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**Summary Approval Procedure to prevent prohibition on pre-acquisition profits or losses being treated in holding company’s financial statements as profits available for distribution**

**SAP Step Plan**

**Part 5**

# Step plan/action help sheet

**Name of procedure:** Summary approval procedure to prevent prohibition on pre-acquisition profits or losses being treated in holding company’s financial statements as profits available for distribution

**Sectional references**: Section 118 of CA 2014 (prohibition of pre-acquisition profits being treated in hold company’s financial statements as profits available for distribution); Section 202 of CA 2014 (Summary Approval Procedure) & Section 205 of CA 2014 (declaration to be made to allow pre-acquisition profits to be distributed by the parent company); Section 181 (notice of general meetings), Section 193 (unanimous written resolution) & Section 194 (majority written resolution) of CA 2014; Section 119 CA 2014 (Distributions in kind – determination of amount).

**Date**:

**Steps**:

|  |  |  |  |
| --- | --- | --- | --- |
| **Step** | **Commentary** | **Legislative Reference** | **Done** |
| 1 | Assess whether the transaction comes within the remit of Section 118  i.e. is the holding company proposing to make a dividend and is this dividend proposed to be funded fully or partly from profit and loss/distributable reserves created as a result of a dividend being paid by a subsidiary (and received by the parent/holding company) from the profits earned by that subsidiary prior to the date the parent/holding company acquired its interest in that subsidiary  OR  Has the holding company profit and loss reserves created as a result of a dividend being paid by a subsidiary (and received by the parent/holding company) from the profits earned by that subsidiary prior to the date the parent/holding company acquired its interest in that subsidiary and does the holding company now wish for the dividend received to be categorised as profits available for distribution.  If the answer to this question is yes, move to step 1A. If the answer is no or even if when this dividend received were to be converted to distributable reserves there would still be insufficient reserves to allow a further dividend from the parent/holdings company, there is no further work required. | S118 CA 2014 |  |
| 1A | Assess whether there are tax implications as a result of the proposed SAP to allow the dividend received from pre-acquisition reserves/profits to being distributable.  There should be no tax implications of effecting the SAP to allow the profit and loss reserves as a result of the dividend received to become distributable.  However where the SAP is approved and the requirements met and in addition the holding company will pay a dividend out of these newly created distributable reserves the tax implications will need to be considered.  Where the dividend to be paid to another Irish Company or a company registered in the EU or member state with which Ireland has a double tax treaty with, then no dividend withholding tax should need to be deducted from the payment. Note a [dividend withholding tax return](http://www.companiesact2014.com/downloads/dwt-form-and-payment-slip/) will however still need to be filed by the company with revenue. In order to pay the dividend gross the company paying the dividend should first obtain a DWT declaration from the proposed recipient to confirming there entitlement to receive the dividend gross ([form V3 for Irish registered companies](http://www.companiesact2014.com/downloads/composite-resident-form-v3-exemption-from-dwt-for-certain-persons-resident-in-ireland-in-respect-of-relevant-distributions/) and [Form V2B for EU or company who is resident in a tax treaty country](http://www.companiesact2014.com/downloads/non-resident-form-v2a-exemption-from-dwt-for-a-qualifying-non-resident-individual-in-respect-of-relevant-distributions/)).  However where the dividend is being paid to an Irish individual dividend withholding tax of 20% will need to be withheld from the payment and paid over to the revenue within 14 days of the following month the dividend was paid together with a return detailing who the dividend was paid to. Where the dividend is being paid to a person in an EU member state (who is not resident or ordinarily resident) or to an individual with which Ireland has a double tax treaty with, the dividend can be paid gross as long as a DWT declaration is received (before the dividend is paid) from the proposed recipient confirming there entitlement to receive the dividend gross (Form V2A for EU or person who is resident in a tax treaty country).  If the dividend is in a non-cash form or it is treated as a distribution as the market value of the asset sold was greater than the price paid by the shareholder a DWT may still need to be deducted (and applied to the re-grossed amount). Where this is the case, in addition stamp duty (if a property is transferred) and CGT (for the company) will need to be considered.  Before the SAP is completed a full an analysis of the tax consequences should be considered to see whether the cost would exceed the benefit of the transaction.  Where the holding company utilises these new distributable reserves in order to allow a share for share/undertaking swap (i.e. the shares of a subsidiary are transferred to another company in return for the company receiving the shares issuing shares in itself to the shareholders of the transferring company, you should refer to the requirements for another SAP under S204 to allow for the variation in capital as a result of this proposed reorganisation. | TCA 1997 |  |
