COMPANY LAW REVIEW GROUP
an grúpa athbhreithnithe dlí cuideachtaí

COMPANY LAW REVIEW GROUP

ANNUAL REPORT 2020

Contents

Chairperson's Letter to the Minister for Enterprise, Trade and Employment

Mr Leo Varadkar, T.D.,
Tánaiste and Minister for Enterprise, Trade and Employment
23 Kildare Street
Dublin 2
D02 TD30

Mr Robert Troy, T.D.
Minister of State for Trade Promotion, Digital and Company Regulation
23 Kildare Street
Dublin 2
D02 TD30

31 March 2021

Dear Tánaiste,

Dear Minister,

I have pleasure in presenting the Company Law Review Group's Annual Report for 2020.

2020 was a particularly busy year for the Review Group. As well as delivering its Annual Report for 2019 in March 2020, which included its examination of the summary approval procedure, the Review Group delivered four special reports and one formal submission during the year. It also commenced consideration of important aspects of insolvency law, which will be the subject of further reports during 2021.

In my letter to you of 31 March 2020 accompanying the 2019 report, I noted that the most pressing issue then facing the country was the Covid-19 pandemic. The pandemic and its economic effects then presented and continue to present enormous challenges to everyone and to the conduct of business on a human and economic front. The pandemic gave rise to material legal issues, and I am pleased that the Review Group was in a position to present proposals to deal with practical company law issues that have arisen as a consequence.

Report on measures to address company law issues arising by reason of the Covid-19 pandemic (Annex 1)

The Review Group delivered its first 2020 Report on 25 June 2020, which set out a series of proposals to mitigate the effect of the pandemic on company procedures and meetings and making important adjustments to insolvency law. The report's recommendations included:

- enabling multi-location execution of documents under a company seal;
- enabling shareholder meetings to occur on electronic platforms;
- increasing the indebtedness thresholds that enable a creditor to initiate winding-up proceedings against a company; and
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- extending the maximum period of examinership.

It is noted that that most of the Review Group's recommendations were accommodated in the Companies (Miscellaneous Provisions (Covid-19)) Act 2020, which passed all stages in the Oireachtas on 1 August 2020, just over four months following delivery of this report.

Report on certain company law issues arising under the EU Central Securities Depositories Regulation 909/2014 (CSDR) (Annex 2)

The Review Group's second report was also delivered on 25 June 2020 and contained an appraisal of certain company law proposals of Euroclear Bank NV/SA that arose in light of the migration of securities of Irish listed companies to the intermediated system rendered necessary as a result of Brexit and CSDR. The Review Group had during 2019 liaised extensively with the Department of Enterprise Trade and Employment (DETE) and the Department of Finance in the design of the Migration of Participating Securities Act 2019. I would note that earlier this month, using the procedures laid down in that Act, all the relevant companies have successfully migrated to the new system.

The report's recommendations included

- adjusting the law relating to share certificates and transfers of securities to and from CSDR-authorised depositories;

- adjusting majorities required for schemes of arrangement and company takeovers;

- allowing for electronic acceptances of takeover offers; and

- varying the record time for voting.

It is noted that most of the Review Group's recommendations were accommodated in Part 4 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020

Report advising on a legal structure for the rescue of small companies (Annex 3)

The Review Group delivered its third Report on 22 October 2020 in response to the Tánaiste's letter of 8 July 2020 in which the Review Group was requested to:

- examine and make recommendations as to how the statutory scheme of arrangement provisions of the Companies Act 2014 might be adapted to provide a rescue framework for SMEs;

- examine and make recommendation as to ways in which key elements of the examinership process, including a stay on enforcement proceedings and a cross class cram down, might be incorporated into a rescue framework for SMEs;

- consider other EU Member States' voluntary restructuring processes, with a strong emphasis on creditor agreement and make recommendation as to whether such a process is desirable in an Irish context with particular emphasis on the French framework (mandate ad hoc procedure); and

- make any other recommendations the CLRG consider appropriate.

The Report's primary recommendation is the institution of a special rescue process for small companies which it calls the "summary rescue process". The principal aspects of such a process are these:

- commencement not by an application to and order of the Court but by decision of the directors;
- conduct of the process by the company's directors with the assistance of a suitably qualified process adviser;
- limitations on the abuse or serial use of the process;
- the same criteria as to necessity for viability of the post—process company as apply in an examinership; and
- cross-class cram-down of creditors subject to the approval of the Court.

The Review Group notes that the Legislation Programme for the Spring Session 2021 published on 13 January 2021 includes reference to a Companies (Amendment) Bill to provide for a dedicated rescue process for small companies. The Review Group stands ready to assist in this regard.

Report on potential impact of artificial intelligence (AI) on company law in the context of corporate governance (Annex 4)

The Review Group's fourth report was delivered on 22 December 2020. In it the Review Group examines the use of AI in the context of company law with a view to informing the development of the Government's AI strategy, which is being led by the Department of Enterprise Trade and Employment.

The report noted the three main types of AI – assisted AI, advisory AI and autonomous AI and the issues of bias and transparency that arise in the context of each. The Review Group concluded that it will be difficult for legislation to remain contemporaneous in an ever-evolving area like AI. Therefore, legislators should look to a broad principle-based framework which remains applicable regardless of technological advances. The issue of AI will remain a work in progress item for the Review Group.

Submission on Directive (EU) 2019/2121 of 27 November 2019 (the Cross-Border Conversions and Divisions Directive) (Annex 5)

On 13 October 2020, the Review Group made a formal submission on Member State options under this Directive, recommending that the transposition of this Directive be effected with the revocation of SI No 157/2008 (European Communities (Cross-Border Mergers) Regulations 2008) making of a new Statutory Instrument, consolidating the provisions of SI No 157/2008 with the provisions made necessary by the transposition of the Directive.

Other work of the Review Group

In addition to the formal reports of the Review Group, CLRG members have liaised to assist your officials in relation to discrete technical matters arising.

In October 2020, the Review Group commenced its work on current Work Programme item No 1:

- to review whether the legal provisions surrounding collective redundancies and the liquidation of companies effectively protect the rights of workers;

- to review the Companies Acts with a view to addressing the practice of trading entities splitting their operations between trading and property with the result being the trading business (including jobs) go into insolvency and assets are taken out of the original business; and

- to examine the legal provision that pertains to any sale to a connected party following insolvency of a company including who can object and allowable grounds of an objection.

Following up on strand 1 of this work, the Review Group delivered its review of existing legislative provisions regarding the provision of information to creditors generally and in particular to employees on 5 March 2021. This will be followed up with a further report on the second and third strands in the coming months.

The Review Group notes that the Legislation Programme for the Spring Session 2021 includes reference to a Companies (Amendment) Bill to provide for changes to relevant provisions of company law in respect of the rights of employees, as creditors, concerning the liquidation of a company. The Review Group stands ready to assist in this regard.

Acknowledgements

I would like to record and acknowledge with thanks the dedicated work of the members of the Review Group and of its Committees. I would like to single out for special mention Professor Irene Lynch Fannon and Salvador Nash, Chairs of the Corporate Insolvency and Corporate Governance Committees respectively, who between them chaired 27 Committee meetings during the year as well as leading and participating in drafting of Review Group reports related to their Committees' deliberations.

I would also like to give special mention to two long-serving CLRG members who retired from the Review Group during 2020, Helen Curley, Principal Officer in DETE and CLRG founder member Ralph MacDarby, who for many of his 20 years on the Review Group sat as Chair of the Corporate Governance Committee.

I would also like to thank Tara Keane, former Secretary of the Review Group, who moved to other responsibilities during 2020, and new CLRG Secretary Stephen Walsh.

Yours sincerely,

Paul Egan SC
Chairperson
Company Law Review Group

1. Introduction to the Annual Report 2020

1.1 The Company Law Review Group

The Company Law Review Group (CLRG) is a statutory advisory body charged with advising the Minister for Enterprise, Trade and Employment ("the Minister") on the review and development of company law in Ireland. It was accorded statutory advisory status by the Company Law Enforcement Act 2001, which was continued under Section 958 of the Companies Act 2014. The CLRG operates on a two-year work programme which is determined by the Minister, in consultation with the CLRG.

The CLRG consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and trade unions), regulators (implementation and enforcement bodies) and representatives from government departments including the Department of Enterprise, Trade and Employment ("the Department") and Revenue. The Secretariat to the CLRG is provided by the Company Law Development Unit of the Department of Enterprise, Trade and Employment.

1.2 The Role of the CLRG

The CLRG is established to monitor, review and advise the Minister on matters pertaining to company law. In so doing, it is required to "seek to promote enterprise, facilitate commerce, simplify the operation of the Act, enhance corporate governance and encourage commercial probity" as per section 959(2) of the Companies Act 2014.

1.3 Policy Development

The CLRG submits its recommendations on matters in its work programme to the Minister. The Minister, in turn, reviews the recommendations and determines the policy direction to be adopted.

1.4 Contact information

The CLRG maintains a website www.clrg.org. In line with the requirements of the Regulation on Lobbying Act and accompanying Transparency Code, all CLRG reports and the minutes of its meetings are routinely published on the website. It also lists the members and the current work programme.

The CLRG's Secretariat receives queries relating to the work of the Group and is happy to assist members of the public. Contact may be made either through the website or directly to:

Stephen Walsh
Secretary to the Company Law Review Group
Department of Enterprise, Trade and Employment
Earlsfort Centre
Lower Hatch Street
Dublin 2
D02 PW01

Email: stephen.walsh@enterprise.gov.ie

2. The Company Law Review Group Membership

2.1 Membership of the Company Law Review Group

The membership of the Company Law Review Group at 31 December 2020 is set out in this table.

Paul Egan SC	Chairperson (Mason Hayes & Curran LLP)
Alan Carey	The Revenue Commissioners
Barry Conway	Ministerial Nominee (William Fry)
Máire Cunningham	Law Society of Ireland (Beauchamps)
Richard Curran	Ministerial Nominee (LK Shields LLP)
Marie Daly	Irish Business and Employers' Confederation (IBEC)
Emma Doherty	Ministerial Nominee (Matheson)
Ian Drennan	Director of Corporate Enforcement
Bernice Evoy	Banking and Payments Federation Ireland CLG
James Finn	The Courts Service
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Rosemary Hickey	Office of the Attorney General
Tanya Holly	Ministerial Nominee (DETE)
Shelley Horan	Bar Council of Ireland
Gillian Leeson	Euronext Dublin (The Irish Stock Exchange PLC)
Neil McDonnell	Irish Small and Medium Enterprises Association CLG (ISME)
Dr. David McFadden	Ministerial Nominee (Companies Registration Office)
Prof. Irene Lynch Fannon	Ministerial Nominee (School of Law, University College Cork)
Vincent Madigan	Ministerial Nominee, formerly of the Department of Enterprise Trade and Employment
Kathryn Maybury	Small Firms Association Ltd (KomSec Limited)
Salvador Nash	The Chartered Governance Institute (KPMG)
Fiona O'Dea	Ministerial Nominee (DETE)

Ciara O'Leary	Irish Funds Industry Association CLG (Dechert LLP)
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace LLP)
Maureen O'Sullivan	Ministerial Nominee (Registrar of Companies)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Maura Quinn	The Institute of Directors in Ireland
Eadaoin Rock	Central Bank of Ireland
Doug Smith	Irish Society of Insolvency Practitioners (Eugene F Collins)

The members below also served during 2020.

Sinead Boyle	Irish Auditing and Accounting Supervisory Authority (replaced by Kevin Prendergast)
Barry Cahir	Irish Society of Insolvency Practitioners (Beauchamps) (replaced by Doug Smith)
Jeanette Doonan	Revenue Commissioners (replaced by Alan Carey)
Helen Curley	Department of Enterprise, Trade and Employment (replaced by John Maher)
David Hegarty	Office of the Director of Corporate Enforcement (alternate for Ian Drennan)
John Loughlin	Consultative Committee of Accountancy Bodies – Ireland (CCAB-I) (replacement to be confirmed)
John Maher	Department of Enterprise, Trade and Employment (replaced by Fiona O'Dea)
Ralph Mac Darby	The Institute of Directors in Ireland (replaced by Maura Quinn)
Therese Moore	Euronext Dublin (alternate for Gillian Leeson)
Conor O'Mahony	Office of the Director of Corporate Enforcement (alternate for Ian Drennan)
Grace O'Mahony	Central Bank of Ireland (alternate for Eadaoin Rock)
Kevin O Neill	Courts Service (replaced by James Finn)

2.2 Committees of the Company Law Review Group

The membership of the Review Group's Committees at 31 December 2020 is set out in the following tables.

(a) Statutory Committee

Paul Egan SC	Chairperson
Barry Conway	CLRG member
Richard Curran	CLRG member
Máire Cunningham	CLRG member
Marie Daly	CLRG member
Rosemary Hickey	CLRG member
Tanya Holly	CLRG member
Dr David McFadden	CLRG member
Vincent Madigan	CLRG member
Kathryn Maybury	CLRG member

(b) Corporate Enforcement Committee

Ian Drennan	Chairperson
Barry Conway	CLRG member
Marie Daly	CLRG member
Michael Halpenny	CLRG member
Shelley Horan	CLRG member
Mary Hughes	Revenue Commissioners
Rosemary Hickey	CLRG member
Prof. Irene Lynch Fannon	CLRG member
Vincent Madigan	CLRG member
Kathryn Maybury	CLRG member
Salvador Nash	CLRG member

(c) Corporate Insolvency Committee

Prof. Irene Lynch Fannon	Chair School of Law, University College Cork
Marie Daly	CLRG member
Michael Halpenny	CLRG member
David Hegarty	Office of the Director of Corporate Enforcement
Rosemary Hickey	CLRG member
Tanya Holly	CLRG member
Tara Keane	Department of Enterprise, Trade and Employment
Neil McDonnell	CLRG member
Dr. David Mc Fadden	CLRG member
Vincent Madigan	CLRG member
Conor O'Mahony	Office of the Director of Corporate Enforcement
Paddy Purtill	Revenue Commissioners
Doug Smith	CLRG member

(d) Corporate Governance Committee

Salvador Nash	Chairperson
Barry Conway	CLRG member
Máire Cunningham	CLRG member
Marie Daly	CLRG member
Emma Doherty	CLRG member
Dr David McFadden	CLRG member
Vincent Madigan	CLRG member
Kathryn Maybury	CLRG member
Jacqueline O'Callaghan	Revenue Commissioners
Conor O'Mahony	Office of the Director of Corporate Enforcement
Gillian O'Shaughnessy	CLRG member

(e) Part 23 Committee

Paul Egan SC	Chairperson
George Brady	Matheson
Neil Colgan	CRH PLC
Alex Costello	Department of Finance
David Fitzgibbon	Matheson
David Hegarty	Office of the Director of Corporate Enforcement
Rosemary Hickey	CLRG member
Tanya Holly	CLRG member
Will Joyce	Dept. of Finance
Alan Kelly	Revenue Commissioners
Gillian Leeson	CLRG member
Vincent Madigan	CLRG member
Dara McNulty	Central Bank of Ireland
Therese Moore	Euronext Dublin (The Irish Stock Exchange PLC)
Joe Molony	Computershare LTD
Pat O'Donoghue	Link Registrars LTD
Mark Talbot	William Fry

3. The Work Programme

3.1 Introduction to the Work Programme

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, in consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items of work to the programme as matters arise. During 2020 the CLRG completed its 2018-2020 work programme and the current work programme began in June 2020 and runs until mid-2022. The work programme is focused on continuing to refine and modernise Irish company law, with a strong emphasis on the area of insolvency. The impact of Brexit and the effects of Covid 19 on company law issues are also reflected in the current work programme.

