any necessary statutory instrument made pursuant to s. 1072, were presumably intended to classify any buy-backs by Irish PLCs with listings on the key markets here, in the UK or in the U.S., as one or other of these three types of purchase.

2.2.2 From a governance and compliance standpoint, by not including purchases of own shares by a PLC carried out on AIM within the "overseas market purchase" definition, there is a significant doubt as to whether the PLC must comply with other provisions of the Act, with which presumably it should be complying- e.g. s 1080 (duty on PLC to notify overseas market purchase on its website etc) or s 1079 (duty to make returns to CRO within the reduced time period of 3 days of the overseas market purchase).

2.3 Recommendation

2.3.1 The Law Society is unaware of any good reason to exclude AIM from the list of recognised markets and it may be that this was an oversight. The solution for this, in our view, is for the Minister to make a new S.I., so as to recognise AIM for the purposes of s 1072(2)(a)(ii). A buy- back of own shares by a PLC on AIM would then be regarded as an "overseas market purchase" for the purposes of s 1072, 1073 and 1074 and related sections.

3. Absence of a provision similar to section 62(2) of the Companies Act 1963 (permitted use of share premium account)

3.1 The Issue

3.1.1 Section 71(5) of the Act continues the obligation on companies, originally contained in Section 62(1) of the Companies Act 1963 (the '1963 Act'), to create a share premium account reflecting any value received in respect of the allotment of shares in excess of the nominal value of those shares, subject to certain exceptions. The excess value now forms part of the company's "undenominated capital", which is defined by Section 64 of the Act to mean the amount of a company's company capital which is in excess of the nominal value of its issued shares. Consequently, premiums on issued shares form part of a company's company capital, which the company is permitted to reduce if it wishes pursuant to section 84 of the Act either by using the Summary Approval Procedure, or by passing a special resolution that is confirmed by the High Court.

3.1.2 However, <u>Section 71 has not re-enacted Section 62(2) of the 1963 Act</u>. Section 62(2) enabled a company which had set up a share premium account to use these premiums for a number of purposes, including paying up unissued shares to be allotted to members as fully paid bonus shares, and writing off the company's preliminary expenses or the expenses of, or commission paid, or discount allowed on any issue of shares or debentures.

3.1.3 Section 126 of the Act, although an "optional" provision in the Act, in effect preserves the ability of a company to apply any share premiums (forming, as they do, part of its undenominated capital) in paying up unissued shares to be allotted to members as fully paid bonus shares. However, for some reason there is no provision in the Act which corresponds to that part of Section 62(2) of the 1963 Act which enabled a company to use the share premium account to write off the company's preliminary expenses or the expenses of, or commission paid, or discount allowed on any issue of shares or debentures.

3.1.4 The result is that a company which has created a share premium account cannot apply any of the sums in that account in writing off the company's preliminary expenses or the expenses of or commission paid or discount allowed on any issue of shares or debentures, unless it carries out a formal reduction of company capital pursuant to Section 84 of the Act either by using the Summary Approval Procedure (**SAP**), or by passing a special resolution that is confirmed by the High Court.

3.1.5 It was not necessary, under the Companies Acts 1963-2013, for a company to have to carry out a formal capital reduction, in order to be able to write off the company's preliminary expenses, or the expenses of or commission paid or discount allowed on any issue of shares or debentures, and it is not clear to us why this should now be the case. Any company wishing to utilise the SAP or go to Court to reduce its company capital will inevitably have to engage lawyers and accountants in order to do so, thereby incurring costs and expenses which can be significant. An example of such a cost will be the requirement to prepare the necessary statutory auditor's report in connection with a capital reduction using the SAP. In addition, a capital reduction is a significant corporate transaction which takes time to carry into effect. The directors must also bear in mind the criminal and civil consequences for breach of the relevant provisions regulating the use of the SAP, which is not to be undertaken lightly.

3.2 Consequences for Irish companies

3.2.1 The result of not continuing a provision in the Act as outlined above has been to reduce the flexibility for companies in regard to the use of share premiums that existed prior to the coming into force of the Act. The availability of the SAP to reduce the undenominated capital/share premium is not an ideal substitute for private companies, for the reasons set out above.