| 1B | Draft of a schedule of the total amount of the company’s assets and liabilities of the company at the latest date not more than 3 months before the date of the declaration (management accounts or financial statements). | S205 CA 2014 |  |
| 2 | Arrange to hold a board meeting no longer than 12 months from the carrying out of the act of the (holding) company making a distribution from dividends received from pre-acquisition reserves of the subsidiary. At this meeting: | S202(1) CA 2014 |  |
| 2a | - approve the dividend/distribution by the holding company and the summary approval procedure | S202(1) CA 2014 |  |
| 2b | - the majority of directors or all of the directors agree to recommend to the members to allow the company (holding company) to pay a dividend from pre-acquisition reserves under the SAP S205/S118 CA 2014 and a special resolution be passed to permit this activity. | S201 & S202(1) CA 2014 |  |
| 2c | At this meeting or a meeting held not earlier than 30 days before the approval of the members by special resolution (where an initial meeting discussed in step 2 has been held after this 30 day period), the directors should make a declaration in writing declaring that having made full enquiry, the company will be able to pay its debts as they fall due for the 12 months period following the date the restricted activity was carried out i.e. the payment of the dividend or the date of the distribution (Section 201 & 202 CA 2014). See step 4 for further items to be included in the directors’ declaration.  The special resolution can be in writing under Section 193 (unanimous resolution)/ Section 194 (majority resolution) or passed at an extraordinary general meeting.  Where the resolution is passed in writing then the directors’ declaration must be attached to the written resolution. | S202(6) CA 2014 |  |
| 3 | Prepare a statement of assets and liabilities of the company up to a period not exceeding 3 months from the date of making the directors declaration. | S204(1)(d) |  |
| 3a | Obtain a report prepared by a person who is qualified to be the independent auditor of the company stating in that experts opinion, the declaration (as detailed in step 4) made by the directors is not unreasonable. | S208 CA 2014 |  |
| 4 | The minutes of the board meeting in step 2 should detail: | Section 201, 202 & 204 of CA 2014 |  |
| 4a | the name of the company and the company number |  |  |
| 4b | the date, location and time of the meeting and the members present at the meeting |  |  |
| 4c | details of who was appointed chairman of the meeting |  |  |
| 4d | that the directors have disclosed their interest in the decisions been taken under Section 231 of CA 2014; Note that notwithstanding the disclosures, was pursuant to the companies Constitution, entitled to vote and be counted in the quorum in relation to any matter in which he/she has an interest. It should also state whether a quorum was present if there is a minimum requirement stated in the constitution. | S231, 228 & 229 of CA 2014 |  |
| 4e | Ensure and state the fact that at least one director is a resident in the European Economic Area as required by Section 137 CA 2014 and that no director present holds more than 25 directorships for the purposes of and in accordance with Sections 228 and 229 CA 2014. | S137 CA 2014 |  |
| 4f | Ensure that it records (and ensure it is a fact) the fact that no director is restricted from acting as a directors as detailed in Section 819, 839, 840 841, 842 and 828 of CA 2014. | Section 819, 839, 840 841, 842 and 828 of CA 2014. |  |
| 4g | Include a paragraph for ‘Background’ providing details of the ‘proposed dividend’ by the company from profits recognised in the company from pre-acquisition reserves of the subsidiary company or alternatively pre-acquisition profits to be distributed from the subsidiary to this holding company which in turn will be dividended out giving details of the reasons why it is proposed and the fact that a summary approval procedure is required to be implemented in order to legitimise the transaction and allow the distribution to be made by this holding company. |  |  |
| 4h | Include a paragraph for ‘Purpose of meeting’ providing exact details for the reason why the meeting was held e.g. to consider and if thought fit to approve the proposed dividend (including the amount) from the pre-acquisition profits received from the subsidiary (naming the subsidiary and the date the pre-acquisition profits were received from the subsidiary to the company) and resolving that the a dividend be permitted to be made to the company’s shareholders and provide a declaration of directors as required by Section 202 & 205 of CA 2014 in order to allow the proposed dividend to proceed and to recommend to the shareholders to pass a special resolution to effect the transaction. | S202 & 205 CA 2014 |  |
