

# LAW SOCIETY SUBMISSION

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**COMMENTARY AND PROPOSALS FOR AMENDMENTS TO THE  
COMPANIES ACT 2014**

DEPARTMENT OF JOBS, ENTERPRISE AND INNOVATION

APRIL 2016

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## 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

The Law Society of Ireland (the “Law Society”) makes the following comments on various provisions of the Companies Act 2014 (the “Act”). Since enactment of the Act, the Society has provided feedback on the operation of a number of provisions, for the Department to consider. The Society welcomes the opportunity to engage with the continuing implementation of the Act.

Recommendations and proposals within this submission include:

- Registration of charges for foreign companies.
- Section 408(1): the definition of shares within the meaning of ‘charges’.
- Section 150: Disclosure of directors’ home address and safety/security issues.

## 2. Registration of Charges for Foreign Companies

### 2.1 Context

2.1.1 The Act contemplates that a charge provided by a foreign company will only be registerable if the foreign company has established a branch in the State. The difficulty is that there may be considerable doubt in relation to whether the foreign company has or has not established a branch in Ireland.

2.1.2 Accordingly the practice has now arisen for a number of banks to require that a foreign company providing security on property in the State would be required to register as a branch so that the bank can register its charge. This of course may not be satisfactory to the foreign company concerned and may cause a degree of friction as between the bank and its customer.

### 2.2 Background

2.2.1 Prior to 1st June 2015 a non-Irish company that had an established place of business in Ireland and which created security over Irish situate assets was obliged to register that security at the Irish Companies Registration Office (“CRO”) within 21 days. Failure to make that filing rendered the security void as against the Liquidator or other Creditor of that non-Irish company. The requirement to file was easily satisfied in circumstances where the non-Irish company had registered with the CRO as an external company and so had its own public record at the CRO against which a filing could be made.

2.2.2 However, problems arose in respect of security over Irish situate assets created by a non-Irish company which had an established place of business in Ireland but did not

register at the CRO as an external company. Under Irish law a filing would need to be made at the CRO, but the CRO had no records against which it could be registered.

2.2.3 Therefore, a practice developed whereby the CRO would accept a filing in respect of such security and put it on a “Slavenburg Register” so that a secured party had the comfort of knowing that the security filing requirements had been complied with. As a result, the default method of ensuring that security was properly taken from foreign companies was merely to carry out a Slavenburg filing which the CRO would accept where the company was not registered as an external company.

2.2.4 It is important to note that the Slavenburg register in Ireland was not a searchable register, so while it satisfied a filing requirement, it did not provide a notice facility to parties who might seek to lend money or trade with the non-Irish company.

## 2.3 Companies Act 2014 Changes

2.3.1 With effect from 1st June 2016 the CRO no longer accept Slavenburg filings. Instead, Section 1301 provides that the registration requirements for charges in Section 409 applies to relevant external companies. Section 1301 provides that relevant external companies are external companies which have a branch in Ireland. Therefore, it is a requirement for a non-Irish limited liability company which has a branch in Ireland, to file any security interests that it creates over Irish situated assets at the CRO within 21 days. Similar to the position prior to 1st June 2015, failure to make the necessary filing renders the security void.

2.3.2 Whether or not a non-Irish company has a branch in Ireland (and is therefore a “relevant external company”) is a question of fact. Relevant external companies are, following establishing a branch in Ireland, required to satisfy certain requirements with the CRO. The Act provides that unless those registration requirements have been completed by the company it will not be possible to register particulars of a charge created by a relevant external company under the Act.

2.3.3 The main effect therefore of this change in law brought about by the Act is that where a lender is taking security over Irish assets from a foreign company it will need to be satisfied that either:

- (i) The foreign company is not a relevant external company for the purposes of the Act or;
- (ii) The foreign company is a relevant external company and it has completed all of its branch registration requirements under the Act so that a charge can be registered with the CRO.

2.3.4 Unfortunately it will not be possible for a lender to be completely satisfied that a foreign company is not a relevant external company for the purposes of the Act as this is a question of fact.

2.3.5 A further problem for lenders is that the relevant legislation does not clearly define what is meant by a branch. There is case law which sets out some criteria in establishing whether a branch exists such as the judgment in *Somafer S.A. v Saar-Ferngas AG [1978] ECR 2183*. From this case law certain questions can be asked of the company to establish whether a branch is in place or not, but the lender will be somewhat dependent on obtaining correct answers and even if truthful answers are provided there is always the risk that a Court, on the application of the Liquidator, may decide that the company had established the branch in Ireland and put the security taken by the lender at risk.

## 2.4 The UK Position

2.4.1 Under the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 (“the 2009 Regulations”), overseas companies with an established place of business in the U.K. were required to register charges at the U.K. Companies House. This regime was similar to the current system in Ireland in that failure to register any such charge at the Companies House would result in the security being void against a liquidator, administrator or creditor of the overseas company. The 2009 Regulations were intended to simplify the previous regime under the Companies Act 1985 and end the practice of making Slavenburg registrations of charges created by overseas companies.

