

LAW SOCIETY SUBMISSION



FURTHER COMMENTARY AND PROPOSALS FOR AMENDMENTS TO THE COMPANIES ACT 2014 (SUBMISSION NO. 3)

DEPARTMENT OF JOBS, ENTERPRISE AND INNOVATION

OCTOBER 2016

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

1. Introduction

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

1.2 Recommendations and issues covered within this submission include:

- Difficulties caused by the mandatory nature of s183(5) and (8).
- Difficulties caused by the mandatory nature of s184.
- Limitations of the merger procedure under Part 9 of the Act.
- Section 480 (5) to (8) – registers in the State.
- Error in s167.
- Error in s1205 – Proxies.
- Requirement to make a notification in respect of rights to subscribe for shares.
- The EC (Public Limited Companies Subsidiaries) Regulations 1997.
- Section 471 – Domestic Mergers.

2. Section 183(5) and section 183(8)

2.1 Summary

2.1.1 Until the commencement and entry into force of the Act, provisions equivalent to section 183(5) and section 183 (8) were effectively "optional" provisions, in that Irish companies were always entitled, if they so wished, to include alternative provisions in relation to the depositing of instruments of proxies and powers of attorney or other relevant documentation with the company or its representatives, either within the State or outside the State. However, section 183(5) is now a mandatory provision of Irish law, meaning that its provisions with regard to these matters concerning proxies cannot be derogated from, even by including by the company including different provisions in its constitution. By virtue of section 183(8), which is also a mandatory provision, failure to comply with the strict terms of section 183(5) will render the instrument of proxy invalid. In such circumstances, if the provisions are not complied with, there could be a serious doubt as to the validity of any votes purportedly given pursuant thereto.

- 2.1.2 The mandatory nature of these provisions has already caused problems for some Irish companies including Irish PLCs, in particular those with U.S. listings. Unless the problem is rectified by restoring the status quo ante, as suggested in this submission, it is likely to continue to raise complications both for existing and new Irish companies, including those seeking to raise funds from U. S. investors and list on U.S. markets.
- 2.1.3 It is our strong recommendation therefore that these two subsections be prefaced with words such as "Unless the company's constitution otherwise provides" (which is the approach taken in relation to Section 183(3), for example) in order to ensure that these provisions can again be treated as optional provisions, rather than as mandatory provisions of the Act.

2.2 Background

- 2.2.1 Section 183(5) of the Act is derived in part from Regulation 69 in Part 1 of Table A in the first schedule to the now-repealed Companies Act 1963, with modifications. The subsection provides that the instrument of proxy, and the power of attorney or other authority under which it is signed, or a notarially certified copy of that power or authority, shall be deposited at the registered office of the company concerned or at such other place within the State as specified for that purpose in the notice of meeting, and must be deposited not later than the time set out in subsection (6). However, as indicated above, the 2014 Act has now recast section 183(5) as a mandatory, as opposed to an optional, provision, meaning that there is no scope for the company to include alternative provisions in its constitution- even if these alternative provisions are agreed as between the company and its members.
- 2.2.2 **Section 183 (8)** of the Act, which is also a mandatory provision, provides that if subsection (5) is not complied with, the instrument of proxy will be invalid as a matter of Irish law. This section is originally derived from Regulation 70 in Part 1 of Table A in the first schedule to the Companies Act 1963.

2.3 The problems caused by the mandatory nature of these provisions

- 2.3.1 Because of its mandatory nature, Section 183(5) has the potential to cause difficulties for any Irish company, where there is a discrepancy between, on the one hand, the proxy voting arrangements agreed as between the company and its members and reflected in the company's constitution, and, on the other hand, the strict wording of section 183(5). The subsection has caused particular difficulties for a number of Irish- incorporated public limited companies with listings of their securities on markets outside the State, such

as the New York Stock Exchange (NYSE) and NASDAQ. Compliance with the strict requirements of the new subsection (5) would not be reflective of normal market practice for example, in the context of general meetings of the members connected with reorganisations and other significant transactions of such companies.

- 2.3.2 For many of these companies, all or the vast majority of shares in the company are held by a nominee of an entity known as the Depository Trust Company (DTC). In practice, it is the beneficial interests in these shares which are traded on the relevant exchange. Complex processes have evolved in the U.S. over the years, regarding the manner in which proxies are appointed in order to ensure that the voting instructions of the beneficial owners of shares in those companies (which frequently have many millions of shares in issue, the beneficial ownership of which is held through a myriad of investment banks, stockbrokers and other intermediaries) are properly reflected at shareholder meetings. Those processes are tried and tested and relied on in the U.S. markets. However, they are not always compatible with the rigid provisions of section 183(5), potentially causing significant issues for general meetings of those companies.
- 2.3.3 In particular, appointment of proxies is often delegated through a series of arrangements and appointments of attorney involving, in some cases, hundreds of powers of attorney that would be relevant for any particular meeting. In many cases, those powers of attorney are not granted specifically for a particular meeting. Many are standing appointments, which have been in force for many years. Section 183 requires that the originals or certified copies of all of those powers of attorney be deposited at the registered office of a company for every general meeting. This creates not just a logistical challenge and an administrative burden for those companies but potentially deprives beneficial owners of a vote through the inability to obtain originals or certified copies of all of those powers of attorney.
- 2.3.4 A further potential problem is caused by the requirement in section 183(5) that, in order for the proxies to be valid, these documents, if not deposited at the registered office, have to be deposited at another place within the Republic of Ireland. Having regard in particular to the ability afforded by the Act to companies to conduct their general meetings outside the State, it is highly anomalous to impose such a strict requirement. It ought to be perfectly lawful if some or all of the relevant documents are deposited at the registered office, or are instead deposited at any place designated by the company's board of directors in any other jurisdiction where the company may be carrying on a