3.2 Company Law Review Group Work Programme 2018-2020

1) Examine and make recommendations on whether it will be necessary or desirable to amend company law in line with recent case law and submissions received regarding the Companies Act 2014.

2) Review the enforcement of company law and, if appropriate, make recommendations for change.

3) Review the provisions in relation to winding up in the Companies Act 2014 and, if appropriate, make recommendations for change.

4) Provide ongoing advice to the Department of Business, Enterprise and Innovation on request for EU and international proposals, including proposals in relation to the harmonisation or convergence of national company insolvency laws.

5) Examine and make recommendations on whether it is necessary or desirable to adopt, in Irish company law, the UNCITRAL Model Law on Cross-Border Insolvency.

6) Review the operation of the Summary Approval Procedure introduced in the Companies Act 2014.

3.3 Additional item to the 2018-2020 Work Programme

On 5 December 2018, the Minister wrote to the Chairperson requesting that the CLRG examine the regulation of receivers, and referred the following terms of reference:

(1) Examine and make recommendations as to whether the supervisory regime for receivers in the Companies Act 2014 needs to be strengthened including in relation to the introduction of qualifications for appointment as a receiver to the property of a company and ongoing supervision.

(2) Examine and make recommendations as to whether receivers should be obliged to provide information to the company on the management of the business and progress of the receivership, (beyond the abstract referred to in sections 430 and 441) particularly where a receiver has been appointed over all or substantially all of the property of a company. If a receiver is a receiver/manager should there be a requirement for the receiver to supply

information to the borrower and potentially other creditors, particularly preferential creditors, on the progress of the receivership.

(3) Notwithstanding section 444 of the Companies Act 2014 in relation to the court's power to fix a receiver's remuneration, and notwithstanding that the receiver's remuneration may be fixed in an instrument, examine and make recommendations as to whether there should be a requirement for greater transparency in relation to receivers' fees for the information of both the company (to whose property the receiver has been appointed) and other creditors, in particular, preferential creditors.

Should factors that a debenture holder or a court must consider when fixing a receiver's fee be set out in the Companies Act such as are set out in relation to liquidator's fees at section 648(9) of the Act?

(4) Any other recommendations the CLRG consider appropriate.

This additional item was adopted as part of the CLRG's work programme on 10 December 2018.

3.4 Company Law Review Group Work Programme 2020-2022

The Company Law Review Group embarked on a new two year work programme from June 2020.

1. Consider the Companies Act in the context of creditors' rights under the following headings:

   - Review whether the legal provisions surrounding collective redundancies and the liquidation of companies effectively protect the rights of workers.

   - Review the Companies Acts with a view to addressing the practice of trading entities splitting their operations between trading and property with the result being the trading business (including jobs) go into insolvency and assets are taken out of the original business.

   - Examine the legal provision that pertains to any sale to a connected party following insolvency of a company including who can object and allowable grounds of an objection.

2. Provide ongoing advice to the Department of Enterprise, Trade and Employment on potential amendments to company law in light of the Covid-19 pandemic and the consequent effects on companies' administration, solvency and compliance with the Companies Act 2014.

3. Provide ongoing advice to the Department of Enterprise, Trade and Employment on the migration of participating securities in light of Brexit, and any consequential company law amendments arising.

4. Examine the possible impacts of the increased use of Artificial Intelligence in the context of the Companies Act 2014, with particular regard to corporate governance matters.

5. Provide ongoing advice to the Department of Enterprise, Trade and Employment on request in relation to EU and international proposals on company law.

6. Examine and make recommendations on whether it will be necessary or desirable to amend company law in line with recent case law and submissions received regarding the Companies Act 2014.

7. Review the enforcement of company law and, if appropriate, make recommendations for change.

8. Review the CLRG's recommendation from its 2017 Report on the Protection of Employees and Unsecured Creditors' in relation to "self-administered liquidation" and make further recommendation as to how this might be implemented.

9. Review the obligations outlined in relation to the directors' compliance statement in the Companies Act 2014, and, if appropriate, make recommendations as to how these might be enhanced in the interest of good corporate governance.

3.5 Additional item to the 2020-2022 Work Programme

On 8 July 2020, the Tánaiste wrote to the Chairperson requesting that the Review Group should:

1. Examine and make recommendations as to how the statutory scheme of arrangement provisions of the Companies Act 2014 might be adapted to provide a rescue framework for SMEs.

2. Examine and make recommendation as to ways in which key elements of the examinership process, including a stay on enforcement proceedings and a cross class cram down, might be incorporated into a rescue framework for SMEs.

3. [Examine] Other EU Member States provide for voluntary restructuring processes, with a strong emphasis on creditor agreement. Examine and make recommendation as to whether such a process is desirable in an Irish context with particular emphasis on the French framework (mandate ad hoc procedure).

4. Any other recommendations the CLRG consider appropriate.

This additional item was adopted as part of the CLRG's work programme on 13 October 2020.

4. Review Group and Committee Activity 2020

4.1 Plenary Meetings of the Company Law Review Group

The CLRG meets in plenary session to discuss the progression of the work programme and to formally adopt its recommendations and publications. Five CLRG Plenary Meetings were held in 2020 on 2 March, 20 April, 24 June, 13 October and 12 December.

During the year, the Review Group delivered its Annual Report for 2019, the four Reports set out in Annexes 1 to 4 and the Submission in Annex 5.

4.2 Committees of the Company Law Review Group

The work programme of the CLRG is largely progressed by the work of its Committees, of which there are five currently constituted. The Committees consider not only items determined by the work programme, but issues arising from the administration of the Companies Act 2014 and matters arising such as court judgements in relation to company law and developments at EU level.

CLRG members volunteer to serve on Committees that are relevant to their interests and area of expertise. CLRG members can nominate alternates to serve on Committees where the Committee's work is outside the CLRG member's area of expertise. A Committee, on the proposal of its Chair, can co-opt individuals to the Committee where they have technical expertise relevant to the particular deliberation.

4.3 Statutory Committee (Item 5 of the current Work Programme)

The Statutory Committee is primarily convened to provide responses to proposed legislative amendments within short time frames. The Committee is chaired by CLRG Chairperson Paul Egan SC and met on 2 occasions in 2020.

In 2020 the Committee prepared a formal submission to the Department of Enterprise, Trade and Employment on Directive (EU) 2019/2021 Cross-Border Conversions and Divisions of Companies. The recommendations in the submission were approved and adopted as recommendations of the Review Group and communicated to the Department in October 2020. The submission is set out in Annex 5 to this Report.

4.4 Corporate Enforcement Committee (Item 7 of the Current Work Programme)

Corporate enforcement in Ireland has recently been and is currently the subject of consideration by a number of bodies. Relevant activities in that context have included:

- the 23 October 2018 Law Reform Commission Report on Regulatory Powers and Corporate Offences, aspects of which came within the terms of reference of the Hamilton Review Group (referenced below);[1]

[1] https://www.lawreform.ie/_fileupload/Completed%20Projects/LRC%20119-2018%20Regulatory%20Powers%20and%20Corporate%20Offences%20Volume%201.pdf; and https://www.lawreform.ie/_fileupload/Completed%20Projects/LRC%20119-2018%20Regulatory%20Powers%20and%20Corporate%20Offences%20Volume%202.pdf.

- the 9 November 2020 Report of the Hamilton Review Group on structures and strategies to prevent, investigate and penalise economic crime and corruption[2], the recommendations of which have been adopted by Government; and

- the General Scheme of the Companies (Corporate Enforcement) Authority Bill 2018[3], which has undergone pre-legislative scrutiny in the Houses of the Oireachtas, as a result of which the report of the Joint Committee on Enterprise, Trade and Employment is awaited.

The confluence of these circumstances – which may serve to change the Company Law Enforcement environment in Ireland generally – would have rendered the work of the Enforcement Committee during 2020 duplicative. In particular, the probability of legislative amendment reduced the necessity for ongoing review of company law enforcement by the Committee itself. In light of that, the work of the Committee in 2020 awaited the outcome of legislative developments.

4.5 Corporate Insolvency Committee (items 1 and 8 and additional item of the current work programme and items 3, 4, 5 & additional item of 2018-2020 work programme)

The Corporate Insolvency Committee examines insolvency law under the Companies Act and is chaired by Professor Irene Lynch Fannon. The Committee met 18 times during 2020.

The Committee in conjunction with the Corporate Governance Committee developed the Report on measures to address company law issues arising by reason of the COVID-19 pandemic, which was approved and adopted by the Review Group. This Report is set out in Annex 1 to this Report.

The Committee developed the Report advising on a legal structure for the rescue of small companies, which was approved and adopted by the Review Group. This Report is set out in Annex 3 to this Report.

The Committee engaged in a consideration of the Preventive Restructuring Directive (EU) 2019/1023[4] in the light of DETE's public consultation on its transposition. This Directive seeks to introduce a preventive restructuring process in Member States across the EU with various options being available. The Examinership process is typical of what is envisaged. The Directive seeks to reduce barriers for cross border investment, reduce the cost of insolvency and support efforts to reduce non-performing loans. Committee members made submissions to DETE in this context.

During 2020 the Committee commenced work on examining Item 1 on the Work Programme for 2020 – 2022 in relation to creditors rights in liquidations, including employees' rights, the practice of trading entities splitting their operations between trading and property, and transactional avoidance.

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[2] http://www.justice.ie/en/JELR/Hamiliton_Review_Group_Report.pdf/Files/Hamiliton_Review_Group_Report.pdf.

[3] https://www.gov.ie/en/publication/ef9afb-companies-corporate-enforcement-authority-bill-2018/

[4] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), OJ L 172, 26.6.2019, p. 18–55

4.6 Corporate Governance Committee (Item 4 and 9)

The Corporate Governance Committee examines law related to the governance of companies and is chaired by Mr. Salvador Nash. It held 9 meetings during 2020.

The Committee in conjunction with the Corporate Insolvency Committee developed the above-mentioned Report on measures to address company law issues arising by reason of the COVID-19 pandemic, which was approved and adopted by the Review Group.

The Committee also developed the Report on the effect of artificial intelligence on company law in the context of corporate governance, which was adopted by the Review Group. This Report is set out in Annex 4 to this Report.

4.7 Part 23 Committee

The Part 23 Committee is concerned with the law applicable to companies to which Part 23 of the Companies Act applies (primarily public limited companies with listed or traded securities). The Committee is chaired by CLRG Chairperson Paul Egan SC and had 2 meetings in 2020.

The Committee prepared the Report on certain company law issues arising under the EU Central Securities Depositories Regulation 909/2014, which was approved and adopted by the Review Group. This Report is set out in Annex 2 to this Report.

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ANNEXES

ANNEX 1

COMPANY LAW REVIEW GROUP

REPORT ON MEASURES TO ADDRESS COMPANY LAW ISSUES ARISING BY REASON OF THE COVID-19 PANDEMIC

JUNE 2020

Contents

Chairperson's Letter to the Minister for Business, Enterprise and Innovation

Ms Heather Humphreys T.D.,
Minister for Business, Enterprise and Innovation
23 Kildare Street
Dublin 2 D02 TD30

25 June 2020

Dear Minister,

I am pleased to present to you a Special Report of the Company Law Review Group (CLRG) on proposals to deal with company law issues arising by reason of the Covid-19 pandemic.

In my letter to you of 31 March 2020 delivering the Review Group's Annual Report for 2019, I noted that the most pressing issue facing the country was the Covid-19 pandemic. The pandemic and its economic effects continue to present enormous challenges to people generally and to the conduct of business on a human and economic front.

On its own initiative and further to the CLRG's interaction with your officials, a number of proposals originated and received by Review Group and the Department have been considered in depth by two CLRG Committees, the Corporate Governance Committee and the Corporate Insolvency Committee. The conclusions arrived at by the Committees have been formally adopted by the Review Group, subject to some reservations in relation to specific issues on the part of some Group members, which, where applicable, are noted in the Report.

I would like to express my sincere thanks to fellow Review Group members, and in particular to Professor Irene Lynch Fannon, Chairperson of the CLRG Corporate Insolvency Committee and Salvador Nash, Chairperson of the CLRG Corporate Governance Committee for their work done to formulate what I believe are a measured and appropriate set of practical proposals to deal with the most immediate company law issues to fall out from the pandemic. I would also like to thank the Department of Business, Enterprise and Innovation for their support, in particular, Secretary to the Group, Ms. Tara Keane.

Yours sincerely,

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Paul Egan
Chairperson
Company Law Review Group

1. Introduction to the Report

1.1 The Company Law Review Group

The Company Law Review Group ("**CLRG**") is a statutory advisory body charged with advising the Minister for Business, Enterprise & Innovation ("**the Minister**") on the review and development of company law in Ireland. It was accorded statutory advisory status by the Company Law Enforcement Act 2001, which was continued under Section 958 of the Companies Act 2014. The CLRG operates on a two-year work programme which is determined by the Minister, in consultation with the CLRG.

The CLRG consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and trade unions), regulators (implementation and enforcement bodies) and representatives from Government departments including the Department of Business, Enterprise and Innovation ("**the Department**" or "**DBEI**") and the Revenue Commissioners. The Secretariat to the CLRG is provided by the Company Law Development and EU Unit of the Department.

1.2 The Role of the CLRG

The CLRG was established to "monitor, review and advise the Minister" on matters concerning company law. In so doing, it is required to "seek to promote enterprise, facilitate commerce, simplify the operation of the Act, enhance corporate governance and encourage commercial probity" (section 959 of the Companies Act 2014).

1.3 Policy Development

The CLRG submits its recommendations on matters in its work programme to the Minister. The Minister, in turn, reviews the recommendations and determines the policy direction to be adopted.

1.4 Contact information

The CLRG maintains a website www.clrg.org. In line with the requirements of the Regulation of Lobbying Act 2015 and accompanying Transparency Code, all CLRG reports and the minutes of its meetings are routinely published on the website. It also lists the members and the current work programme.