| 4i | Provide details of the requirements of the summary approval procedure (requirement for a special resolution) with reference to Section 118 and what is to be included in the directors declaration under Section 205 in the minutes (Note the directors declaration can be done up on the Form SAP-205). That being:  1) The majority of directors must make a declaration stating:   * the amount of profits or losses that will be subject to the alternative treatment i.e. the amount of the ‘proposed dividend’ to be paid from the pre-acquisition profits received; * the total amount of the company’s assets and liabilities as stated in its last statutory or interim financial statements properly prepared at the latest date not more than 3 months before the date of the declaration; * that the declarants have made full inquiry into the affairs of the Company and that, having done so, they have formed the opinion that, if the Company, were to make the ‘proposed distribution’ within 2 months after the date of making the declaration, the company will be able to pay or discharge its debts and other liabilities in full as they become due during the period of 12 months after the date of that distribution. In assessing the liabilities the directors must consider the likelihood of guarantees paid having to be paid or security given having to be realised;   2) that a special resolution is required to be passed by the shareholders approving the dividend from profit and loss reserves creased from a dividend from the subsidiary from pre-acquisition reserves.  3) that the declaration of the directors is accompanied by a report prepared by a person who is qualified to be the independent auditor of the company stating in that experts opinion, the declaration made by the directors is not unreasonable | S118, S205(1) & 208 CA 2014 |  |
| 4j | Detail the fact that the directors were advised of the serious nature of the Section 118 declaration and the penalties that the directors were liable for if the directors make the declaration without unreasonable grounds for doing so (i.e. they may be liable for all liabilities that arise within the 12 month period). | S210 CA 2014 |  |
| 4k | Detail the fact that the directors took account of the financial position and liabilities of the company (including prospective and contingent) and have assessed the financial position of the company before the transaction takes place and the expected financial position after the transaction takes place. Include the fact that the directors were presented with the balance sheet before and the expected balance sheet after, during the meeting as part of this process. | S204(1) CA 2014 |  |
| 4l | Detail the fact that the directors reviewed the latest set of management accounts/interim financial statements/statutory financial statements and confirmed following the SAP to utilise the profits recognised from pre-acquisition reserves there was sufficient distributable profits to make the distribution. | S119 CA 2014 |  |
| 4m | Detail the transaction itself (i.e. detail the fact that a dividend was proposed to be paid from profits recognised from pre-acquisition reserves of its subsidiary (naming the subsidiary) and the fact the a SAP declaration is required to effect this transaction) and provide details of the amount of the proposed dividend and the proposed date of payment if the transaction is approved by special resolution.  Detail the fact that such a transaction is not permitted under Section 118 unless Section 205 of CA 2014, SAP approval procedure is applied. | S205, S118 CA 2014 |  |
| 4n | Draft up the directors declaration to be signed by all or a majority of directors which addresses (Note the directors declaration can be included in the [Form SAP-205](http://www.companiesact2014.com/downloads/sap-205-form-for-use-with-summary-approval-procedure/) and should be signed by all the directors making the declaration): | S205(1) CA 2014 |  |
|  | * the amount of profits or losses that will be subject to the alternative treatment i.e. the amount of the ‘proposed dividend’ to be paid from the pre-acquisition profits received; | S205(1)(a) CA 2014 |  |
|  | * the total amount of the company’s assets and liabilities as stated in its last statutory or interim financial statements properly prepared at the latest date not more than 3 months before the date of the declaration; | S205(1)(b) CA 2014 |  |
|  | * that the declarants have made full inquiry into the affairs of the Company and that, having done so, they have formed the opinion that, if the Company, were to make the ‘proposed distribution’ within 2 months after the date of making the declaration, the company will be able to pay or discharge its debts and other liabilities in full as they become due during the period of 12 months after the date of that distribution. In assessing the liabilities the directors must consider the likelihood of guarantees paid having to be paid or security given having to be realised; | S205(1)(c) CA 2014 |  |