significant part of its business, and where the bulk of its shareholders are likely in many cases to reside.

- 2.3.5 The difficulties identified above could, unless rectified, also adversely affect the conduct of meetings of existing and to-be established indigenous Irish PLCs, particularly those in the rapidly growing technology and pharmaceutical sectors, which will be conducting public offerings and seeking listings on markets such as the NYSE and NASDAQ, in order to grow and expand their businesses.
- 2.3.6 It must also be stressed that, while the examples above relate to the particular problems which Irish PLCs with U.S. listings can face, the mandatory nature of these provisions has the capacity to cause difficulties for the members of any Irish company which, for whatever reason, wish to depart from the rigid procedures in section 183(5) in the same way as they were permitted to do, prior to the commencement of these provisions in the Act.

2.4 Conclusion and recommendation

- 2.4.1 This change in the legal status of the procedures set out in s 183(5) from optional to mandatory was a significant change in the normal market practice of Irish companies, and Irish PLCs in particular. , So far as we are aware, we do not think that such a fundamental change was recommended by any party, or expected by companies and their advisers. Neither are we aware that there were any concerns from a market perspective regarding the enforceability of deposited proxies for Irish PLCs which necessitated making these provisions mandatory. The norm in practice is for the company secretary and chairman to satisfy themselves, if they have any concerns about the validity of proxy execution. Indeed, given the many ways in which proxies may be signed and delivered, it is more progressive to leave the matter to the discretion of the company rather than have it prescribed by legislation.
- 2.4.2 Furthermore, the Law Society suspects that a number of companies and advisers may be unaware of the newly mandatory nature of sections 183(5) and 183(8). As a consequence, the change brought about by the Act in relation to these provisions is a potential trap for the unwary.
- 2.4.3 It is our strong recommendation therefore that these two subsections be prefaced with words such as "***Unless the company's constitution otherwise provides***" (which is the approach taken in relation to Section 183(3), for example) in order to ensure that these provisions can again be treated as optional provisions, rather than as mandatory provisions of the Act. If this

change is made, Irish companies will once again be free to enter into appropriate alternative arrangements with regard to the conduct of their general meetings subject always to complying with the remaining provisions of the Act. We also recommend this simple solution as the preferred means of returning to the status quo ante rather than attempting to make any particular adjustments to the wording of section 183(5), as it permits maximum flexibility to members, as was the position prior to the coming into force of section 183(5).

3. Section 184

3.1 Summary of the issue

3.1.1 Problems have also arisen in practice as a result of the newly mandatory nature of section 184 of the Act. Section 184 is derived from Regulations 71 and 72 in Part 1 of Table A in the first schedule to the Companies Act 1963. Those provisions also were originally optional in nature. Section 184 is, however, now a mandatory provision of the Act and, as a consequence, an instrument appointing a proxy must be in the form set out in that section, or "as near to that form as circumstances permit".

3.1.2 The words "as near to that form as circumstances permit" might suggest that there is some scope to depart from the form of proxy set out in section 184. However, it is unclear if this language would entitle a company or a member seeking to appoint a proxy to make a material departure from the prescribed form of proxy set out in that section. For example, it is unclear if it is permissible to include a second alternative proxy in addition to the first alternative proxy permitted by the provisions of section 184. It is also unclear if it is permissible to delete the prescribed boxes permitting an abstention to be included in the voting instructions given to the proxy. Similarly, it is uncertain whether it is permissible to delete the requirement in the section that the proxy will vote as he or she thinks fit unless otherwise instructed, or (for example) go into further detail as to what limitations might be imposed on the ability of the proxy to vote on other matters arising at the meeting other than the specific resolutions which come before the members.

3.2 Conclusion and recommendation

As with the changes effected by the Act to section 183(5) and section 183(8), we think it is unlikely that such a significant change in normal market practice for many years regarding the use of proxy forms was intended to be introduced by the Act, and as with the preceding provisions, many companies and their advisers may be unaware of the change. For these reasons, we would strongly recommend that the provision again be made optional as was the case prior to the commencement of the Act by the inclusion of the words "***Unless the company's constitution otherwise provides***", at the beginning of Section 184.