2.4.2 On 1st October 2011 the Overseas Companies (Execution of Documents and Registration of Charges) (Amendment) Regulations 2011 (“the 2011 Regulations”) came into force introducing a new regime for charges created by overseas companies. The principal effect of the 2011 Regulations was to abolish the requirement that overseas companies with an established place of business in the U.K., register charges over U.K. properties with Companies House

2.4.3 There is still a requirement under those Regulations for the overseas company to retain its own register of charges and the failure to maintain such a register will constitute an offence by that company.

2.4.4 The Law Society understands that this change was made to the law in the UK because under the old 2009 regime (which is similar to the current regime in Ireland) the trigger event for registration of a charge was difficult to determine and also that it was causing an unnecessary burden on lenders. It was also felt that because the Slavenburg Register could not be searched, it served absolutely no purpose. This was the case with the old Slavenburg Register in Ireland.

## 2.5 Conclusion

- 2.5.1 The Law Society submits that a similar approach (but not identical) to deal with this issue should be taken as the one taken in the UK. Where overseas companies have not registered with the CRO as a branch, there should be no requirement to register security in the CRO where security is taken over that company's property in Ireland. It should also be made clear that not registering security in those cases will not prejudice the position of the party which has taken the security.
- 2.5.2 Where a non-Irish company has registered as a branch, the security would be registrable in the usual way and this requirement would not be changed. This would depart from the UK position.
- 2.5.3 Obviously, the registration requirement in respect of charges for Irish companies would be unchanged.
- 2.5.4 The advantage of this approach would be that it would provide legal certainty to financial institutions funding non-Irish companies and taking security from them as to when they need to register their security.
- 2.5.5 As the Slavenburg register was not searchable in any event, it is submitted that the removal of the obligation to file security where the company is not registered as a branch will not alter the ability of banks or creditors to search. In any event, the registering of charges over property in the Property Registration Authority will still apply.

## 3. Section 408 (1)

- 3.1 The Law Society would like to draw attention to an anomaly which has been identified in relation to Section 408(1) of the Act.
- 3.2 Section 408(1) defines a "charge" in relation to a company for the purposes of Part 7. Paragraph (c) of that sub-section excludes "shares, bonds or debt instruments" from the definition of a charge.
- 3.3 A "share" is defined in section 2(1) of the Act as meaning a share in the share capital of a company, and as including stock except where a distinction between stock and shares is express or implied.
- 3.4 A "company" is also defined in section 2(1) and the definition states that a "company" (a) in Parts 2 to 14 shall be read in accordance with section 10 (section 10 states that unless expressly specified otherwise, a reference in Parts 2 to 14 of the Act to a company is a reference to a private company limited by shares); (b) subject to the foregoing, means a company formed and registered under the Act or an existing company.

- 3.5 It therefore follows that the reference in section 408(1) to shares may well be interpreted as simply only referring to shares in an Irish incorporated company. There appears to be no policy basis for a position whereby a company did not have to register a charge over shares in an Irish company but did have to register a charge over shares in a company incorporated outside of the jurisdiction.
- 3.6 The Law Society therefore recommends an amendment be made to section 408(1)(c) to refer to shares whether such shares are in a company incorporated under the Act, in an existing company or in a body corporate incorporated outside of the State.

#### **4. Obligation to Disclose Usual Residential Address and the Exemption for Personal Safety/Security**

- 4.1 A director's home address is publicly available on the Companies Registration Office (CRO) website. Under section 149 of the Act, every company must file prescribed personal details in relation to each director and secretary with the CRO, including home address, nationality and date of birth. Failure to comply with these obligations can result in criminal penalties being imposed on the company and its officers (category 3 offence)(section 150(4)).
- 4.2 Section 150(11) of the Act and the implementing statutory instruments (SI 225/2015 and SI 543/2015) introduced a new process allowing a director's residential address to be omitted from the public register (and the relevant company register on which the relevant details must also be entered) where the director's personal safety or security is at stake. The policy objective behind this new measure was to minimise potential risks to directors of certain types of company where home address details were easily accessible to members of the public.
- 4.3 The procedure involves obtaining a supporting statement from a person not below the rank of Chief Superintendent in An Garda Síochána and an application to the CRO. The new process is largely untested and no guidance has been published as to the level of threat which must be involved, the evidence which must be produced or whether the director must appear in person at the police station. There seems to be no system in place within An Garda Síochána to deal with applications of this type nor was there any awareness of the provision among any of the Garda stations contacted. For this reason, the exemption procedure is not being used in practice and the policy objectives of the change in law are not being achieved.
- 4.4 The Law Society accordingly recommends that:
- (i) a dedicated unit or contact point within An Garda Síochána with the necessary resources be formally nominated (and/or details of same published) to deal with applications of this type;

- (ii) guidelines be published as to the criteria to be used in granting any supporting statement by An Garda Síochána; and
- (iii) procedures be put in place to allow directors residing outside the State to make the relevant application through their Irish legal advisers.

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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