| 4o | Detail the acknowledgement of the directors of the obligations imposed under Section 205 and the fact that they acknowledge that the draft declaration was true and correct. | S204 CA 2014 |  |
| 4p | Detail the fact that the directors’ declaration was produced to the directors for their review and after consideration it was signed by all or a majority of directors on the basis that all the conditions required by Section 205 as detailed above had been met, they were happy to proceed to deem the Section 205 Declaration executed.  Have the directors making the declaration sign the [form SAP-205](http://www.companiesact2014.com/downloads/sap-205-form-for-use-with-summary-approval-procedure/) as this is the directors declaration that will be filed with the CRO | S204(1) CA 2014 |  |
| 4q | Detail the wording of the special resolution to allow the proposed dividend which will be provided to the shareholders for approval. This should detail the fact that the proposed dividend (including the amount of this dividend) as referred to in the directors’ declaration attached to the resolution constitutes a dividend of profits earned from pre-acquisition reserves received from its subsidiary (naming the subsidiary) within the meaning of Section 118 of CA 2014 and the fact that the dividend is approved. | S202 CA 2014 |  |
| 4r | Recommend that the directors’ declaration and the special resolution when passed be filed with the CRO within 21 days of reducing the share capital. | S204(4) CA 2014 |  |
| 4s | Request the secretary or director to obtain the independent persons report to confirm the declaration which was just passed was ‘not considered unreasonable’ in order to satisfy the requirements of Section 208 | S208 CA 2014 |  |
| 4t | Detail the fact that it was resolved that an extraordinary general meeting be held to allow the shareholders to vote on the special resolution and that the required notice be given to all members together with a copy of the signed directors’ declaration which includes the independent persons report (which is a person authorised to be a statutory auditor).  THIS STEP IS ONLY PERFORMED WHERE A WRITTEN RESOLUTION IS NOT BEING PASSED I.E. WHERE A MEETING IS HELD. | S181 CA 2014 |  |
| 4u | Unanimously agree that the directors be given authority to authorise the dividend (unless the Constitution require that these be authorised by a members resolution) |  |  |
| 4v | Declare the meeting closed |  |  |
| 4w | Have the chairperson sign and date the board minute and insert it into the minute book of the company. |  |  |
| 5 | Where applicable draft the written special resolution based on the resolutions detailed in the board meeting above at step 4q and reference the fact that the directors resolution is attached to the written resolution itself (which includes the independent persons report) and have this resolution signed by all members entitled to vote where a unanimous resolution has been passed in accordance with Section 193(1) CA 2014. Ensure the company name and number is included at the top of this resolution and the narrative at the top specifically states that they are special resolutions and pursuant to S193(1) of CA 2014 for all purposes be as valid and effective as if a general meeting had been convened. Where a written majority resolution has been passed ensure this resolution is signed by the required majority of members and it refers to S194 with wording similar to the aforementioned. Ensure where a majority written resolution is to be passed that the required notice mentioned in step 5a below is dealt with. | S193 CA 2014  S194 CA 2014 |  |
| 5a | Where a written resolution is not utilised there is no need for the resolution to be signed. In addition it should not refer to Section 193/194 in any way and the wording in relation to it being valid and effective as if a general meeting had been convened because effectively an extraordinary meeting has to be convened for a resolution that is not written. It should use the wording as per step 4q.  Ensure all members entitled to attend and vote at the meeting/on the written resolution have been informed of the meeting within the required notice period (this is also applicable for a majority written resolution). The required notice period of not less than 21 clear days’ notice should be given unless a consent to short notice is obtained from all its members and auditor where applicable in which case a shorter period can be given as dictated by Section 181 of CA 2014.  This notice should include: the date, time, location of the meeting, give details of the special resolutions to be considered for approval, the fact that a proxy can be utilised which does not have to be a member and the date by which the member must notify the company of a proxy being used. A consent to short notice should be signed by all members including the auditor (if applicable) where less than the statutory notice is provided which is a signed confirmation from all parties that they consent to the short notice. A copy of the directors’ declaration should be attached to the notice of the meeting. | S181 CA 2014  S181(5) 183 CA 2014 |  |