3.2.2 More significantly, where the company concerned is a PLC, the SAP is unavailable for this purpose. Consequently the PLC will have no option but to apply to the High Court so as to reduce its company capital in order to write off these costs and expenses.

3.2.3 Further, if a company does not avail of the SAP or seek the approval of the High Court to effect a capital reduction, we understand that from an accounting perspective, the effect will be to require the amount of expenses to be offset against the company's distributable profits, thereby reducing the amount of such profits available to the company's members and creditors.

3.2.4 It should be noted that in the UK a provision similar to subsection (2) of Section 62 of the 1963 Act was retained in Section 610 (2) of their Companies Act 2006, having been in previous UK Companies Acts. Consequently, UK-incorporated companies continue to be able to utilise the share premium account to write off the company's preliminary expenses etc. without having to engage in a formal reduction of capital.

3.3 Recommendation

3.3.1 For the foregoing reasons, the Law Society recommends that the flexibility for Irish companies, previously provided Section 62(2) of the 1963 Act, be restored as soon as practicable in the Act, by making an appropriate amendment to Section 71 to reinstate this power.

3.3.2 In the absence of an identifiable policy rationale, it is likely that the omission of a comparable Section 62(2) in the 2014 Act was unintended by the drafters and the legislature.

4. Disapplication of Sections 161(7) and 162 of the Act to Companies Limited by Guarantee ("CLG's)

4.1 Section 161(7)

4.1.1 Previously Regulation 40 of Table C under the Companies Act 1963, which applied to CLG's save as modified, provided that:-

> "a director may vote in respect of any contract in which he is interested or any matter arising thereout".

4.1.2 Section 161(7) of the Act, subject to the provisions of the Act, permits a director to vote in respect of any contract, appointment or arrangement in which he or she is interested and he or she shall be counted in the quorum present at the meeting.

4.1.3 Section 1173(5) of the Act disapplies those sections of the Act as set out in the Table in Part 18 to CLG's. Section 161 (7) of the Act is one of the sections of the Act which is disapplied to CLG's.

4.1.4 The logic for the initial disapplication of Section 161(7) of the Act may have stemmed from the fact that the majority of CLG's are used by Charities, Clubs and not for profits organisations and the belief that having Section 161(7) of the Act disapplied in the first instance was the better default position. The disapplication of section 161(7) of the Act to CLG's puts CLG's in general at a disadvantage, when compared to the CLS/DAC company type.

4.1.5 In particular, with Owner Management Companies ("OMC") which are usually CLG's there is often a need for a developer-director at the development stage when the OMC is under its control to be able to vote in respect of any contract in which he is interested and the disapplication of Section 161(7) to CLG's would not allow this.

4.1.6 In previous submissions made by the Law Society the Minister was asked to reconsider the disapplication of section 161(7) of the Act to DAC's and this was rectified in the Act as enacted with the result that Section 161(7) of the Act is no longer disapplied in relation to DAC's however we do not believe that at the time the impact of the disapplication of Section 161(7) of the Act to CLG's was considered.

4.1.7 It is noted in contrast to the position of CLG's that while Section 161(7) of the Act continues to be disapplied to PLC's under the Table in Part 17 of the Act that Section 1113 of the Act specifically deals with the voting by directors of a PLC in respect of certain matters.

4.1.8 Section 128 of the Act - whereby a company can have one director - is disapplied to CLG's. However Section 1194 of the Act specifically provides that a CLG must have at least 2 Directors and that nothing in Parts 1-14 of the Act in relation to having a sole director shall apply to a CLG.

4.1.9 While there is an argument to be made that section 161(7) of the Act (which the Act provides at Section 157 is a provision that applies save where the constitution provides otherwise - but is then specifically disapplied in the Table at Part 18 to CLG's) could be reapplied in the case of a CLG, as there is no mandatory prohibition on a director voting on contracts in Part 18 of the Act. Taking this approach allows for ambiguity and uncertainty and the Law Society believes the position should be clarified.

