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## Precedents - Section 238 Companies Act 2014

The Conveyancing Committee has drafted certificates for use where there are directors dealing with companies, and dealings between companies, in substantial transactions in respect of non-cash assets and Section 238 Companies Act 2014 requires consideration.

### Directors dealing with companies – substantial transactions in respect of non-cash assets – section 238 of the Companies Act 2014

#### Summary of the prohibition contained in section 238

1. Unless otherwise stated references to sections are to sections of the Companies Act 2014.
2. Section 238 substantially re-enacts the provisions of section 29 of the Companies Act 1990. Under section 238 a company may not enter into an 'arrangement' with:
  - (a) a director of the company; or
  - (b) a director of its holding company; or
  - (c) a person connected with such director,without the arrangement having been first approved by an ordinary resolution of:
  - (i) the members of the company; and
  - (ii) if the director or connected person is a director of its holding company or is connected with such a director, an ordinary resolution of the members of the holding company.
3. An arrangement for the purpose of the section is one whereby one or more non-cash assets (i.e. any asset other than cash whether in euro or a foreign currency) of the requisite value are acquired:
  - (a) by the company from a director of the company or of its holding company or a person connected with such a director; or
  - (b) by a director of the company or of its holding company or a person connected with such a director from the company.
4. The connected persons of a director are defined in section 220 as:
  - (a) that director's spouse, civil partner, parent, brother, sister or child;
  - (b) a person acting in his capacity as the trustee of a trust the principal beneficiaries of which are that director, the spouse, civil partner or any children of that director or any body corporate which that director controls, or
  - (c) a partner (within the meaning of the Partnership Act 1890) of that director; or
  - (d) any body corporate controlled by that director.

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5. The child of a director's civil partner who ordinarily resides with that director and his or her civil partner is deemed to be a child of that director.

6. A body corporate is controlled by a director of a company if, but only if, that director alone or together with any other director(s) of the company or any person connected with such director or with any of the other directors is:

(a) interested in one-half or more of the equity share capital of that body; or

(b) entitled to exercise, or control the exercise of, one-half or more of the voting power at any general meeting of that body.

Further particulars of what constitutes 'control' are given in section 220.

7. Any shadow director (section 221) or de facto director (section 222) of a company is treated as if he or she is a director of that company.

8. A non-cash asset is of the requisite value if it is worth at least €5,000 and it either exceeds €65,000 or 10% of the net assets of the company in question.

9. An ordinary resolution of the members of an LTD may be passed by any of the following means: (i) at a duly convened general meeting of the members; (ii) by a unanimous written resolution (section 193); or (iii) by a majority written resolution (section 194). Other types of company may also be able to avail of unanimous or, to a lesser extent, majority written resolutions subject to the provisions of the 2014 Act and their constitutions.

### **Summary of exemptions from section 238**

10. An 'arrangement' is not prohibited by the section if:

(a) it is approved by an ordinary resolution of the shareholders of the company and / or any holding company (as appropriate);

(b) the value of the non-cash asset is less than the threshold amount (see paragraph 8 above);

(c) the non-cash asset is being acquired by one member of a group from another member of that group where the group comprises a holding company and its wholly owned subsidiaries;

(d) it is entered into in the course of the winding up of a company unless it is a members' voluntary winding up;

(e) it is a disposal by the receiver of a company; or

(f) it is an acquisition by a person who is a shareholder in the company in that person's character as shareholder (e.g. a distribution in specie);

11. Furthermore no approval is required under section 238 from the shareholders of a company which is:

(a) a wholly owned subsidiary; or

(b) not incorporated under the Irish Companies Acts (2014 or previous).

As well as excluding companies incorporated outside Ireland, this latter category also excludes other types of body corporate incorporated under Irish law such as ICAVs and industrial and provident societies.

12. For the definitions of 'subsidiary', 'wholly owned subsidiary' and 'holding company' see sections 7 and 8 of the 2014 Act.

13. It is worthwhile bearing in mind that a company may have more than one holding company. To take a simple example: if company A owns company B and company B owns company C, companies A and B will be holding companies of company C. If the director or connected person in question is also a director of any holding company or is connected with such a director, resolutions will be required from all such holding companies except any that are incorporated in Ireland but not under the Companies Act 2014, incorporated outside Ireland or are themselves wholly owned subsidiaries.

### **Conveyancing Committee recommendations**

14. The Conveyancing Committee has considered the implications of section 238 for conveyancing practice and has concluded that – as was the case under section 29 of the Companies Act 1990 - in transactions between natural persons and companies and in transactions between companies, a certificate should be included in the relevant assurance to show either that no approving resolution is required or that all requisite resolutions have been passed.

15. The Committee considers that the detail of the matter should not be one of title and that the certificates should do no more than certify the position. Accordingly, it is not sought to produce either the formal resolution of the company or other detail in the certificates which would put an investigator on notice of additional facts.

16. No such certificate is required in a transaction between natural persons.

17. It is not necessary to state in the certificates the mode of passing of the relevant resolution(s); the fact of passing is sufficient.

### **Specimen certificates**

18. These certificates do not exhaust the situations which may arise and should be varied as appropriate.

- [Download specimen certificates](#)

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