The CLRG's Secretariat receives queries relating to the work of the Group and is happy to assist members of the public. Contact may be made either through the website or directly to:

Tara Keane
Secretary to the Company Law Review Group
Department of Business, Enterprise and Innovation
Earlsfort Centre
Lower Hatch Street
Dublin 2 D02 PW01
Tel: (01) 631 2675 Email: tara.keane@dbei.gov.ie

2. The Company Law Review Group Membership

2.1 Membership of the Company Law Review Group

The membership of the Company Law Review Group at 31 December 2019 is provided below.

Paul Egan	Chairperson (Mason Hayes & Curran)
Barry Conway	Ministerial Nominee (William Fry)
Bernice Evoy	Banking and Payments Federation Ireland
Ciara O'Leary	Irish Funds Industry Association (Maples and Calder)
David McFadden	Ministerial Nominee (Companies Registration Office)
Doug Smith	Irish Society of Insolvency Practitioners (Eugene F Collins)
Eadaoin Rock	Central Bank
Emma Doherty	Ministerial Nominee (Matheson)
Gillian Leeson	Euronext Dublin
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace)
Ian Drennan	Director of Corporate Enforcement
Irene Lynch Fannon	Ministerial Nominee (University College Cork)
James Finn	The Courts Service
Jeanette Doonan	Revenue Commissioners
John Loughlin	CCAB-I (PWC)
John Maher	Ministerial Nominee (DBEI)
Kathryn Maybury	Small Firms Association (KomSec Limited)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Máire Cunningham	Law Society of Ireland (Beauchamps)
Marie Daly	Irish Business and Employers' Confederation (IBEC)
Maureen O'Sullivan	Ministerial Nominee (Companies Registration Office)
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Neil McDonnell	Irish Small and Medium Enterprises Association (ISME)
Ralph MacDarby	Institute of Directors in Ireland
Richard Curran	Ministerial Nominee (LK Shields)
Rosemary Hickey	Office of the Attorney General

Salvador Nash	The Chartered Governance Institute (KPMG)
Shelley Horan	Bar Council of Ireland
Tanya Holly	Ministerial Nominee (DBEI)
Vincent Madigan	Ministerial Nominee

3. The Work Programme

3.1 Introduction to the Work Programme

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, in consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items of work to the programme as matters arise. The most recent work programme began in June 2018 and ran until the end of May 2020. The work programme is focused on continuing to refine and modernise Irish company law, with a strong emphasis on the area of insolvency. The work programme for June 2020 to May 2022 is at present being formulated but the statutory mandate of the CLRG to monitor, report and advise the Minister on matters concerning company law remains current at all times.

3.2 Company Law Review Group Work Programme 2018-2020

The Review Group's Work Programme under which this Report was prepared was as follows:

1) Examine and make recommendations on whether it will be necessary or desirable to amend company law in line with recent case law and submissions received regarding the Companies Act 2014.

   This Report is delivered in fulfilment of the Review Group's mandate under this heading.

2) Review the enforcement of company law and, if appropriate, make recommendations for change.

3) Review the provisions in relation to winding up in the Companies Act 2014 and, if appropriate, make recommendations for change.

4) Provide ongoing advice to the Department of Business, Enterprise and Innovation on request for EU and international proposals, including proposals in relation to the harmonisation or convergence of national company insolvency laws.

5) Examine and make recommendations on whether it is necessary or desirable to adopt, in Irish company law, the UNCITRAL Model Law on Cross-Border Insolvency.

6) Review the operation of the Summary Approval Procedure introduced in the Companies Act 2014.

3.3 Additional item to the Work Programme

On 5 December 2018, the Minister wrote to the Chairperson requesting that the CLRG examine the regulation of receivers under specific terms of reference. This additional item was formally adopted as part of the CLRG's work programme 10 December 2018 and a special report delivered to the Minister in May 2019.

3.4 Decision-making process of the Company Law Review Group

The CLRG meets in plenary session to discuss the progression of the work programme and to formally adopt its recommendations and publications.

3.5 Committees of the Company Law Review Group

The work of the CLRG is largely progressed by the work of its Committees. The Committees consider not only items determined by the work programme, but issues arising from the administration of the Companies Act 2014 and matters arising such as court judgements in relation to company law and developments at EU level. This Report is the product of work by the Corporate Insolvency Committee chaired by Professor Irene Lynch Fannon and the Corporate Governance Committee chaired by Salvador Nash.

4. Company law measures related to the Covid-19 Pandemic

` 4.1 Introduction

4.1.1 Company law issues created by the Covid-19 pandemic

As the Covid-19 pandemic spread throughout Ireland, it became apparent that a number of issues would arise under the Companies Act 2014.

- Company law requires, subject to exceptions, that companies hold annual general meetings each year. Other general meetings of companies can be convened for specific purposes. The practical and legal restrictions on meetings have meant that many such meetings have not been able to be conducted in the usual manner.
- The separate locations and social distancing of company directors and other officers has rendered it at best difficult and at worst impossible for companies to execute documents requiring more than one signature, notably those executed under seal.
- The closing of the public offices of the Registrar of Companies and the apprehension that filing requirements would be rendered impossible created a concern that companies, and their directors would be unavoidably out of compliance with requirements to deliver documents for registration to the Companies Registration Office.
- In the same way that companies have general meetings of members, meetings of creditors are required before and during the winding up of companies, most notably the creditors' meeting before the commencement of a creditors' voluntary winding up. The guidelines and regulations on social distancing have similarly affected the ability to conduct these meetings in the usual way.
- The economic slow-down and cashflow impact on companies has exposed a considerable number of, otherwise viable, companies to a greater risk of the commencement of procedures leading to a winding up, particularly where the debts outstanding are relatively modest.
- Where a company is trading during the pandemic with the benefit of forbearance of its creditors, concerns have been expressed by and to Review Group members that trading in good faith in anticipation of a satisfactory exit from the pandemic, which ultimately proves to be ill-founded, could create a consequent risk to directors of restriction as a director or the imposition of personal liability for reckless trading. To a significant extent these fears will have been allayed by the statement issued by the ODCE on 4 June 2020 entitled "Covid-19 and the insolvency-related functions of the ODCE".[1]
- Whilst the examinership procedure of company rescue has been effective in preserving many enterprises that might otherwise have been wound up, the cost of an examinership as well as certain of the procedures have been identified as disincentives to its use. While most of the issues regarding examinership have been adjudged to be medium term issues not appropriate for amendment without proper considered review, the Group recognised that the normal time limits associated with examinership could present difficulties in the context of Covid-19.

[1] https://dbei.gov.ie/en/Publications/COVID-19-and-the-insolvency-related-functions-of-the-ODCE.html

4.1.2 Activity of the Review Group

The Review Group began its consideration of the company law issues after what is now the Emergency Measures in the Public Interest (COVID-19) Act 2020 was introduced as a Bill in March 2020. Shortly after its enactment, a series of outline company law proposals were submitted to the Department by the Chairperson, although these proposals had not been considered in detail or approved by the Review Group. Subsequently those proposals, as well as a number of other issues raised with the Department were referred back to the Review Group's Corporate Insolvency Committee and Corporate Governance Committee for a fuller consideration. The Committees met, by electronic means, 4 and 4 times respectively and their proposals and this Report were approved, subject, where noted in some instances, to the reservations and/or dissenting views of the Director of Corporate Enforcement and Irish Congress of Trade Unions, by a meeting of the full Review Group, held by electronic means on 24 June 2020.

4.1.3 Companies Registration Office

Against a background of quickly developing circumstances and the dislocation of personnel, the Registrar of Companies has organised a matrix of effective solutions that has enabled companies and their directors to be in compliance with their filing obligations. Accordingly, this Report does not contain proposals with respect to Companies Registration Office procedures.

4.1.4 Draft Heads of a Companies (Covid-19) (Amendment) Bill 2020

The Review Group's conclusions and recommendations, subject to the above-mentioned reservations and dissenting views, are crystallised in:

- the draft Heads of a Companies (Covid-19) (Amendment) Bill 2020 set out in Appendix 2; and
- the draft Heads of Statutory Instrument: Companies Act 2014 (General Meetings) Regulations 2020 set out in Appendix 3.
- The draft Heads of Statutory Instrument: Companies Act 2014 (Creditors' Meetings) Regulations set out in Appendix 4.

Although the draft legislative provisions have been drafted in some detail to cover the various issues that, in the view of the Review Group, arise and need to be addressed, it is recognised that the complexity of certain of the issues will require the drafting to be looked at in further detail by the Office of Parliamentary Counsel to ensure they fit harmoniously into the 2014 Act and without creating any unintended consequences.

The Central Bank of Ireland has requested that the implementation of this Report's recommendations, including regarding extension of time to hold annual general meetings ("**AGMs**"), is effected in such a way as does not relieve entities authorised and/or regulated by it from their obligations that they may have under the laws for which it is competent authority, such as obligations which require timely reporting of information laid before AGMs.[2]

An outline of the reasoning and, in certain cases, open points for further consideration are set out in the succeeding sections of this Report.

[2] The reasoning for this is explained in further detail in the Explanatory Note to Head 4 in Appendix 2.

4.2. Duration of potential company law measures

The Emergency Provisions in the Public Interest (Covid-19) Act 2020 has two different definitions of "emergency period" for the purposes of the legislation referred to in it:

- It is 3 months from 27 March 2020, subject to being extended, for the purposes of measures pursuant to the Residential Tenancies Act 2004.
- For the purposes of the Redundancy Payments Act 1967 and Civil Registration Act 2004 it is the period beginning on 13 March 2020 and ending on 31 May 2020.

The Review Group recommends that a period – referred to in its proposals as "the interim period" should run until 31 December 2020 subject to the power of the Minister, subject to conditions, to extend the period for one or more of the proposed legal provisions.[3] The primary "interim period" running to the end of 2020 has the advantage of simplicity and ease of understanding and it is particularly relevant to the issue of annual general meetings, which must take place in each calendar year.

The conditions required to be satisfied before the Minister might exercise the power to extend the period are first that the Minister consults with the Minister for Health and secondly takes into account any legal or practical restrictions in the State on travel or meetings.

The effect of an extension would be to enable the continuance of certain of one or more of the "interim provisions", i.e. those provisions of company law that are proposed to apply during the interim period. It would not however enable a deferral of a company's 2020 annual general meeting beyond 31 December 2020, the issue that is now addressed. Consideration should also be given to distinguishing between matters which are essentially procedural in nature, such as the conduct of AGMs and creditors' meetings, and those which have to do with protection, for example, proceedings under reckless trading and an extension to the period of protection in examinership. It may be that the Minister determines that the latter should not be subject to an extended interim period.

The Review Group also note that the pace at which the economy is opening has accelerated and may obviate the necessity to extend the interim provision in respect of certain measures.

4.3. General meetings

4.3.1 Requirement to have an AGM

The Companies Act 2014 requires, by way of default requirement, that all companies must have their first annual general meeting ("AGM") within 18 months of incorporation and once in every year thereafter with no more than 15 months elapsing between AGMs.[4] The financial statements to be presented to the AGM must be made up to a balance sheet date no more than 9 months before the AGM.[5] General meetings are convened for other reasons, usually by the directors but the Companies Act enables general meetings to be convened by members in particular instances.[6] The pandemic,

[3] The Review Group note that there is a variety of "interim provisions provided for in other jurisdictions which the Department may wish to take into account. In the case of Germany, the period runs from 23rd March to September 30th by a decree of the Federal Government. In New Zealand, the period for "safe harbour" legislation is six months from 3rd April 2020. Other EU Member States such as Slovenia and Latvia have similar periods to Germany.

[4] Section 175.

[5] Section 341(2).

[6] Section 178.

with the accompanying regulations and guidelines on assembly and travel, has rendered it close to impossible for companies to convene general meetings in the normal fashion. In that regard, many public companies have limited personal attendance while enabling electronic participation in the meeting, working around votes by show of hands by instead conducting all votes on a poll with proxy votes only.

Additionally, during the pandemic, the High Court refused, on the balance of convenience, to prevent Grafton Group PLC from proceeding with its Annual General Meeting where its shareholders were encouraged not to attend and had no ability to participate during the meeting.

4.3.2 Exemptions and the *Duomatic* principle

The Companies Act does provide for private limited companies and single-member companies to avoid the requirement to hold annual general meetings, where the members entitled to attend and vote at general meetings sign a written resolution to note and approve the matters ordinarily attended to at an AGM. [7] Quite apart from this provision, "[t]he unanimous agreement of members, whether express or implied from their acts or omissions, can have the same consequences as if the members had passed a formal resolution to that effect." [8] This is what is often called the "Duomatic principle" after the English case of *Re Duomatic Ltd*[9] although as Dr Thomas B Courtney points out, the principles in that case were settled in Irish law 15 years prior to that case in the Irish case of *Buchanan Ltd and another v McVey* [10], in which the court stated:

> "If all the corporators agree to a certain course then, however informal the manner of their agreement, it is an act of the company and binds the company subject only to two pre-requisites: *Re Express Engineering Works Ltd* [1920] 1 Ch 466, *Parker and Cooper Ltd v Reading* [1926] 1 Ch 975. 231
>
> The two necessary pre-requisites are (1) that the transaction to which the corporators agree should be intra vires the company; (2) that the transaction should be honest: P*arker and Cooper Ltd v Reading* [1926] 1 Ch 975."[11]

4.3.3 Virtual meetings

The Act also provides that a general meeting may be held in 2 or more venues at the same time using any technology that provides members, as a whole, with a reasonable opportunity to participate. [12] However, the Act also requires that a notice of general meeting must "specify ... the place … of the meeting"[13] and does not have provisions explicitly enabling a company to stipulate which venue a member should attend.

Accordingly, for companies that cannot navigate their circumstances so as to avail of the written AGM procedure or a bilocated or multi-located AGM, compliance with the law presents a challenge in light of restrictions on travel and assembly. There is also the practical issue of hotels and similar venues that have conventionally been used by companies for general meetings becoming

[7] Sections 175(3), 196(2).

[8] Thomas B Courtney *The Law of Companies,* 4th Ed 14.114.

[9] [1969] 2 Ch 365.

[10] [1954] IR 89.

[11] Courtney, 14.114.

[12] Section 176(4).

[13] Section 181(5)(a).

unavailable as a result of their closing down and not reopening, or reopening with attendance limits that would preclude their use.

The Review Group has chosen not to state a position on whether the current law precludes virtual general meetings without a physical venue, not least on account of the above-mentioned *Duomatic* principle. However, the Review Group is of the opinion, and so recommends, that the law should be clarified to provide for explicit provisions to deal with virtual general meetings. Although the Review Group has deliberately limited its considerations to the "interim period" – to the end of 2020 (subject to possible extension), it sees some advantage in clarifying the law in the case of virtual meetings generally.