4.1.10 The Law Society recommends that the disapplication of Section 161(7) of the Act to CLG's be removed.

4.2 Section 162

4.2.1 Section 162 of the Act provides that;-

> "A director of a company may hold any other office or place of profit under the company (other than the office of statutory auditor) in conjunction with his or her office of director for such period and on such terms as to remuneration and otherwise as the directors of the company may determine"

4.2.2 Section 162 of the Act is also disapplied to CLG's by Section 1173 (5) of the Act.

4.2.3 Again the logic for the initial disapplication of Section 162 of the Act may have stemmed from the fact that the majority of CLG's are used by Charities, Clubs and not-for-profit organisations and the belief that having Section 162 of the Act disapplied in the first instance was the better default position. This may have been due to the fact that the Revenue Commissioners do not as a rule permit the holding of a paid office by a director of a company seeking charitable status for tax purposes.

4.2.4 The disapplication of Section 162 of the Act to CLG's creates a doubt as to whether a director of a CLG may lawfully hold any other "office or place of profit" under the company. Finance directors who are paid a salary would fall into the category of directors holding such an "office or place of profit", and while there is an express provision under Section 159 of the Act for managing directors which is not disapplied to the CLG, at the very least this disapplication of Section 162 of the Act is anomalous and creates a doubt as to other paid positions.

4.2.5 By way of example it is often the case that organisations such as Chambers of Commerce take the legal form of a CLG but do not hold the Revenue Charitable exemption. The disapplication of Section 162 to CLG's would appear to suggest that a CLG will not be able to have member on its board who is also in a position of paid employment when in practice this is often the case.

4.2.6 In previous submissions made by the Law Society the Minister was asked to reconsider the disapplication of section 162 to DAC's and this was rectified in the Act.

4.2.7 Again there is the argument to be made to the effect that a CLG may nevertheless include disapplied provisions in their constitution because its members have a right to amend their constitution at any time. However it must be doubtful that an express disapplication of relevant powers provided for in the Act can simply be bypassed by the taking of such a step, as this would call into question the nature and effect of any express statutory disapplication of a provision of the Act where there is no express right granted by the Act to reintroduce such disapplied powers by another route.

4.2.8 To prevent ambiguity and uncertainty the Law Society recommends that the disapplication of Section 162 of the Act to CLG's be removed.

5. Distributions and Reductions of Capital

5.1 The Companies (Amendment) Act, 1983, Section 45(1), provided that "A company shall not make a distribution except out of profits available for the purpose". Section 51(2) defined "distribution", and paragraph (c) of that sub-section provided for two exceptions, being (i) the reduction of share capital by a company by paying off paid up share capital; and (ii) the reduction of share capital by extinguishing or reducing all or part of a member's' liability on shares not fully paid up.

5.2 Under the 2014 Act (the "Act"), Section 117(1) again provides that a company shall not make a distribution except out of profits available for the purpose. However Section 123 in defining "a distribution" no longer contains the two exceptions referred to above dealing with reduction of capital. The exceptions were included in earlier drafts of the Bill but were taken out at a very late stage before enactment of the 2014 Act.

5.3 Because of the width of the definition of “a distribution” it now appears that a reduction of capital involving a payment to the shareholders or the extinguishing of any liability on their shares is a distribution and therefore requires the Company to have distributable profits of an amount at least equal to the amount to be paid off the share capital or of the liability to be extinguished or reduced, as the case may be.

5.4 This interpretation would seem to be bolstered by Section 117(9) which provides that in the case of a reduction in capital which does not involve payment out to shareholders, the resulting reserve is to be treated as a realised profit.

5.5 The fact that Section 84(1)(c) provides that a company can “… pay off any paid up share capital…” without making reference to a requirement to have distributable reserves to do so does not itself mean that that requirement to have distributable profits in both of these cases does not apply.