| 6 | Where an extraordinary meeting is held (as opposed to a written resolution), draft the minutes of the extraordinary general meeting with the usual requirements (as per steps 4(a)-4(c)) and detail the approval of the special resolution to approve the proposed dividend from pre-acquisition profits with the wording as per step 4q. Where consent to short notice was given note this in the minutes to the meeting.    Ensure the minutes are signed by the chairperson. | S202 CA 2014 |  |
| 7 | Hold a board meeting to advise that:  - the shareholders had passed the resolutions at the extraordinary general meeting held earlier in the day or through written resolution if applicable; and  - to instruct the secretary to file the Form G1 together with the directors’ declaration/Form SAP-205 within 21 days and 15 days respectively to the CRO; and  - to instruct the secretary to arrange for the dividend withholding tax form to be filed with revenue where a dividend form is required (together with any tax if applicable)  Document in the board minutes the aforementioned facts in addition to the standard confirmations detailed in step 4(a) to 4(f) above. | Section 201(3) & 205(4) of CA 2014 |  |
| 8 | Make the distribution. Issue a dividend counterfoil to the party that received the dividend where a dividend is paid or deemed to be paid (this is regardless of whether this was a dividend in cash or non-cash). |  |  |
| 9 | Ensure a copy of the [declaration/Form SAP-205](http://www.companiesact2014.com/downloads/sap-205-form-for-use-with-summary-approval-procedure/) is delivered to the CRO not later than 21 days after the date on which the restricted activity commenced. If it is not submitted within this period it will invalidate the summary approval process | Section 201(3) of CA 2014 |  |
| 9a | File the [Form G1](http://www.companiesact2014.com/downloads/g1-special-resolution/) with the CRO ensuring that the directors declaration is attached to the G1 (ideally within 15 days of passing the special resolution). | S191 CA 2014 |  |
| 9b | in the effective date on the G1, date this the date the special resolution was dated. Include the company number and Company name on page one of Form G1 |  |  |
| 9c | In the resolution details section of the Form G1, type the resolutions passed into the resolution text area on the form G1 which is an exact replicate of the resolution prepared at step 6 or 7 above or alternatively attach a copy of the resolution prepared and state ‘see resolution attached’. Also attach the directors declaration (which includes the independent persons report) |  |  |
| 9d | In the resolution passed section of the Form G1, insert ‘In writing’ if done by a written resolution as opposed to by a formal meeting. If by meeting select the general meeting option. |  |  |
| 9e | In the writing type section of the Form G1, insert ‘Pursuant to section 193(1) (unanimous written resolution) if it is done by written resolution under S193 CA 2014. If it is done by written majority resolution (S194 CA2014) insert ‘PURSUANT TO Section 194’  If it is passed by meeting then insert ‘extraordinary general meeting’. |  |  |
| 9f | In the section ‘particulars of persons verifying the contents of the form’, under revenue online section include ‘No’ where it is being filed on core |  |  |
| 9g | Complete the information of the person/director that will sign the signature page at ‘particulars of persons verifying the contents of the form´ of the Form G1 on CORE or if done by hard copy in the certification section of the form |  |  |
| 9k | Include details of the agent presenting/filing the From G1 in the detail of presenter section of the Form G1 |  |  |
| 9l | File the Form G1 on CORE or send to the CRO together with the directors’ declaration where a hard copy is filed out |  |  |
| 10a | Arrange for a director to sign the electronic G1 signature page once filed on core (where core is used) and send this to the CRO with the directors’ declaration. |  |  |
| 11 | Where a [dividend withholding tax return](http://www.companiesact2014.com/downloads/dwt-form-and-payment-slip/) is required to filed, file this with revenue on ROS no later than 14 days after the month in which the distribution occurred and if required any DWT which is to be withheld should be paid over at that time.  Note if this is a distribution is specie as a result of a share for share or a share for undertaking no DWT form or dividend withholding tax needs to be paid. However if this is the case a Section 204 SAP may also need to be performed (see step 1A above). |  |  |
| In my professional opinion in my capacity as the professional advisor, the summary approval procedure and related company secretarial documentation comply with the Company Law requirements.  **Signed: Date:** | | | |

## Forms

Dividend withholding tax form

Non-Resident Form V2A - Exemption from DWT for A Qualifying Non-Resident Individual in respect of relevant distributions

Non-Resident Form V2B - Exemption from DWT for A Qualifying Non-Resident Company in respect of relevant distributions

Composite Resident Form V3 - Exemption from DWT for Certain Persons Resident in Ireland in respect of Relevant Distributions

CRO Form G1

Form SAP-205 (directors declaration)