4.3.4 A defence where an AGM cannot proceed

The Review Group gave consideration to providing a defence to companies where their annual general meeting did not take place during the pandemic. However, after extensive reflection and discussion, the Review Group, in light of its mandate in particular "to enhance corporate governance and encourage commercial probity"[14], is firmly of the opinion that, while there might be arguments in favour of such a defence, it should be "meetings-as-usual" but facilitated by legal provisions that remove any apparent anomalies or impediments. At the beginning of 2020, it will have been a minority who knew of, let alone used the various virtual meeting platforms such as Zoom, Webex, and Microsoft Teams etc. The experience of the Review Group and its Committees and of Review Group members in their own businesses, practices and organisations, has indicated that on line meetings have in a certain sense become the new normal.

4.3.5 Mode of enactment of proposal

The Review Group also gave consideration as to whether the provisions to clarify virtual meetings should be spelled out in an amendment to the 2014 Act or contained in Ministerial regulations. Again, after extensive reflection and discussion, it has concluded that Ministerial regulations, founded on an enabling provision giving an outline of their scope, provides the best solution, in particular as the detail of the Ministerial regulations take into account the views of stakeholders and an enabling provision would provide an opportunity for swift amendment should there be a need.[15]

The draft Statutory Instrument aims to address the principal issues surrounding a virtual meeting:

- the content of the notice of the general meeting;

- the minimum capabilities of the electronic platform used for the general meeting;

- quorum; and

- voting.

As a default, the platform should enable two-way audio-visual communication between members and the "top table", with the option for members to connect by audio only. However, in the case of those few companies where the numbers in attendance would outstrip the capacity of audio-visual platforms commonly available, it is proposed that member communication be facilitated by

[14] Companies Act 2014 s. 959(2).

[15] This is similar to the approach taken in section 239 of the Companies Act 1990 and the Companies Act 1990 (Uncertificated) Securities Regulations 1996 (SI 68/1996), which together provide that title to securities may be evidenced otherwise than by a certificate and transferred without a written instrument, which Regulations, as amended, continue in force under the Companies Act 2014.

audience response software where attendees participate by sending questions and comments by typed message rather than orally.

4.3.6 Extension of time for 2020 AGM

Whilst the Review Group did not conduct a formal survey of companies for this purpose, the consistent report of CLRG members was that a significant number of companies were delaying their AGMs in anticipation of either the lifting of the lockdown or a change in the law or both. The Review Group notes also the EU Council Regulation 2020/699 on temporary measures concerning the general meetings of European companies (SE) and of European Cooperative Societies (SCE)[16] enabling AGMs to be held up until the end of 2020 and not within the timeframe that would otherwise apply. It therefore recommends that such an extension be allowed to companies formed under Irish law also.

4.3.7 Provision for cancellation and rescheduling of meetings

The Review Group proposes that a general meeting, once convened, can be cancelled and rescheduled ahead of the date of the meeting without a requirement for a quasi-meeting to occur at which a formal adjournment would take place. In a number of cases known to the Review Group, meetings have proceeded solely for the purpose of formal adjournments, in some cases with company representatives standing outside locked venues, going through the formalities to allow for such adjournments.

4.3.8 Dividend resolutions

The cashflow difficulties caused by the pandemic has resulted in a number of companies withdrawing dividend resolutions that would have been indicated in the relevant financial statements or formally notified in notices of AGM. The Review Group proposes a provision that will explicitly enable companies to withdraw dividend resolutions or to reduce the dividend proposed if they change their view after the notice of AGM has been issued.

4.3.9 Restricted Meetings

The Review Group also debated at length whether it was necessary to introduce provisions to permit restricted access general meetings during the pandemic. However, the Review Group is of the opinion that clarifying the law in respect to virtual meetings in conjunction with the ability to cancel a general meeting removes the need for such provisions.

4.4. Documents under seal

The Review Group proposes that documents to be executed under seal may consist of several separate documents with the seal on one, and signatures on another or others. This is to deal with situations where a company's directors or registered person and company seal will be in separate locations and unable to meet in person. There are work-arounds available, such as the appointment by the company of an attorney under power of attorney. However, the formalities involved in executing a power of attorney can themselves create an issue if, as often is the case, notwithstanding section 15(2) of the Power of Attorney Act 1996 [17] which states that this is not

[16] OJ 27.05.2020 L165 p 25. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.165.01.0025.01.ENG&toc=OJ:L:2020:165:TOC

[17] Powers of Attorney Act 1996, s. 15: (1) Where an instrument creating a power of attorney is signed by direction of the donor it shall be signed in the presence of the donor and of another person who shall attest the instrument as witness. (2) A power of attorney is not required to be made under seal. (3) This section is

necessary, the counterparty to the company demands that the power of attorney is itself executed under seal by reason of section 15(3) of that Act as well as the opinion that is held by some commentators that, for a deed to be executed by an attorney, the power of attorney itself must be executed under seal.[18]

4.5. Financial threshold for initiating a winding up

4.5.1 Current position under the Act

Section 569 of the Companies Act sets out the circumstances in which a company may be wound up by the court. Section 569(1)(d) provides that the court may wind up a company where it is unable to pay its debts. Under s. 570 a company is deemed to be unable to pay its debts if, inter alia, a creditor, who is owed a sum exceeding €10,000 serves a demand for payment and the company does not satisfy this demand within 21 days and similarly where two or more creditors owed a sum exceeding €20,000 issue a demand for payment and this demand is not met.

The impact COVID-19 has had on the normal operation of business will mean that companies which would be viable, but for the Government restrictions on movement and public gatherings, might now find themselves unable to pay their debts in the short term. In light of this, submissions were made to the Department expressing concerns that companies could be wound up over relatively small unpaid debts. In this context, it was proposed that a temporary increase should be made to the financial threshold for initiating a winding from €10,000 to €50,000 in respect of single creditors and €20,000 to €100,000 in the aggregate. It was also suggested that the period to pay a debt on foot of a statutory demand should be extended from 21 days to 6 months. It was suggested that this would allow many companies the breathing space required to trade through the crisis and retain employees.

4.5.2 Impact on other creditors

Throughout the Corporate Insolvency Committee's deliberations, it was highlighted that any amendment in this regard must be considered within the context of the potential impact on creditors. It was pointed out that these creditors are often other companies and any proposed amendment must be sufficiently balanced so as not to unduly interfere with their access to liquidity. The Committee were cognisant that increasing the threshold significantly or extending payment deadlines unduly could in fact have the opposite effect to that intended and could ultimately push other companies towards insolvency by restricting their cashflow. Equally, consideration must be given to employees.

4.5.3 Conclusions

Accordingly, the Review Group recommends that a temporary limited increase in the threshold for applications to wind up companies was warranted in the interest of both preserving employment and protecting the economy post-crisis. In balancing the interests of competing parties in this regard, an increase from €10,000 for single creditors and €20,000 in the aggregate to €50,000 in both instances was considered most appropriate. However, the Review Group does not consider that an extension in the period of 21 days to discharge a statutory demand is warranted.

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without prejudice to any requirement in or under any other enactment as to the witnessing of powers of attorney or as to the execution of instruments by bodies corporate.

[18] "Does the Companies Act 2014 really remove the need for a company seal?" James Byrne. *Commercial Law Practitioner* 2015, 22(8), 196-198

It must be noted that the provisions of s. 570(a) and (b) are cross referenced in a number of other provisions in the Companies Act 2014, for example ss. 610 and 818 which refer to reckless trading and restriction of directors respectively. The intention of this proposal is to limit the amendment of s. 570(a) and (b) for the purposes of s. 569 (1)(d) only.

4.6. Convening of creditors meetings during the interim period

4.6.1 Requirement to hold a creditors meeting

There are various provisions in Parts 9, 10 and 11 of the Companies Act 2014 which regulate various processes requiring a creditors' meeting to take place. The structure of the Companies Act is such that in each relevant Chapter of these Parts the provisions are stated to apply to that process only, save to the extent a provision provides otherwise. Thus s. 585 states that the following provisions apply to creditors' voluntary windings up only, subject to the rider just mentioned. The Committee wish to provide for a general provision applicable to creditors' meetings generally and so it is proposed to clearly state that the proposed s. 688A applies to all creditors' meetings.

As with general meetings, described earlier in the report, government restrictions on public gatherings and travel have made it difficult for such meetings to be convened in the normal fashion. In response to this, submissions were made to the Department proposing that the Companies Act be amended to allow for any such meeting to be conducted by electronic means.

4.6.2 Creditors' meetings to be held and conducted by electronic means.

The Review Group considers it a pragmatic and sensible proposal to provide for creditors' meetings to be held by electronic means while preserving all of the other rules which apply to these meetings, in particular ensuring that creditors receive proper notice of any meetings and are afforded a reasonable means of participating fully in such meetings. This is a position which has been adopted in respect of AGMs[19] and creditors' meetings[20] in other jurisdictions and a number of accountancy bodies have already issued guidance to insolvency practitioners on how to conduct meetings in this manner.

4.6.3 Mode of enactment of the proposal

The Corporate Insolvency Committee debated at length as to the most appropriate way to enact the proposed amendment. Consideration was first given to a specific or general principle based approach. Subsequently, discussions centred on the language and formula of construction being developed to deal with AGMs and the issue of primary versus secondary legislation.

The Committee initially considered specifying all provisions of the Companies Act which deal with creditors' meetings and outlining an amendment in respect of each. However, upon deeper analysis it became evident that this posed a significant risk that certain sections might be unintentionally missed. The Committee gave particular weight to High Court jurisprudence which outlines that where specific provisions in an Act are referenced, this has the effect of excluding those not referenced from the scope of the provision[21].

[19] UK, Germany, Australia

[20] Australia already provides for virtual creditors' meetings in R75 – 30 of the Insolvency Practice Rules (Corporations Rules)

[21] "*Expressio unius est exclusio alterius*" – this maxim of statutory interpretation roughly translates to that which is omitted is understood to have been excluded. It has wide application and has been utilised by the courts to interpret constitutions, treaties, wills and contracts as well as statute.

This led the Committee to adopt a principle that insofar as possible meetings would be held in accordance with the provisions of the Companies Act generally and that only where necessary specific detail would be addressed, for example regarding how notice should be served or how documentation normally presented at a creditors' meeting would be dealt with.

In considering whether the amendment should be provided by way of primary or secondary legislation the Committee examined the construction of the recommendation in relation to AGMs which, as outlined earlier in this report, provides for an enabling provision for virtual meetings in the Companies Act with the detail of such meetings to be dealt with by way of regulation. Given the Committee's broad, principle based approach to creditors' meetings it was considered appropriate to effect the amendment in a similar manner. The proposed legal provisions mirror those proposed for general meetings.

Accordingly, the Review Group recommends that virtual creditors' meetings be enabled in the Companies Act and to provide for any specific detail to be dealt with by regulation. It was also noted that the regulation-making power was particularly important in the context of the evolving nature of the pandemic to ensure the Minister can respond in a timely fashion to any operational issues arising.

4.6.4 Mandatory vs permissive provision

The Corporate Insolvency Committee considered whether virtual meetings should be mandatory during the interim period or whether the provision should be permissive and provide for the option of virtual meetings. The underlying objective of the Committee in this regard was to ensure that creditors' have a fair and genuine opportunity to participate fully in the meeting. The Review Group recommends that provision be made for the option of virtual meetings. However, where a physical meeting is held there should be a mandatory obligation to facilitate virtual participation.

4.7. Continuing to trade during the COVID-19 outbreak

4.7.1 Current position under the Act

Section 610 of the Companies Act provides that a director or an officer of a company, which is in the course of being wound up or in the course of examinership proceedings, may be found personally liable for the company's debts in circumstances where it is considered by the court that he or she knowingly carried out any business of the company in a reckless manner.

The economic effect of COVID-19 and the associated Government shut down of business has significantly impacted the liquidity of companies and has given rise to concerns, amongst business and directors' representative groups, that directors may find themselves being held personally liable for the debts of the company by trying to trade, in good faith, through the crisis.

Applications to have personal liability imposed on directors on foot of the section can be made by liquidators, an examiner, a receiver, a creditor or a contributory of the company concerned. In practice however, such applications are very rarely litigated. In the absence of any material levels of litigation on the issue, some anecdotal evidence was advanced that threats of such applications are made somewhat more frequently, i.e., in an effort to force payment or part-payment of outstanding debts.

The Office of the Director of Corporate Enforcement (ODCE), which considers an amendment to be unnecessary, expressed the view that concerns of this nature are more matters of misperception in that the existing jurisprudence clearly demonstrates that the Courts give appropriate consideration and weight to relevant facts and circumstances – such as, in the instant case, the impacts of the

pandemic. The ODCE is, therefore, of the view that honest and responsible directors have little, if anything, to fear from the existing provisions.

Additionally, there are differing assessments within the legal community about whether or not availing of the Government's Temporary Wage Subsidy Scheme amounted to a declaration of insolvency. It was noted that the Revenue Commissioners, who have been charged with administering the Scheme, have publicly stated that they would not consider any application to the scheme as being a declaration of insolvency. Under the Scheme the Government undertakes to pay a portion of the worker's salary provided that the employer keeps the employee on the company's books rather than laying them off. In order to qualify for the Scheme a business must demonstrate that its turnover has reduced by at least 25% and that it is unable to pay normal wages and outgoings as they fall due. It is this point which gave rise to some concerns in respect of reckless trading under the Companies Act.

In response to these concerns, submissions were made to the Department seeking legislative amendment to explicitly provide that a director will not be considered to have traded recklessly by reason only of trading during the COVID-19 outbreak. Detailed below is a comprehensive consideration of the Committee's deliberations in respect of same.

4.7.2 Directors' duties

The amendment that is proposed at section 4.7.5 must first be considered within the context of directors' duties. Where a business is solvent and trading as normal, the company's directors owe their fiduciary duties[22] to the company. Where a company is at risk of insolvency, directors also have a duty to have regard to the interests of creditors as described in case law but not as yet codified in Ireland.[23].

However, the Review Group acknowledges that the Irish Courts have demonstrated an appreciation for entrepreneurial risk and the bar for a finding of reckless trading, and consequential imposition of personal liability on the directors concerned, is therefore quite high. In particular, the Courts have afforded some latitude for a continuation of trading for a short period in certain circumstances. The extension of any such latitude by the Courts would generally be contingent upon (i) there having been a reasonable prospect that the company would be able to trade out of its difficulties within a relatively short timeframe; and (ii) the directors having acted in good faith and having acted honestly and responsibly in all other respects. While case law in the area is limited to 3 reported cases, some examples of relevant case law are outlined in the following section.

Where it is clear that the company cannot survive, it is argued that there exists a duty at common law to put the company into creditors' voluntary liquidation and to preserve the company's assets so they can be applied *pro tanto* in discharge of its liabilities.

4.7.3 Case law

In the case of *Hefferon Kearns Ltd*[24] the High Court interpreted 'reckless' to mean gross carelessness and held that for an officer to be held liable for reckless trading he must have been party to the carrying on of the business in a manner which he knew involved a serious and obvious risk of loss or

[22] One of the more far-reaching reforms introduced in the Companies Act 2014 was the codification of the duties of directors which are set out in section 228 of the Act.