5.6 When the rules on distributions and realised profits were originally introduced in 1983, with the enactment of the Companies (Amendment) Act of that year, it was recognised that paying off share capital or reducing or extinguishing a liability on shares should logically be exceptions to the definition of a "distribution". We cannot see any reason why that should not have continued under the Act and indeed that continues to be the case under the equivalent U.K. Company Law provisions on distributions. The effect of the 2014 amendment to the definition of a "distribution" is to require a company to find distributable profits in order to be able to lawfully reduce or extinguish the liability of members in respect of any unpaid shares, or pay off paid up capital, as permitted by section 84 of the Act, and this does not appear to be necessitated by any provision of the Act, or by any common law capital maintenance principles.

5.7 Therefore, the change in the law effected by the Act appears to reduce the flexibility which was available to companies under the now-repealed 1983 Act, and could be potentially very problematic, in some cases at least, in that a limited company is now obliged to write down distributable reserves in such cases. This could make the procedures under section 84 unworkable in many cases - for example, if the company has insufficient distributable reserves for this purpose, or has such reserves but does not want to use them up in this way.

5.8 A reason for the removal of the exceptions was given in the Explanatory Memorandum; however that refers to the restriction imposed by section 117 (3) and suggests that the removal of the exceptions was necessary in order to ensure “consistency” with that subsection. However, it seems to us that section 117 (3) is not relevant as that subsection addresses the use of unrealised profits in paying up unpaid amounts on shares. The typical reason behind a company deciding to reduce, or extinguish, the liability of members in respect of unpaid shares, is because the company has decided that it no longer needs to call on those members to pay up all, or any, amounts unpaid on their shares, because the company is already adequately capitalised from other sources. There is no question of a company wishing to *pay up* any of the amounts unpaid on its shares in such circumstances, whether through the use of unrealised profits or otherwise and therefore Section 117 (3) appears irrelevant in this context.

5.9 The Law Society therefore submits that Section 123 of the Act be amended so as to include the exceptions to the definition of “distribution” which were previously contained in Section 51 (2)(c) of the Companies (Amendment) Act, 1983.

6. Section 82 (6)(h)

6.1 The Law Society has identified a difficulty which is arising in practice in relation to Section 82 (6)(h) of the Act. Section 82(2) contains a general prohibition on a company giving financial assistance for the purposes of an acquisition of shares in itself or its holding company.

6.2 Section 82 (6) sets out a list of transactions which are excluded from that general prohibition and paragraph (h) of that sub-section seeks to exclude refinancings of previous transactions which were themselves excluded from the prohibition because they were entered into in accordance with the Summary Approval Procedure set out in Section 202 (referred to below as a “Previously Approved Transaction”).

6.3 A “refinancing” is not defined but the language of paragraph (h) indicates that it is, or includes, a transaction which effects “that which is commonly known as a refinancing”. The view being adopted by legal practitioners is that there is a lack of clarity as to what is a refinancing and that it is necessary to await a judicial interpretation of “refinancing” following the hearing of oral evidence as to what in the banking/financial sector is commonly known as a refinancing.

6.4 The effect of this is Section 82 (6)(h) is being widely treated as a *dead letter* since parties to refinancing transactions feel obliged to effect same in accordance with the Summary Approval Procedure notwithstanding the clear intent of the legislature that such transactions be exempt from that procedure.

6.5 The Law Society would propose therefore that paragraph (h) be amended to give greater clarity as to what is a refinancing for the purposes of the paragraph. It is accepted that it would be difficult to provide an exhaustive definition of a refinancing but it should certainly be possible to provide that “refinancing” is to be regarded as including certain specified transactions. These would include bona fide transactions effected by reason of changes in circumstances since the entry into the Previously Approved Transaction and which consist of:-

(a) new borrowing for the purpose of repaying (in whole or in part) a liability arising as a result of a Previously Approved Transaction; and/or

(b) the alteration of the terms or conditions of a Previously Approved Transaction.