4. Merger procedure under Part 9 of the Act cannot be used by two or more DACs

- 4.1 Pursuant to clause 462 of the Act in order to use the domestic merger procedure under Chapter 3 of Part 9 of the Act at least one of the merging companies must be a private company limited by shares (LTD). The definition of "private company limited by shares" in section 2 of the Act means "unless otherwise indicated, a private company limited by shares registered under Part 2 of the Act as distinct from a designated activity company of the type referred to in section 965 (2)(a)". This means that two or more DACs, although being a type of private limited company, cannot use the new procedure to effect a merger.
- 4.2 The Law Society is not aware of any reason why two or more DACs cannot merge under Part 9 of the Act and would ask the Department to consider an amendment to the Act to allow two or more DACs to merge.

5. Section 480 (5) to (8) - Registers In the State

- 5.1 Section 480(5) of the Act provides that:- " Without prejudice to sub-sections (6) and (7), the 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”.

- 5.2 Section 480(6) provides:- “That 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) [this is the court order confirming the merger] and without the necessity of there being produced any other document...., 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”.
- 5.3 Section 480(7) provides that without prejudice to the generality of subsection 6 that where a deed (within the meaning of section 32 of the Registration of Deeds and Title Act 2006) is produced for registration by the Property Registration Authority (PRA) the PRA must enter the successor company in place of any transferor company in respect of such deed.
- 5.4 Section 480(8) provides that the registers set out in the section shall be deemed to constitute registers for the purposes of subsection 6 e.g. register of members of a company, register of charges, the Land Registry.
- 5.5 It is unclear from the terms of the Act whether the registration provisions described above will apply in the event that Successor Company effects the Merger by way of the SAP. This is because Section 472 (which provides for when a merger takes effect when the SAP is used) expressly dis-applies the remaining sections of Chapter 3 of Part 9 where the SAP is used (with the exception of Sections 479 (preservation of rights of holders of securities), Section 480(3) (prescribed effects provisions), section 483 (civil liability of directors and experts) and section 484 (criminal liability for untrue statements in merger documents).

6. Error in Section 167 of the Act

- 6.1 Sections 167(1)(a)(II) and 167(1)(b)(II) of the Act refer to an amount prescribed under section 945(1)(k). The Law Society believes that this reference should be to section 943(1)(i) as there is no section 945(1)(k) in the Act.

7. Error in Section 1205 Proxies of the Act

- 7.1 The Law Society believes that the reference in section 1205(b) of the Act to section 183(8) should be to section 183(9) and that the reference in section 1205(c) to section 183(9) should be to section 183(10).

8. Requirement to make notification in respect of rights to subscribe for shares

- 8.1 Section 77(6) of the Companies Act 1990 imposed an obligation to disclose the acquisition of a right to acquire shares in a public limited company but exempted (in Section 77(7)) the acquisition of a right to subscribe for new shares (as distinct from existing issued shares).
- 8.2 No similar exemption is expressly provided for in the Act with the result that there appears to have been an unintended change in the law. As this has implications from all persons acquiring a right to subscribe for shares in a public limited company, such as under share option schemes, it is submitted that the exemption should be reinstated. It is suggested that this would be best achieved by including the exemption in Section 1059 of the Act.

9. The EC (Public Limited Companies Subsidiaries) Regulations 1997

- 9.1 The General Scheme for the Companies Act 2014 envisaged the repeal of the EC (Public Limited Companies Subsidiaries) Regulations 1997 ("the 1997 Regulations"); however the Act did not in fact effect such repeal.
- 9.2 The continuation in force of the 1997 Regulations has the effect of maintaining the uncertainty as to whether overseas parent public companies and their subsidiaries are affected by the prohibition on a subsidiary providing financial assistance for the acquisition of shares in its parent public company. Irish subsidiaries and Irish public companies are subject to such a prohibition by virtue of Section 82(2) of the Act by virtue of the definitions in Section 64(1) of that Act.
- 9.3 It is submitted that the prohibition existing under Irish law should only apply to Irish public limited companies and their subsidiaries and that therefore the

1997 Regulations should now either be repealed in full or alternatively that Regulation 5 be repealed so that the prohibition on a subsidiary providing financial assistance for the acquisition of shares in its parent public company is dealt with in Irish law exclusively by Section 82(7) of the Act.

10. Section 471 of the Act

- 10.1 In relation to domestic mergers by absorption, Section 471 of the Act requires the making available of certain documents for inspection by members for 30-days prior to implementation of the merger. This 30-day waiting period causes significant delays for internal group reorganisations. In a situation where the Summary Approval Procedure is to be employed to approve the merger (which requires a unanimous resolution of the members of each relevant company in respect of a merger), and in an absorption scenario (where by definition the absorbing parent – the ‘successor company’ – is the 100% owner of the subsidiary – the ‘transferor company’) the 30-day inspection in favour of members does not appear to serve an effective purpose, but rather simply causes delays.
- 10.2 If members of the successor company require time and further information they can request it given that the members’ resolution to be passed must be passed unanimously. The Directors’ Explanatory Report (Section 467) and the Expert’s Report (Section 468) contain carve outs in relation to mergers by absorption. The Law Society believes it would be a significant improvement if Section 471 were amended to include a similar carve out for mergers by absorption.

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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