[23] The CLRG's Report on the Protection of Employees and Unsecured Creditors recommended that a director's duty to creditors be codified in the Companies Act 2014. It should also be noted that the Preventative Restructuring Directive sets out codified directors' duties as a company approaches insolvency.

[24] *Hefferon Kearns Limited (No. 2)* [1993] 3 IR 191

damage to others and yet ignored that risk because he did not really care whether such others suffered loss or damage or because of a selfish desire to keep his own company alive.

The Court also remarked in this case that:

> *"[it]* would not be in the interests of the community that whenever there might appear to be any significant danger that a company was going to become insolvent, the directors should immediately cease trading and close down the business. Many businesses which might well have survived by continuing to trade coupled with remedial measures could be lost to the community*"*.

These comments have particular relevance to businesses which now find themselves in a precarious financial situation by virtue only of the current crisis.

In re *Appleyard Motors Ltd*[25]. a director who had been found by the High Court to be personally liable for reckless trading, successfully appealed to the Court of Appeal. In deciding whether or not to accede to an application to hold a director personally liable, the Court will require knowledge that the actions of the directors *would* in fact cause loss to creditors – and not that they *might* do so – having regard to the general knowledge, skill and experience that may reasonably be expected of a person in the position of the director. The Court of Appeal held that the loss to the creditors must have been foreseeable to a high degree of certainty.

However, the prevailing view of the Review Group is that the limited jurisprudence in the area would be of little comfort to the average company director and may be inclined to make more conservative decisions about trading through the pandemic on the basis of their fiduciary duties, in particular when approaching insolvency. In addition, the Committee were informed that the threat of a reckless trading action being brought by an aggrieved creditor against directors of a company was sometimes used in negotiations behind the scenes.

The ODCE, supported by the Irish Congress of Trade Unions (ICTU) and some other members, holds the view that any such concerns do not appear to be based on a realistic assessment of the provision having regard to the high threshold established by the Courts.

4.7.4 Temporary Wage Subsidy Scheme

The Corporate Insolvency Committee examined specific concerns arising from a companies' participation in the Government's Temporary Wage Subsidy Scheme. The Committee had the benefit of having amongst its membership a representative from the Revenue Commissioners participating in its deliberations who could reflect the Commissioners' policy position on the matter. Guidance issued by the Revenue Commissioners explicitly states that participation in the scheme does not, in the Commissioners' assessment, amount to a declaration of insolvency:

> "The declaration by the employer is not a declaration of insolvency. The declaration is simply a declaration which states that, based on reasonable projections, there will be, as a result of disruption to the business caused or to be caused by the COVID-19 pandemic, a decline of at least 25% in the future turnover of, or customer orders for, the business for the duration of the pandemic and that as a result the employer cannot pay normal wages and outgoings fully but nonetheless wants to retain its employees on the payroll."[26]

[25] *Toomey Leasing Group Ltd. v Sedgwick & Ors* [2016] IECA 280

[26] https://www.revenue.ie/en/corporate/communications/documents/guidance-on-employer-eligibility-and-supporting-proofs.pdf

The scheme has been widely promoted across Government, including by the Minister for Business, Enterprise & Innovation, Heather Humphreys, T.D., who has actively encouraged companies to engage with the Revenue Commissioners and apply for the scheme. The Committee took the view that participation in a Government funded scheme designed to aid business to trade through the crisis must be considered reasonable behaviour by a director. Indeed, it could be argued that not availing of the scheme runs counter to section 228(1) of the Companies Act which provides that a director has a duty to act in good faith in what he or she believes to be in the best interest of the company.

4.7.5 Conclusions

As noted above certain members of the Committee, including those from the ODCE and ICTU, are of the opinion that a legislative amendment is not necessary in that the matter is adequately addressed by the relevant jurisprudence and the application of the provisions of section 610(8) of the Companies Act 2014. [27]. This subsection provides that where it is demonstrated that a person has acted honestly and responsibly, the Court may, having regard to all the circumstances of the case, relieve the person either wholly or in part, from personal liability on such terms as it may think fit.

The statement issued by the ODCE on 4 June 2020 would also appear to be relevant in this context. In its statement, the ODCE outlined, *inter alia,* its view of the range of considerations that could reasonably be expected to be taken into account in determining whether a company director had acted honesty and responsibly. The ODCE's views are informed by its assessment of the relevant jurisprudence, particularly in respect of restriction applications. It seems reasonable to anticipate that the Courts may have regard to similar considerations in determining whether directors have acted honestly and responsibly in the context of the application of section 610.

For the reasons detailed above, the ODCE does not support the recommendation for legislative amendment. The ODCE holds the view that the proposal could remove an important remedy for inappropriate and reckless behaviour by some company directors whose actions could have devastating impacts on their creditors.

Notwithstanding the foregoing views, the Review Group on a majority basis, recommends that there should be a legislative amendment in order to convey a message to the business community that a continuation of trade in good faith without fear of personal liability, in circumstances where they have acted in an honest and responsible manner, is fundamental for economic recovery. It is also considered appropriate in terms of recognising the unique situation that directors were put in whereby business decisions were largely taken out of their hands by a government mandated lock down.

4.8. Applications for restriction orders

4.8.1 Current position under the Act

Section 820 of the Companies Act provides that the Director of Corporate Enforcement, a liquidator or receiver of an insolvent company can make an application to the High Court for the restriction of a director. In practice, the vast majority of such applications are made by liquidators following the submission of reports to the ODCE and the ODCE determining if the liquidator should be required to make such an application. Furthermore, most restrictions now arise on foot of voluntary undertakings given to the ODCE in accordance with section 852, i.e., without the directors concerned having to engage in High Court litigation.

[28] https://dbei.gov.ie/en/Publications/COVID-19-and-the-insolvency-related-functions-of-the-ODCE.html.

In conjunction with concerns raised in respect of reckless trading, employer representatives and legal practitioners also highlighted a concern that directors might find themselves subject to restriction orders by virtue of trading during the Covid-19 crisis. Submissions were made to the Department proposing an amendment to the Act to ensure that directors of companies which decide to trade during this time would not be subject to restriction proceedings solely on that basis.

The ODCE does not consider that there is any appreciable increase in the risk of a director facing restriction proceedings in the circumstances outlined in the submissions. Specifically, the ODCE has indicated that it would generally not consider directors to have acted dishonestly or irresponsibly in circumstances where the company has become insolvent as a consequence of events largely, and genuinely, outside the directors' control. The ODCE further confirms that this has been its policy position as adopted throughout the period of almost 20 years that the ODCE has been adjudicating upon liquidators' reports. It is the actions taken, or not taken, by the directors in response to financial difficulties being faced by the company that will inform the assessment as to whether directors should face a restriction application (or undertaking as the case may be). In the course of the Corporate Committee's deliberations on 4 June 2020, the ODCE issued its Statement entitled "Covid-19 and the insolvency-related functions of the ODCE".[28]

Furthermore, even in the event that the ODCE decided not to grant relief to a liquidator (i.e., required the liquidator to make a restriction application to the Court), the matter would then fall to be determined by the High Court which, as evidenced by the jurisprudence, has clearly, and consistently, demonstrated a willingness to take account of all relevant facts and circumstances, including where appropriate external factors.

4.8.2 Legislation versus guidance

Much of the Corporate Insolvency Committee's debate focused on whether a legislative amendment or comprehensive guidance from an appropriate State body such as the Director of Corporate Enforcement was the most satisfactory manner in which to address the concerns expressed in respect of this issue.

It appeared that a significant amount of concern arose in respect of the perceived link between accessing the government's Temporary Wage Subsidy Scheme and a declaration of insolvency. The Committee noted that it was difficult to conclude that anybody would seek to apply for restriction solely on the grounds that a person has applied for financial assistance from a government emergency scheme (which obviously means that it is public policy that people should avail of the scheme). In fact, it would seem more credible to suggest that a failure to apply could, in certain circumstances, be considered an act of irresponsibility by a director of a company which met the eligibility criteria for the scheme.

On the other hand, there was also an acceptance that legislation spoke to the world at large. Furthermore, as described above s. 820 of the Companies Act 2014 provides for applications for restriction to be made by a liquidator, receiver or the Director of Corporate Enforcement. Therefore, it is possible that regardless of guidance provided for by the ODCE and the position taken by the ODCE, applications could be made by others without engagement with the ODCE (although such applications are extremely rare). These observations are distinct from the fact that under s. 683 a liquidator is obliged to apply for a restriction order unless relieved from the obligation to do so by the ODCE.[29] The decision of the Court of Appeal (Kelly P. Irvine and Hogan JJ. Concurring) in *Re*

[28] https://dbei.gov.ie/en/Publications/COVID-19-and-the-insolvency-related-functions-of-the-ODCE.html.

Walfab Engineering Ltd[30] does offer some limited guidance on the extent to which the Courts may take into account external contributing factors. In an application made by the ODCE on foot of section 160(2)(h), Companies Act, 1990, for the disqualification of the directors of the company, the High Court had noted, inter alia, that the actions of the directors in this case had taken place post 2008 in what was described as a 'financial maelstrom' and were excused in that context.

This decision was appealed by the ODCE and on appeal overturned by the Court of Appeal. In his judgement, Kelly J stated:

> "For my part, I cannot agree that the factors identified by the trial judge can be regarded as relevant to the exercise of his discretion. The whole thrust of the legislative provision is to ensure that all directors of all companies comply with their obligations. It matters not that they be directors of family companies, or be at the helm of large or quoted enterprises. Neither do the qualifications of the directors or the economic challenges that the companies may be facing affect the obligations of directors to act responsibly in respect of an insolvent company."

4.8.3 Conclusions

Some practitioners on the Corporate Insolvency Committee and the Review Group were of the view that an amendment to the Companies Act was necessary in terms of providing legal certainty in respect of the matter. However, the prevailing view of the Review Group is that the comprehensive Statement issued by the ODCE on 4 June 2020 sufficiently addresses the concerns raised and does not therefore recommend a legislative amendment. In addition, a distinction can be drawn between the reckless trading regime, which can be initiated by a creditor[31] and the restriction regime, which cannot.[32]

Notwithstanding that the Review Group is not in favour of an amendment, for information, a draft provision which had been under consideration by the Corporate Insolvency Committee is set out in Appendix 5 of this Report to assist the Minister should circumstances arise at some point in the future where the matter is revisited.

4.9. Examinership (extension)

4.9.1 Current position under the Act

Examinership is a system of court protection under the Companies Act 2014 for companies experiencing financial difficulties but which have a reasonable prospect of survival as a going concern. The legislative provisions relating to examinership were first introduced in 1990 by the accelerated enactment of the Companies (Amendment) Act, 1990. The purpose of examinership as envisioned by the Oireachtas and as established in case law , for example as stated by Clarke J in *Re Traffic Group Ltd and Companies Acts* (2007) where the court observed (reflecting earlier judicial statements) that:

> "…the principal focus of the legislation is to enable in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and, of equal, or indeed greater, importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community".

[31] Companies Act 2014 s. 610(1).

[32] Companies Act 2014 s. 820(1).

Part 10 of the Companies Act 2014 sets out the law governing the operation of examinerships in Irish companies. In the case of small companies, the Part allows for the examinership to be run under the supervision of the Circuit Court, rather than the High Court. This particular provision was made on foot of a recommendation made by the CLRG in its 2012 Report - Report on proposals to reduce the cost of rescuing viable small private companies.[33] This amendment was designed to reduce costs.

Section 520(4) provides a considerable array of protection to a company in examinership, including:

a) No proceedings/resolutions for winding up may commence/passed.

b) No receiver may be appointed to the company.

c) No legal actions can be initiated against the company without the consent of the examiner.

d) No action for recovery or goods under retention of title or hire purchase can take place

e) No action for oppression under s212 can be taken.

Under s520 the period of the examiner's appointment is for 70 days which can be extended by the court to 100 days and further in exceptional circumstances. Under the protection of the Court the company is afforded a period to continue trading. During this time the examiner will attempt to devise a scheme of arrangement that is considered to be capable of facilitating the survival of the business. This will include the formulation of proposals in relation to a range of factors such as restructuring, sale of assets, attraction of new investors and/or write down of outstanding liabilities. If the Examiner succeeds in formulating a scheme of arrangement, it is then considered by the company's creditors and if approved by them, put to the court. If the court approves the scheme, its proposals become binding.

In light of the current events the focus of the examinership legislation remains very relevant in the context of preserving businesses and jobs. Concerns have been raised with the Department that COVID-19 has substantially impacted insolvency practitioners' ability to complete the process within the timeframe available and it has been proposed that the period of protection afforded to companies during examinership should be extended.

4.9.2 Balancing of interests

The Corporate Insolvency Committee examined the proposal within the context of striking a fair balance between the sometimes, competing interests of stakeholders involved. In principle it was accepted that allowing companies some additional breathing space to restructure was warranted to take account of the particular difficulties associated with the current pandemic. However, members acknowledged the benefits of the present time limits in terms of having a process that required a resolution of the financial issues of the company. Currently, the entire process must be concluded within 100 days, extendable by the court to give its decision. The speed of these processes results in several key benefits, including lower administrative costs, limiting the effects of the associated stay on creditors and a smaller delay for investors hoping to reinvest their assets. Particular concern was raised in respect of the potential knock-on effect to other creditors which can include other companies.

Equally, insolvency practitioners highlighted the practical difficulties of convening meetings with creditors in light of the restrictions on public gatherings as well as seeking investment in circumstances where it is difficult, for example, for investors to do their due diligence in examining

[33] http://www.clrg.org/publications/clrg-report-on-proposals-to-reduce-the-cost-of-rescuing-small-private-companies-2012.pdf

premises etc. It was highlighted that practitioners at times discount using examinership for large scale restructuring as the time limits are too restrictive to complete the work required. However, this was a general point and not confined to COVID-19 and was therefore not considered any further

4.9.3 Conclusions

On balance, the Review Group considers that an additional 50 days to complete an Examinership during the current pandemic would be appropriate where the Examiner can satisfy the Court that there were exceptional circumstances arising due to the pandemic that are precluding him/her from concluding the examinership within the existing time limits. This is considered an appropriate response to protect employment and viable enterprises.

The proposal will amend section 534, providing that the Court may extend the period by not more than 50 further days in addition to the current provision in s. 534(3) allowing for a 30-day extension. This additional extension will be linked to exceptional circumstances and provided only by way of court application.

The extension is purely recommended to deal with the instant pandemic and should not be taken as an indication that a more general extension is supported by the Committee. Any general amendments to the examinership process would require significant research and must be considered more thoroughly in the context of the Preventative Restructuring Directive.[34]

4.10 Further consideration of examinership and business rescue

4.10.1 Additional measures and/or reform

In addition to this proposed amendment to the current examinership legislation, the Review Group is cognisant of two further types of submissions made to it and to the Department regarding the challenges faced by businesses and the possibilities presented by the Examinership legislation to provide a rescue framework for businesses in distress following COVID-19 shutdown. The first type of proposal included additional measures to streamline the existing legislation as it is currently used. The second type of proposal suggested an overhaul of examinership legislation to more appropriately address the needs of small and medium enterprises in this context.