6.6 The adoption of this suggestion would require the amendment of paragraph (h) to incorporate the text in italics below so that the revised paragraph (h) would read as follows:-

<u>New text of Section 82 (6)(h)</u>

"(h) the giving of financial assistance:-

(i) by means of a loan or guarantee, the provision of security or otherwise to discharge the liability under, or effect that which is commonly known as a refinancing of, any arrangement or transaction that gave rise to the provision of financial assistance, being financial assistance referred to in subsection (2) that has already been given by the company in accordance with the Summary Approval Procedure or section 60(2) of the Act of 1963; or

(ii) by means of any subsequent loan or guarantee, provision of security or otherwise to effect a refinancing of—

a. refinancing referred to subparagraph (i); or

b. refinancing referred to in this subparagraph that has been previously effected (and this subparagraph shall be read as permitting the giving of financial assistance to effect such subsequent refinancing any number of times);

and, without prejudice to the generality of the foregoing, a refinancing within the meaning of this paragraph shall be deemed to include-

1.1 (A) new borrowing for the purpose of repaying (in whole or in part) a liability arising as a result of an arrangement or transaction previously approved in accordance with the Summary Approval Procedure or section 60(2) of the Act of 1963; and

(B) altering any of the terms, conditions or covenants of any loan, guarantee, or security entered into pursuant to or in connection with any such previously approved transaction."

7 Section 275

7.1 Section 38(1) of the Act provides that a LTD shall have "full and unlimited capacity to carry on or undertake any business or activity, do any act or enter into any transaction". Notwithstanding this section, Section 18 expressly states that such a

LTD “**shall not** carry on the activity of a credit institution or an insurance undertaking”. The definition of a “credit institution” contained in Part 6 of the Act at section 275 includes, inter alia, a company or undertaking “engaged in the business of…granting credit for its own account”. Accordingly, where it is intended that the Company will grant credit / loans (albeit if this is only to group companies), this activity would appear to fall within this definition of a “credit institution”. On this basis it appears that there is doubt as to whether an LTD can lend money on its own account.

The Law Society understands that the issue with s 275 has already been mentioned to both the Department and the Central Bank of Ireland with a view to an appropriate amendment being made to clarify that only companies regulated as credit institutions will be included in the definition of “credit institution” in the Act.

8. Section 459(7), Schedule 6 para 11(2)(a) and SI 255/2006 reg 25

8.1 The statutory procedure for the squeeze-out of minorities is contained in SI 255/2006, the transposition of the EU Takeovers Directive 2004/25/EC rather than under the Act. The Directive applies to listed companies, the Act applies to all other companies. SI 255/2006, which transposes the Directive requires the following:

> 25.(1) Where a notice has been given by an offeror ... the offeror shall, before the expiration of 1 month from the date of the giving of the notice –
>
> (a) transmit to the offeree company a copy of the notice together with subject to paragraph (3), an instrument of transfer of the securities of the dissenting security holders executed on behalf of the dissenting security holders as transferor by any person appointed by the offeror (being either the offeror or a subsidiary of the offeror or a nominee of the offeror or of such a subsidiary), and,
>
> (b) pay to or vest in the offeree company the amount or other consideration representing the price payable by the offeror for the beneficial ownership of the securities which by virtue of Regulation 23 the offeror is entitled to acquire.
>
> (4) Any sums received by the offeree company under this Regulation shall be paid into a separate bank account and any such sums and any other consideration so received shall be held by the company on trust for the several persons entitled to the securities in respect of which the said sums or other consideration were respectively received.

8.2 Section 459(7) of the Act, which applies to unlisted companies only, has language very similar to the above but with the additional provision that after 7 years the money transfers to the Minister for Public Expenditure and Reform.

8.3 However Regulation 22(2) of SI 255/2006 provides "Section 204 of the Companies Act 1963 shall not apply to a bid for a company or other body corporate falling within paragraph (1) in so far as it relates to securities."

8.4 Paragraph 11(2)(a) of Schedule 6 to the Companies Act 2014 provides " ...(a) the reference in Regulation 22(2) of the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006 (S.I. No. 255 of 2006) to section 204 of the Act of 1963 shall be read as a reference to Chapter 2 of Part 9;" meaning that s 459(7) does not apply and the ability to transfer the money to the Minster for Public Expenditure and Reform does not apply.

8.5 The Law Society submits that this is an anomaly that ought to be fixed.

We hope that the Department will find the above comments constructive and helpful. The Law Society will be happy to engage further with the Department if required.

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