

Summary Approval Procedure

COMPANIES ACT 2014

The Companies Act 2014 (the “**Act**”) came into effect on 1 June 2015 and has introduced significant reforms in company law in Ireland. The Act has since then been amended and updated.

Under the Act, a company is able to use a streamlined procedure to authorise, depending on company type, up to seven different types of activities which would otherwise be prohibited or in some cases could only be engaged in with the consent of the High Court.

Key Features

- The summary approval procedure is a streamlined procedure to authorise certain activities.
- The procedure standardises certain ‘whitewash’ processes previously available although some steps depend on the nature of the activity being contemplated.
- Removal of the requirement for an auditor’s report in the context of the validation of certain guarantees of directors’ loans (previously in section 34 of the Companies Act 1990) and which requirement rendered the section 34 ‘whitewash procedure’ unavailable in practice as auditors had been advised by their representative bodies not to give such reports.
- Where an auditor’s report is required under the new procedure the auditor will opine that the director’s declaration is “not unreasonable” rather than as previously opine that the declaration was “reasonable”.

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What activities are affected?

The summary approval procedure (“SAP”) is a validation procedure available to authorise the following (“**restricted activities**”):

- the giving of financial assistance by a company for the purpose of acquisition of its shares;
- the reduction of share capital;
- the variation of share capital on reorganisations;
- the domestic mergers of certain Irish companies;
- the treatment of pre-acquisition profits or losses as being profits available for distribution by a holding company;
- the entering into of certain transactions (eg loans) in favour of a director or connected person (or of the company or a holding company); and
- the commencement of a members’ voluntary winding-up.

In the case of a reduction of capital, a variation of company capital on a reorganisation and a merger, a company can use a court approved process instead of SAP; for the remaining four restricted activities SAP must be used.

The Procedure

Although the procedure varies in respect of certain of the restricted activities, the majority of such activities may be approved as follows:

- a declaration in writing is made by the directors (or by a majority of directors where there are more than two). This must be made at a meeting of the directors held not earlier than 30 days before (i) the meeting of the members to approve the special resolution (or unanimous resolution in the case of a merger) or (ii) the last member signs a written resolution (as the case may be) to approve the activity; and

- the directors’ declaration is then forwarded to the members with notice of the meeting or, where written resolutions are proposed, is appended to the resolution. The members must confer authority on the directors to carry out the restricted activity by way of a special resolution (ie 75% approval) or unanimous resolution in the case of a merger. The special resolution (or unanimous resolution in the case of a merger) must be passed not more than 12 months prior to commencement by the company of the restricted activity (this is reduced to 60, or in some cases 30 days where SAP is used to deal with pre-acquisition profits).

For some restricted activities (reduction in capital, variation of capital on a reorganisation, treatment of pre-acquisition profits and a members winding up of a solvent company) a report of an expert, who is qualified to be the statutory auditor of the company, is required to confirm that the declaration provided is not unreasonable.

Directors’ Declaration

The content of a declaration made pursuant to SAP varies depending on the restricted activity concerned although in all cases it includes confirmation that a full inquiry has been made into the affairs of the company and that the company is able to pay its debts and liabilities as they fall due for a period of 12 months after the restricted activity is carried out.

For example, the content of a declaration to be made in connection with the approval by a company of financial assistance in respect of the acquisition of its shares is similar to that previously required pursuant to section 60 of the Companies Act 1963 although it must now also state:

- the circumstances in which the transaction or arrangement is to be entered into; and
- the nature of the benefit which will accrue to the company directly or indirectly from entering into the transaction or arrangement.

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In certain declarations, depending on the restricted activity, the directors, in forming a view as to the ability of the company to pay debts over the following 12 months, can assume that guarantees will not be called upon or security enforced, in the case of the treatment of pre-acquisition profits the directors must assess the likelihood of guarantees being called or security being enforced.

Filing in Companies Registration Office

A copy of the declaration must be delivered to the Registrar of Companies within 21 days of the commencement date of the restricted activity. Thus the restricted activity can be carried on before the filing is made; however, if there then is a failure to comply with the 21 day rule, the restricted activity is invalidated. In those circumstances certain interested parties may apply for court approval to validate the carrying on of the restricted activity (and the court may make such an order if it considers it is just and equitable to do so). A copy of the special resolution must be delivered to the Registrar of Companies within 15 days of the date on which it is passed.

Director's Liability

Where a director makes a declaration without having reasonable grounds for making the confirmation as to solvency of the company, the court, on application by various specified parties (such as a liquidator, a creditor or the Director of Corporate Enforcement), may declare him or her personally responsible without any limitation of liability for all debts or other liabilities of the company (or successor company in the case of a merger).

If the company is wound up within 12 months of the date of a declaration and its debts are not paid within 12 months after the commencement of the winding up, it is presumed that each director who made the declaration did not have reasonable grounds for the (solvency) opinion stated in the declaration.

Moratorium on Carrying out Restricted Activity

Unless more than 90% of members of each class of issued shares vote in favour of the special resolution the company must wait 30 days from the passing of the special resolution before proceeding to carry on the restricted activity. This delay is intended to enable an application to court to be made and if an application is made the moratorium extends until the application has been disposed of or withdrawn. Members holding not less than 10% of the issued shares may make the application (excluding for this purpose any member who voted for the resolution).

Companies entitled to use SAP

SAP is available to private limited companies, designated activity companies, companies limited by guarantee and unlimited companies. Public limited companies (PLCs) can only use SAP to effect a members' voluntary winding up, treatment of pre-acquisition profits and for the making of loans *etc* to directors/ connected persons.

SAP cannot be used by a private subsidiary company to provide financial assistance for the acquisition of shares in a parent public company (unless allowed by ministerial regulations). A company with a "restricted person" as a director or secretary cannot use SAP except in respect of a members' voluntary winding up.

Action required

Company secretaries and others involved in the administration of companies, and professional advisers assisting in structuring of transactions, need to be familiar with the streamlined summary approval procedure as it reduces the complexity involved in implementing certain transactions and thereby reduce the compliance costs for companies.

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Alternatively, your usual contact in McCann FitzGerald will be happy to help you further.

This document is for general guidance only and should not be regarded as a substitute for professional advice. Such advice should always be taken before acting or refraining to act on any of the matters discussed.

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