4.10.2 The Preventive Restructuring Directive

In reviewing the proposals it received, the Corporate Insolvency Committee has been cognisant of the provisions contained in the EU Preventive Restructuring Directive). Irish legislation will have to address any aspects of the examinership process which do not reflect requirements in the Directive.

For example, as the Committee considered the extension of the period described in section 4.9.3 above it was aware that implementation of certain options in the Directive would allow for, though not require, a longer stay (protection from enforcement by creditors) than is currently allowed under examinership. However, under Article 6(4), the maximum period of the initial stay can be no longer than 4 months (circa 120 days). This can be extended in the circumstances set out in Article 6(7), but the total duration cannot exceed 12 months (Article 6(8). The Committee was of the opinion that any extension to the period of protection in examinership must in any event be within the timeframes outlined in the Directive.

[34] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) OJ L 172, 26.6.2019, p. 18–55.

Prior to the issues which have arisen in the context of COVID 19 the Committee had begun its deliberations regarding implementation of the Directive which is due to be transposed by 17 July 2021 (with the possibility of an extension of 1 year for Member States that encounter particular difficulty see Article 34-92).

In this context it must be noted that in general the Irish examinership process complies with many aspects of the Directive and is in fact a leader in this area in Europe.[35]

4.10.3 Streamlining of examinership

The Irish Society of Insolvency Practitioners made a suite of proposals outlining ways in which it felt the examinership process could be streamlined. While the Committee considered that there was merit in considering these proposals, it ultimately sought to focus itself in this Report only on measures required in the immediate term to address the most significant impacts of the crisis. These proposals will be examined as part of a second stage of work of the Committee.

4.10.4 Rescue scheme for the SME sector

The Irish SME Association made a comprehensive submission to the Department in respect of rescue for SMEs and micro-enterprises. It highlighted concerns with the cost associated with the existing examinership framework and other barriers to access to the process for smaller businesses.

The Review Group considers that there is a need to examine corporate rescue structures suitable for smaller companies and to consider the development of a simplified process for such companies. However, it has not been possible to conduct such an examination in the timeframe available for delivering this Report. The Review Group plans that this issue be examined as part of a second phase of work to deal with medium-term stabilisation measures required to aid economic recovery and that the issue be given priority status in light of the significant challenges facing the sector at this time.

4.10.5 Further consideration in relation to a rescue framework for the SME sector.

Accordingly, the Corporate Insolvency Committee will embark on devising a proposed corporate rescue structure more suitable to the SME sector than examinership. To this end it is cognisant of a number of matters described in the following section.

4.10.6 The context for a new legislative framework for SMES.

The first is that the CLRG has previously considered the suitability of Examinership to the SME sector and issued the above-mentioned report in 2012. One of the recommendations emanating from that Report was enacted in the Companies (Miscellaneous Provisions) Act 2013 which was subsequently subsumed into the Companies Act 2014. This provided that applications for examinership for small companies could be made to the Circuit Court. However, this has not led to a significant uptake in small companies availing of examinership.

The second is the relative success of the examinership process for bigger restructurings and the increasing international interest in examinerships in light of the enactment of the Preventive Restructuring Directive mentioned above. There is certainly a European interest in restructuring and there was a view that adjustment of examinership would not be appropriate in that context. There is recognition amongst practitioners that the examinership legislation is running successfully for a

[35] See generally surveys of European countries by the JCOERE research project based at University College Cork. Ireland, the Netherlands and England and Wales (prior to Brexit) are regarded as European leaders in the field of restructuring. www.ucc.ie/en/jcoere. There are presentations by Barry Cahir at INSOL Europe-Copenhagen 2019 and by Judge Michael Quinn on this and by the Chief Justice.

certain type of company and that this has withstood scrutiny internationally, which is an important consideration in the context of Brexit.

The third, is that a rescue framework more suited to the small and medium enterprise sector should be a standalone process independent from the examinership process, although perhaps mirroring some elements of the examinership legislation and the 30 years of practical experience since its first enactment in 1990. Elements of the examinership process are recognised as being central to a successful rescue framework, namely the granting of a stay or moratorium, support for negotiation with creditors and, where necessary, equity holders, through the introduction of cram down provisions which might include cross class cram down provisions, and a final approval of a restructuring agreement through an official body. These core elements are included in the EU Preventive Restructuring Directive.

The fourth is the scheme of arrangement provisions in Part 9, the equivalent of which in the UK Companies Act 2006 has led to considerable restructuring success in England and Wales.[36]

4.10.7 Conclusion

With these elements in mind, the Review Group concludes that the design of a new legislative framework suitable to the SME sector with considerable focus on reducing court engagement and costs is of utmost importance.

The Corporate Insolvency Committee will initiate this process in the short term bearing in mind the CLRG report of 2012.

4.11 Previous recommendations of the CLRG

The Review Group affirms the recommendations made in two of its previous reports:

- the 2017 Report on the Protection of Employees and Unsecured Creditors[37]; and
- the 2018 Report on the UNCITRAL Model Law on Cross-border Insolvency[38].

In the case of the former, the CLRG made several recommendations designed to further enhance the protections afforded to employees and unsecured creditors in the Companies Act and recommends that consideration be given to implementing their outstanding recommendations in the context of further insolvency law changes in the short term. The Review Group also notes that the recommendations of the Duffy Cahill Report[39] which concern the protection of creditors in the context of insolvency, while not a report of the CLRG, will be of relevance to any revision of the law.

[36] See further Courtney (Eds) Bloomsbury's Professional Guide to the Companies Act 2014 Chapters 7 and 8. See also Payne J: Schemes of Arrangement: Theory, Structure and Operation (CUP, 2014) for a treatment of the English legislation and its success in recent years.

[37] https://dbei.gov.ie/en/Publications/Publication-files/CLRG-Report-on-the-Protection-of-Employees-and-Unsecured-Creditors.pdf

[38] http://www.clrg.org/publications/clrg-uncitral-model-law-on-cross-border-insolvency-recommendations.pdf

[39] "Expert examination and review of laws on the protection of employee interests when assets are separated from the operating entity" presented by Nessa Cahill B.L. and Kevin Duffy, Chairman of the Labour Court, 11th March 2016. https://dbei.gov.ie/en/Publications/Publication-files/Duffy-Cahill-Report.pdf.

Appendix 1 – Committees of the Review Group

Corporate Insolvency Committee June 2020

Irene Lynch Fannon	Chairperson, Ministerial Nominee (University College Cork)
Bernice Evoy	Banking Payments Federation Ireland
Conor O'Mahony	The Office of the Director of Corporate Enforcement
David Hegarty	The Office of the Director of Corporate Enforcement
Doug Smith	Irish Society of Insolvency Practitioners (Eugene F Collins)
Eamonn Richardson	KPMG
Emma Roche-Cagney	Office of the Attorney General
James Finn	The Courts Service
Jane Dollard	Department of Business Enterprise and Innovation
Jill Callanan	LK Shields
Jim Luby	CCAB-I
Kieran Wallace	KPMG
Marie Daly	IBEC
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Neil McDonnell	ISME
Paddy Purtill	Revenue Commissioners
Paul McHenry	CRO
Ralph MacDarby	Institute of Directors Ireland
Rosemary Hickey	Office of the Attorney General
Ruairi Rynn	William Fry
Tanya Holly	Department of Business Enterprise and Innovation
Tony O'Grady	Matheson
Vincent Madigan	Ministerial Nominee

Appendix 1 – Membership of the Corporate Insolvency and Corporate Governance Committees of the Company Law Review Group

Corporate Governance Committee June 2020

Salvador Nash	Chairperson, The Chartered Governance Institute (KPMG)
Barry Conway	Ministerial Nominee (William Fry)
Teodora Corcoran	The Department of Business, Enterprise and Innovation
Richard Curran	Ministerial Nominee (LK Shields)
Máire Cunningham	Ministerial Nominee (Beauchamps)
Marie Daly	Irish Business and Employers' Confederation (IBEC)
Emma Doherty	Ministerial Nominee (Matheson)
David McFadden	Ministerial Nominee (Companies Registration Office)
Vincent Madigan	Ministerial Nominee
Kathryn Maybury	Small Firms Association (KomSec)
Ralph MacDarby	Institute of Directors Ireland
Jacqueline O'Callaghan	The Revenue Commissioners
Conor O'Mahony	The Office of the Director of Corporate Enforcement
Gillian O'Shaughnessy	Ministerial Nominee (Byrne Wallace)

Appendix 2: Draft Heads of

The Companies (Covid-19) (Amendment) Bill 2020

Proposed amendments to the Companies Act 2014
to address difficulties during the Covid-19 outbreak

	Inserts in Act	**Subject matter**	**Key objective**
1.		Citation and commencement	-
2.	2A	Interim period	Act to operate until 31 December 2020; Minister may extend up to 30 June 2021.
3.	43A.	Sealing by companies during the interim period	Document can have a company's seal and signatures on separate sheets
4.	175A.	General meetings during the interim period	Extends the time for the 2020 AGM, permits virtual meetings, rescheduling of meetings and variation or withdrawal of dividend resolutions
5	1103(a)	PLC general meetings during the interim period	Amends the notice provisions for virtual general meetings for PLCs
6	587A	Financial threshold for initiating a winding up	Increase the amount at which a creditor can issue a statutory demand.
7	688A	Convening of creditors' meetings during the interim period.	Provides for creditors' meetings by technological means
8	610A	Continuing to trade during the Covid-19 outbreak	Provides that a director will not be considered to have traded recklessly by reason only of trading during the COVID-19 outbreak, provided they have otherwise acted honestly and responsibly
9	534A	Power of the Court to extend the period within which an examiner must present his/her report to the Court.	in exceptional circumstances, to enable a Court to give an examiner with additional time within which to formulate a rescue plan, bringing the total process from 100 to 150 days

HEAD 1 - Citation and commencement

Provide that:

(1) This Act may be cited as the Companies (Covid-19 Amendment) Act 2020.

(2) This Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision or with respect to any particular type of company and different days may be so appointed for different purposes or different provisions.

Explanatory note:

This Head is a standard provision.

Since the enactment of the Companies Act 2014, the policy has been to maintain that simple citation rather than to create a new family of Companies Acts. Therefore, this General Scheme is prepared with the intention that the final Act will be integrated into the Companies Act 2014, without the need to change that citation.

HEAD 2

Provide for the insertion of the following new section 2A into the Companies Act 2014:

2A. Interim period

(1) *Defined expressions*

In this Act –

"**Covid-19**" has the meaning ascribed to it by the Emergency Measures in the Public Interest (Covid-19) Act 2020;

"**interim period**" means the period commencing on the date of commencement of this section and expiring on 31 December 2020, as may be extended under subsection (2);

"**interim provision**" means any provision of this Act expressed:

(i) to be operative during the interim period; or

(ii) to relate to things done or omitted to be done during the interim period;

"**interim regulation**" means any regulation made under an interim provision.

(2) *Potential extension of interim period*

(a) The Minister may from time to time, after consulting with the Minister for Health and taking into account any legal or practical restrictions in the State on travel or meetings arising from the prevalence or threat of Covid-19, by regulations, for the purposes of one or more interim provisions, extend the interim period to expire on any date or dates no later than 30 June 2021.

(b) Such regulations may provide for different interim periods for different interim provisions.

(3) *Ministerial Regulations effective when signed by Minister*

Every interim regulation shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the interim regulation is passed by either House within the next 21 days on which that House has sat after the interim regulation is laid before it, the interim regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

Explanatory Note:

This section defines the period during which the amending provisions are to apply as "the interim period" with consequent definitions of "interim provision" and "interim regulation" being measures and regulations that apply during that period.

HEAD 3

Provide for the insertion of the following new subsection 43A into the Companies Act 2014

43A. Sealing by companies during the interim period

(1) This section shall remain in operation during the interim period.

(2) Notwithstanding any provision in a company's constitution, any instrument to which its common seal (as provided by section 43) or official seal (as provided by section 44) is to be affixed may consist of any number of counterparts with each of the common seal or official seal, as the case may be, and one or more of the signatures of the different signatories on separate counterparts, each of which when executed and delivered shall constitute an original, all such counterparts together constituting one and the same instrument.

Explanatory note:

With the dislocation of the management of companies, e.g. with the company seal in one location and the directors, secretary and registered persons in other locations, this head is aimed at enabling documents under seal to be executed in different counterparts, with the aggregate of the documents to be considered to be the one instrument.

HEAD 4

Provide for the insertion of the following new section 175A into the Companies Act 2014

175A. General meetings convened and held during the interim period

(1) *Section to apply only until end of interim period*

This section shall remain in operation during the interim period.

(2) *Extension of time for AGM to the end of 2020*

Notwithstanding subsections (1) and (2) of section 175 and subsection (2) of section 341 or any provision of its constitution, a company need not hold an annual general meeting within the period required under this Act or the company's constitution, provided that the meeting is held by 31 December 2020 at the latest.

(3) *General meetings may be conducted by electronic means*

(a) In this subsection, "general meeting" shall mean any of the following:

(i) an annual or extraordinary general meeting of a company;

(ii) a general meeting of holders of shares in a company of a particular class;

(iii) a scheme meeting, as defined by section 449.

(b) A general meeting, during the interim period, whether or not authorised by its constitution and notwithstanding any provision in its constitution to the contrary, shall not be required to be held at a physical venue or venues but may be fully conducted by electronic means provided all those entitled to attend have a reasonable opportunity to participate.

(c) Subsection (5) of section 181 shall apply to general meetings to be held by electronic means, with the substitution in paragraph (a) of that subsection of "the methodology of participation" for "the place".

(d) A general meeting held by electronic means, other than a meeting convened by a member or members under subsections (2) or (5) of section 178, shall be deemed, for the purpose of this Act only, to take place in the place that the directors decide.

(e) The Minister may by regulations make further provision for the convening and conduct of, quorum at, access to and participation in general meetings to be held by electronic means.

(4) *Change of location and date of general meetings*

(a) Notwithstanding any provision to the contrary in a company's constitution:

(i) a general meeting (to include any rescheduled meeting) may be cancelled;

(ii) the venue or venues of a general meeting (to include any rescheduled meeting) or the means of holding and participating in such general meeting by electronic means may be changed;

(iii) a general meeting (to include any rescheduled meeting) may be changed from a physical meeting to a meeting held by electronic means and vice versa;

in each case by or under the authority of the directors of the company at any time up to 3 business days prior to the time scheduled for commencement of the meeting, if considered necessary by the directors for public health reasons arising from Covid-19.

(b) Save where all the members of a company agree in writing, notice of the matter referred to in paragraph (a) shall be given in the same way as the meeting was first notified to members provided that where that is not possible or practicable, notice shall be given:

(i) where the company has a website, by notice on that website;

(ii) by email to all members for whom the company has email addresses; and

(ii) by notice in a national newspaper.

(c) Where any notice of a matter referred to in paragraph (a) specifies:

(i) a rescheduled date, time and place for the meeting;

(ii) electronic means or changed electronic means for participation in the meeting; or

(iii) record date (within the meaning of paragraph (d)) being the time and date for determining a member's eligibility to participate in the meeting;

section 181 is disapplied to the extent necessary to give effect to this subsection.

(d) In paragraph (d) the "record date" shall be:

(i) save where subparagraph (ii) applies, the commencement of the meeting;

(ii) the time specified by the company in accordance with regulation 14 of the Companies Act, 1990 (Uncertificated Securities) Regulations 1996 (SI 68 of 1996).

(5) *Withdrawal or amendment of dividend resolutions*

Where:

(a) the directors of a company have recommended the declaration of a dividend at a general meeting of the company; and

(b) subsequent to convening the general meeting the directors form the opinion, due to the actual or perceived consequences of Covid-19 on the affairs of the company, that the dividend ought to be cancelled or reduced to a particular amount; and

(c) save where all the members of a company agree in writing, notice of the formation of that opinion and consequent proposed cancellation or reduction is given no later than 3 business days before the general meeting in the manner provided in paragraph (c) of subsection (4);

notwithstanding any provision to the contrary in the constitution of the company, the directors may withdraw the resolution to approve a dividend or as the case may be, put an amended resolution to the meeting to approve a dividend less than that originally proposed, in which event a voting instruction to approve the originally proposed dividend shall be exercised in favour of the amended resolution.

Explanatory note:

Subsection (1) states that this is to apply during the interim period only.

Subsection (2) disapplies the requirement for the first AGM to take place within 18 months and for no more than 15 months must elapse between AGMs and provides that the 2020 AGM can be held up to the end of 2020. It also disapplies the requirement that the financial statements to be laid before the meeting are made up to a date no earlier than 9 months before the date of the AGM.

This is aligned with Article 1 of the Council Regulation 2020/699 on temporary measures concerning the general meetings of European companies (SE) and of European Cooperative Societies (SCE) adopted on 25 May 2020: "Where, in accordance with Article 54(1) of Regulation (EC) No 2157/2001, a general meeting of an SE is to be held in 2020, the SE may, by way of derogation from that provision, hold the meeting within 12 months of the end of the financial year, provided that the meeting is held by 31 December 2020." (OJ 27.05.2020 L165 p 25).

Subsection (3) explicitly enables companies to hold general meetings by electronic means and empowers the Minister to make regulations to give further effect to this provision.

Subsection (4) permits the cancellation, rescheduling and relocation of general meetings. In light of the closing down of venues and the uncertainty surrounding venues, it enables companies to cancel and reschedule meeting without the need to have a formal technical meeting to adjourn to another date.

Subsection (5) permits a company's directors to withdraw a dividend resolution or to reduce the dividend proposed to be declared by resolution at a general meeting, due to a change of opinion on their part following the issue of the notice of general meeting.

Note regarding entities authorised and /or regulated by the Central Bank of Ireland:

The Central Bank of Ireland has requested that the implementation of this provision is effected in such a way as does not relieve entities authorised and/or regulated by it from their obligations that they may have under the laws for which it is competent authority, such as obligations which require timely reporting of information laid before AGMs.

Regulation 58(1) of the European Union (Insurance and Reinsurance) Regulations 2015 (SI 485/2015) (Solvency II Regulations) requires an insurance undertaking or reinsurance undertaking to forward to the Bank "each year" 2 copies of the financial statements and reports "laid before its annual general meeting". Thus an extension of time for AGMs without adjusting for this requirement may create a risk that such an undertaking would fail to provide this information to the Central Bank if for whatever reason an AGM were not held within the year. See also European Communities (Life Assurance) Framework Regulations, 1994 (SI 360/1994), Regulation 17; European Communities (Non-Life Insurance Accounts) Regulations, 1995 (SI 202/1995), Regulation 7.

In addition, there are a number of requirements of financial services law which require the preparation of annual audited financial reports and their delivery to the Central Bank without reference to the annual general meeting. For example, under Regulation 4 of the Transparency (Directive 2004/109/EC) Regulations 2007, an issuer whose securities are admitted to a regulated market must make public its annual audited financial report at the latest 4 months after the end of each financial year and ensure that it remains publicly available for at least 10 years. Although this proposal is not intended to impact upon these requirements, it is highlighted for the benefit of Parliamentary Counsel when drafting the legislation.

HEAD 5

Provide for modified provisions for public limited companies

Section 1103 of the Companies Act 2014 is amended as follows:

(2) Notice of a general meeting shall set out—

(a) when and where the meeting is to take place and the proposed agenda for the meeting, and if fully conducted by electronic means, the means of holding and participating in the meeting;

Explanatory note:

This head is intended to modify section 1103 of the Companies Act to provide that a notice for a general meeting being conducted by fully electronic means must outline how the meeting shall be held and how members can participate.

Head 6

Provide for the insertion of the following new section 570A into the Companies Act 2014

570A. Circumstances in which company deemed to be unable to pay its debts during the interim period and consequential matters

(1) *Section to apply only until end of interim period*

This section shall be operative during the interim period.

(2) *Disapplication of €10,000 and €20,000 thresholds*

For the purposes of section 569(1)(d) paragraphs (a) and (b) of section 570 shall not apply during the interim period and will be substituted by the following section 570A(3). Paragraphs (c) and (d) of section 570 shall continue to apply.

(3) *€50,000 threshold*

For the purposes of this Act, a company shall be deemed to be unable to pay its debt if:

(a) one or more creditors, by assignment or otherwise, to whom, in aggregate, the company is indebted in a sum exceeding €50,000 then due, have served on the company (by leaving it at the registered office of the company) a demand in writing requiring the company to pay the sum so due, and

(b) the company has, for 21 days after the date of the service of that demand, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of each of the creditors.

Explanatory Note:

This increases the debt threshold for the commencement of a winding up by the Court under section 569(1)(d) from an individual debt of €10,000 or aggregate debts of €20,000 to €50,000.

In general section 570 defines a range of circumstances where a company is deemed to be unable to pay its debts. This definition is cross referenced in other sections of the Companies Act 2014, for example section 509(3)(c) – power of court to appoint an examiner; 610(4)(a) – liability for fraudulent and reckless trading; and section 818(2)(a) and (b) – definition of insolvency relating to restriction of directors of insolvent companies.

The changes proposed by section 570A relate only to the threshold amounts in at which a creditor(s) can make demands for the purposes of section 569(1)(d) – where a company can be wound up by the court.

Head 7

Provide for the insertion of the following new section 688A into Chapter 13 of Part 11 of the Companies Act 2014

688A. Convening of creditors' meetings virtually and by electronic means during the interim period.

(1) *Section to apply only until end of interim period*

This section shall be operative during the interim period.

(2) *Creditors' meetings may be conducted by electronic means*

(a) In this subsection, "creditors' meeting" shall mean any meeting of creditors convened under any provision of Parts 9, 10 or 11 that is held during the interim period.

(b) A creditors' meeting, notwithstanding any provision to the contrary in this or other enactment, shall not be required to be held at a physical venue or venues but may be fully conducted by electronic means provided all those entitled to attend have a reasonable opportunity to participate.

(c) Where a physical meeting is held, members must be afforded the opportunity to participate by electronic means.

(d) Without prejudice to the terms of this provision, creditors' meetings shall in all other respects be conducted in accordance with the provisions of this Act, with due regard to the requirements therein being practicably adjusted to the holding and conduct of meetings by electronic means.

(e) The Minister may by regulations make further provision for the convening and conduct of, quorum at, access to and participation in creditors' meetings to be held by electronic means.

Explanatory Note:

This head is intended to facilitate the virtual holding of creditors' meetings in voluntary and other liquidations, examinerships, statutory schemes of arrangement under Part 9 of the Act and other insolvency processes. The different types of meetings were too numerous to mention specifically, hence the reference to meetings in Parts 9, 10 and 11.

The structure of the Companies Act 2014 is such that in each Chapter of a Part of the Act referring to a particular insolvency process, for example Chapter 4 of Part 11 on creditors' voluntary winding up, the provisions are stated to apply to the particular process 'save to the extent that the provision expressly provides otherwise'. Thus, for example in Chapter 4 of Part 11 s. 585 makes this statement regarding the following provisions which includes s. 587 which therefore applies to creditors' meetings in a creditors' voluntary winding up only.

It was decided to move this provision to *before* s. 689 in Chapter 13 of Part 11 of the Companies Act 2014 on the grounds that this would be the most appropriate home for the section. However, as this Chapter refers exclusively to *General rules as to meetings of members, contributories and creditors*

of company in liquidation. It does not refer to examinerships under Part 10 or Schemes under Part 9 and therefore, the statement in s. 688A(2)(a) (i) is still necessary.

The provisions as to the conduct of meetings mirror those proposed for general meetings during the interim period. However, some differences are necessary, for example publication on the company's website of information was not deemed appropriate and issued as to change of venue and dividends also were not relevant. Some specific principles needed to be addressed differently regarding documentation and identification of creditors. Because the notice of creditors' meetings must also be advertised in newspapers (see for example s. 587(6), the issue of providing access details is to be addressed in the regulations.

A second principle is that the provision should not be mandatory but permissive with due regard for facilitation of creditors who wish to participate virtually at a meeting which was being held physically, hence section 688A(2)(c).

A third principle is to reiterate that all of the relevant provisions of the Companies Act 2014 as applicable to the holding of creditors' meetings generally continue to apply, hence section 688A(d).

Head 8

Provide for the insertion of the following new section 610A into the Companies Act 2014

610A. Continuing to trade during the Covid-19 outbreak

Where:

(a) a director or officer of a company is party to a decision of a company:

(i) to continue to trade for any time during the interim period in honest and reasonable anticipation of the termination or abatement of the adverse effects of the Covid-19 outbreak and the related restrictions on travel and meetings; or

(ii) to apply for support under Part 7 of the Emergency Measures in the Public Interest (Covid-19) Act 2020 or other government support; and

(b) it is appears to the Court that:

(i) the director or officer has otherwise behaved in an honest and responsible manner; and that

(ii) the company was not, as at 1 March 2020, unable to pay its debts as they fell due;

neither such continuance nor such application shall of itself support any allegation or be construed such that the director has been knowingly a party to the carrying on of any business of the company in a reckless manner.

Explanatory note:

The intention of this head is to provide relief to directors whose companies trade on during the Covid-19 outbreak, subject to the director otherwise acting honestly and responsibly and the company being solvent on 1 March 2020

Head 9

Provide for the insertion of the following new section 534A into the Companies Act 2014

534A Power of the Court to extend the period in which the examiner can present a report to the Court

(1) This section shall be operative during the interim period.

(2) This section shall apply to companies under the protection of the Court under Part 10 following the commencement of this section.

(3) Where, on the application of the examiner, the court is satisfied that the examiner would be unable to report in accordance with the provisions of section 534 and within the period described under subsections (2) and (3) of section 520 or within the extended period provided for in section 534(3), the court may, in exceptional circumstances, allow for an extension of the period in which an examiner may submit his or her report by an additional 50 days, with the consequent extension of the periods provided in subsections (2) and (3) of section 520.

(4) The exceptional circumstances referred to in subsection (3) may concern, but shall not be limited to, procedures to implement the provision of new finance to the company.

Explanatory note:

Under s. 520(2) the period of protection by the court runs to 70 days.

Under s. 534(2)(b) it is envisaged that the examiner would report to the court in 35 days after his or her appointment. However, s. 534(3) acknowledges that a longer period can be given by the court which mirrors the 70 day protection period and goes on to allow for the 70 day period to be extended by an additional 30 days where the court is satisfied that the examiner would be unable to report within the 70 day period mentioned in s. 520(2) but that he or she could report if the period was extended by 'not more than 30 days'.

This head is designed to enable the examiner of companies that go into examinership during the interim period to have a longer period in which to make a report to the court under s. 534 in exceptional circumstances. Currently the examiner has up to 70 days to present a report to the court under the operation of s. 520(2) but 534(3) allows for an extension of that period by 30 days on application to the court. It is proposed to provide for the possibility of an additional extension of 50 days (i.e. 80 days in total) to be granted by the court in exceptional circumstances. Accordingly the maximum period of examinership may, in exceptional circumstances, extend from 100 days (70 plus 30) to 150 days (70 plus 30 plus 50).

Appendix 3: Draft Heads of

Companies Act 2014 (General Meetings) Regulations 2020

I, [Minister], Minister for Business, Enterprise and Innovation, in exercise of the powers conferred on me by section 2A and 175A(3) of the Companies Act 2014 (No. 38 of 2014) hereby make the following regulations:

1. *Title and commencement*

(1) These Regulations may be cited as the Companies Act 2014 (General Meetings) Regulations 2020.

(2) These Regulations shall come into operation on [--] June 2020.

2. *Interpretation*

In these Regulations—

"**the Act of 2014**" means the Companies Act 2014;

"**attendee**" means, in relation to a company, a person entitled to attend a general meeting who is a member, a proxy appointed by a member, an authorised person appointed as provided by section 185 of the Act by a member of the company that is a body corporate, the auditor of the company and any other person entitled to attend a general meeting of the company;

"**company**" means the company convening the general meeting;

"**general meeting**" means a meeting convened by electronic means as provided by section 175A(3) of the Act of 2014.

3. *Notice of general meeting*

The notice of a general meeting shall include:

(a) details of the electronic platform to be used to hold the meeting;

(b) details of any relevant website, access software and access telephone details;

(c) if access to the meeting is to be restricted to those attendees entitled to attend who communicate their prior intention to attend, that fact, and the time by and manner in which such intention must be received by the company;

(d) any requirements or restrictions which a company puts in place in order to identify those who plan to attend;

(e) the procedure for attendees to communicate questions and comments during the meeting; and

(f) the procedure to be adopted for voting on resolutions proposed to be passed at the meeting.

4. *Electronic platform for general meeting*

(1) A general meeting shall be held by common access to an electronic platform which:

(a) enables real time transmission of the meeting; and

(b) provides attendees the opportunity to participate by audio and audio-visual means or any other electronic technology that provides attendees as a whole with a reasonable opportunity to participate in the meeting.

(2) A company shall ensure that such technology enables attendees participating in the meeting:

(a) to hear what is said by the chairperson of the meeting and by any person introduced by the chairperson;

(b) to the extent entitled under the constitution of the company, during the meeting to speak and to submit questions and comments orally to the chairperson;

(c) a mechanism for casting votes, whether before, or during, the meeting;

provided that where, by reason of the large number of attendees proposing to attend the meeting the electronic platform will not enable those in attendance to submit questions orally, provision shall be made to enable questions to be submitted by audience response software, text messaging or similar messaging applications.

(3) A company shall ensure, as far as practicable, that such participation by attendees at a meeting:

(a) guarantees the security of any electronic communication by the attendee;

(b) minimises the risk of data corruption and unauthorised access;

(c) provides certainty as to the source of the electronic communication;

and, in the case of any failure or disruption of such means, that failure or disruption is remedied as soon as practicable,

provided that the company shall not be responsible for any technological failure or disruption relating to the equipment used by an attendee that prevents or interferes with the attendee's participation at the meeting.

(4) Any temporary disruption to the meeting caused by any technical failure shall not invalidate the meeting or the proceedings held thereat.

5. *Attendance at the general meeting*

(1) Each member and proxy appointed by a member shall be counted in the quorum where they participate in a general meeting.

(2) A company may restrict access to the meeting to those attendees who communicate their intention to attend the meeting no later than the time stated in section 183(6) of the Act of 2014.

(3) The holding of a general meeting may be made subject only to such requirements as are necessary to ensure the identification of those taking part in the meeting, to the extent that such requirements are proportionate to the achievement of those objectives.

(4) Attendees shall not permit a person not entitled to attend to participate, listen or view the proceedings of a meeting unless authorised by the Chairperson.

6. *Voting on resolutions proposed*

(1) Where a company has included notice of intention to require voting on a poll on all resolutions in the notice of the meeting:

(a) all resolutions at the general meeting shall be conducted by a poll;

(b) subsections (1), (2), (3) and (7) of section 189 shall not apply.

(2) Where a general meeting is conducted by audio visual means, a vote on a resolution by a show of hands may be conducted by the Chairperson, where he or she is satisfied that the Chairperson can identify and see all persons entitled to vote and can correctly discern their votes for or against the resolution.

(3) Where an attendee is participating in a meeting by audio or by text-based audience participation software, that attendee may communicate his or her vote on a resolution being taken on a show of hands by that audio or software, provided the Chairperson is satisfied as to the identity of the attendee and their entitlement to vote.

GIVEN under my Official Seal,

[--] June 2020

[Minister],

Minister for Business, Enterprise and Innovation.

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation.)

The purpose of these Regulations is to make further provision for the convening and conduct of, access to and participation in general meetings to be held by electronic means by reason of the Covid-19 outbreak.

Appendix 4: Draft Heads of

Companies Act 2014 (Creditors Meetings) Regulations 2020

I, [Minister], Minister for Business, Enterprise and Innovation, in exercise of the powers conferred on me by section 2A and 688A(2)(e) of the Companies Act 2014 (No. 38 of 2014) hereby make the following regulations:

1. *Title and commencement*

(1) These Regulations may be cited as the Companies Act 2014 (Creditors' Meetings) Regulations 2020.

(2) These Regulations shall come into operation on [--] June 2020.

2. *Interpretation*

In these Regulations—

"**the Act of 2014**" means the Companies Act 2014;

"**attendee**" means, in relation to a company, a person entitled to attend a creditors meeting;

"**company**" means the company convening the creditors' meeting;

"**creditors meeting**" means a meeting convened by electronic means as provided by section 688A(2)(a) of the Act of 2014.

3. *Notice of creditors' meeting*

(1) Notice of the creditors' meeting and other documents normally distributed at the creditors' meeting shall be given:

(a) by post; and

(b) by electronic mail to all creditors for whom the company has email addresses,

and shall state clearly that the meeting is being convened under the terms of this provision.

(2) The notice of a creditors meeting shall include:

(a) details of the electronic platform to be used to hold the meeting;

(b) details of any relevant website, access software and access telephone details;

(c) if access to the meeting is to be restricted to those attendees entitled to attend who communicate their prior intention to attend, that fact, and the time by and manner in which such intention must be received by the company;

(d) any requirements or restrictions which a company puts in place in order to identify those who plan to attend;

(e) the procedure for attendees to communicate questions and comments during the meeting; and

(f) the procedure to be adopted for voting on resolutions proposed to be passed at the meeting.

(3) Information referred to in (2) shall not be included in any advertisement of any notice of a meeting in daily newspapers, where this required under the provisions of this Act.

4. *Electronic platform for creditors' meeting*

(1) A creditors' meeting shall be held by common access to an electronic platform which:

(a) enables real time transmission of the meeting; and

(b) provides attendees the opportunity to participate by audio and audio-visual means or any other electronic technology that provides attendees as a whole with a reasonable opportunity to participate in the meeting.

(2) A company shall ensure that such technology enables attendees participating in the meeting:

(a) to hear what is said by the chairperson of the meeting and by any person introduced by the chairperson;

(b) to the extent entitled under the constitution of the company, during the meeting to speak and to submit questions and comments orally to the chairperson;

(c) a mechanism for casting votes, whether before, or during, the meeting;

provided that where, by reason of the large number of attendees proposing to attend the meeting the electronic platform will not enable those in attendance to submit questions orally, provision shall be made to enable questions to be submitted by audience response software, text messaging or similar messaging applications.

(3) A company shall ensure, as far as practicable, that such participation by attendees at a meeting:

(a) guarantees the security of any electronic communication by the attendee;

(b) minimises the risk of data corruption and unauthorised access;

(c) provides certainty as to the source of the electronic communication;

and, in the case of any failure or disruption of such means, that failure or disruption is remedied as soon as practicable,

provided that the company shall not be responsible for any technological failure or disruption relating to the equipment used by an attendee that prevents or interferes with the attendee's participation at the meeting.

(4) Any temporary disruption to the meeting caused by any technical failure shall not invalidate the meeting or the proceedings held thereat.

5. *Attendance at the creditors' meeting*

(1) Each creditor and proxy appointed by a creditor shall be counted in the quorum where they participate in a creditors' meeting.

(2) A company may restrict access to the meeting to those attendees who communicate their intention to attend the meeting no later than the time stated in section 183(6) of the Act of 2014.

(3) The holding of a creditors' meeting may be made subject only to such requirements as are necessary to ensure the identification of those taking part in the meeting, to the extent that such requirements are proportionate to the achievement of those objectives.

(4) Attendees shall not permit a person not entitled to attend to participate, listen or view the proceedings of a meeting unless authorised by the Chairperson.

6. *Voting on resolutions proposed*

(1) Where a creditors' meeting is conducted by audio visual means, a vote on a resolution by a show of hands may be conducted by the Chairperson, where he or she is satisfied that the Chairperson can identify and see all persons entitled to vote and can correctly discern their votes for or against the resolution.

(2) Where an attendee is participating in a meeting by audio or by text-based audience participation software, that attendee may communicate his or her vote on a resolution being taken on a show of hands by that audio or software, provided the Chairperson is satisfied as to the identity of the attendee and their entitlement to vote.

GIVEN under my Official Seal,

[--] June 2020

[Minister],

Minister for Business, Enterprise and Innovation.

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation.)

The purpose of these Regulations is to make further provision for the convening and conduct of, access to and participation in creditors' meetings to be held by electronic means by reason of the Covid-19 outbreak.

Appendix 5:

Draft Provision amending Restriction of Directors Procedure

819 A Restriction orders on insolvency arising from COVID 19.-

(1) No order shall be made under section 819 by reason only of the director (including a de facto director or shadow director) being party to a decision of a company:

(a) to continue to trade for any time during the interim period where this decision is made honestly and responsibly in anticipation of the termination or abatement of the adverse effects of the Covid-19 outbreak and the related social and economic restrictions; or

(b) to apply for support under Part 7 of the Emergency Measures in the Public Interest (Covid-19) Act 2020, or any other similar government measure and

where the Court is satisfied that:

(i) the director has otherwise acted honestly and responsibly in relation to the conduct of the affairs of the company; and

(ii) that the company was as at 1 March 2020, able to pay its debts as they fell due;

(2) Subsection (1) will apply to the operation of the restriction undertaking provisions as outlined in section 852 and to the deliberations of the Director under subsections (2) and (3) of section 850.

Explanatory note:

This draft provision is not the subject of a recommendation of the Review Group. It is provided as pro forma text of a provision that might be considered in the event that the issue discussed at section 4.8 of this Report were reopened.

The intention of the provision would be to provide reliefs and assurances in relation to restriction of directors where their companies trade on during the Covid-19 outbreak.

ANNEX 2

COMPANY LAW REVIEW GROUP

REPORT ON CERTAIN COMPANY LAW ISSUES ARISING UNDER THE EU CENTRAL SECURITIES DEPOSITORIES REGULATION 909/2014 (CSDR)

JUNE 2020

Contents

Chairperson's Letter to the Minister for Business, Enterprise and Innovation

Ms Heather Humphreys T.D.,

Minister for Business, Enterprise and Innovation

23 Kildare Street

Dublin 2 D02 TD30

25 June 2020

Dear Minister,

I am pleased to present to you a Special Report of the Company Law Review Group (**CLRG**) on certain company law issues arising under the EU Central Securities Depositories Regulation 909/2014 (**CSDR**).

In my letter to you of 31 March 2020 delivering the Review Group's Annual Report for 2019, I noted the work of Review Group's Part 23 Committee, which deals with company law as it affects publicly quoted companies. That Committee has continued to examine the potential company law amendments that may be required to facilitate the migration of participating securities from CREST, to the planned new intermediated model of share settlement through Euroclear Bank SA, pursuant to CSDR.

This Report recommends a number of discrete amendments to the Companies Act, which will facilitate and assist the implementation of CSDR for Irish companies.

The Report also sets out the extent of its examination to date of the interplay between CSDR and the amendments made by Directive (EU) 2017/828 of 17 May 2017 (**SRD II**) to Shareholders Rights Directive 2007/36/EC of 11 July 2007. The Review Group does not at this stage offer any recommendations, as its examination of the issues continues.

I would like to extend my sincere thanks to the Part 23 Committee members for their engagement and input in examining these issues and the significant contribution of the Department of Finance to our deliberations.

I would also like to thank the Department of Business, Enterprise and Innovation for their support, in particular, Secretary to the Group, Ms. Tara Keane.

Yours sincerely,

_____

Paul Egan

Chairperson

Company Law Review Group

1. Introduction to the Report

1.1 The Company Law Review Group

The Company Law Review Group ("CLRG") is a statutory advisory body charged with advising the Minister for Business, Enterprise and Innovation ("the Minister") on the review and development of company law in Ireland. It was accorded statutory advisory status by the Company Law Enforcement Act 2001, which was continued under Section 958 of the Companies Act 2014. The CLRG operates on a two-year work programme which is determined by the Minister, in consultation with the CLRG.

The CLRG consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and trade unions), regulators (implementation and enforcement bodies) and representatives from government departments including the Department of Business, Enterprise and Innovation ("the Department") and Revenue. The Secretariat to the CLRG is provided by the Company Law Development and EU Unit of the Department of Business, Enterprise and Innovation.

1.2 The Role of the CLRG

The CLRG was established to "monitor, review and advise the Minister" on matters concerning company law. In so doing, it is required to "seek to promote enterprise, facilitate commerce, simplify the operation of the Act, enhance corporate governance and encourage commercial probity" (section 959 of the Companies Act 2014).

1.3 Policy Development

The CLRG submits its recommendations on matters in its work programme to the Minister. The Minister, in turn, reviews the recommendations and determines the policy direction to be adopted.

1.4 Contact information

The CLRG maintains a website www.clrg.org. In line with the requirements of the Regulation on Lobbying Act and accompanying Transparency Code, all CLRG reports and the minutes of its meetings are routinely published on the website. It also lists the members and the current work programme.

The CLRG's Secretariat receives queries relating to the work of the Group and is happy to assist members of the public. Contact may be made either through the website or directly to:

Tara Keane

Secretary to the Company Law Review Group

Department of Business, Enterprise and Innovation

Earlsfort Centre

Lower Hatch Street

Dublin 2 D02 PW01

Tel: (01) 631 2675 Email: tara.keane@dbei.gov.ie

2. The Company Law Review Group Membership

2.1 Membership of the Company Law Review Group

The membership of the Company Law Review Group at the date of this report is provided below.

Paul Egan	Chairperson (Mason Hayes & Curran)
Barry Conway	Ministerial Nominee (William Fry)
Bernice Evoy	Banking and Payments Federation Ireland
Ciara O'Leary	Irish Funds Industry Association (Maples and Calder)
David McFadden	Ministerial Nominee (Companies Registration Office)
Doug Smith	Irish Society of Insolvency Practitioners (Eugene F Collins)
Eadaoin Rock	Central Bank
Emma Doherty	Ministerial Nominee (Matheson)
Gillian Leeson	Euronext Dublin
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace)
Ian Drennan	Director of Corporate Enforcement
Irene Lynch Fannon	Ministerial Nominee (University College Cork)
James Finn	The Courts Service
Jeanette Doonan	Revenue Commissioners
John Loughlin	CCAB-I (PWC)
John Maher	Ministerial Nominee (DBEI)
Kathryn Maybury	Small Firms Association (KomSec Limited)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Máire Cunningham	Law Society of Ireland (Beauchamps)
Marie Daly	Irish Business and Employers' Confederation (IBEC)
Maureen O'Sullivan	Ministerial Nominee (Companies Registration Office)
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Neil McDonnell	Irish Small and Medium Enterprises Association (ISME)
Ralph MacDarby	Institute of Directors in Ireland
Richard Curran	Ministerial Nominee (LK Shields)
Rosemary Hickey	Office of the Attorney General

Salvador Nash	The Chartered Governance Institute (KPMG)
Shelley Horan	Bar Council of Ireland
Tanya Holly	Ministerial Nominee (DBEI)
Vincent Madigan	Ministerial Nominee

3. The Work Programme

3.1 Introduction to the Work Programme

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, in consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items of work to the programme as matters arise. The most recent work programme began in June 2018 and ran until the end of May 2020. The work programme is focused on continuing to refine and modernise Irish company law, with a strong emphasis on the area of insolvency. The work programme for June 2020 to May 2022 is at present being formulated but the statutory mandate of the CLRG to monitor, report and advise the Minister on matters concerning company law remains current at all times.

3.2 Company Law Review Group Work Programme 2018-2020

The Review Group's Work Programme under which this Report was prepared was as follows:

1) Examine and make recommendations on whether it will be necessary or desirable to amend company law in line with recent case law and submissions received regarding the Companies Act 2014.

   This Report is delivered in fulfilment of the Review Group's mandate under this heading.

2) Review the enforcement of company law and, if appropriate, make recommendations for change.

3) Review the provisions in relation to winding up in the Companies Act 2014 and, if appropriate, make recommendations for change.

4) Provide ongoing advice to the Department of Business, Enterprise and Innovation on request for EU and international proposals, including proposals in relation to the harmonisation or convergence of national company insolvency laws.

5) Examine and make recommendations on whether it is necessary or desirable to adopt, in Irish company law, the UNCITRAL Model Law on Cross-Border Insolvency.

6) Review the operation of the Summary Approval Procedure introduced in the Companies Act 2014.

3.3 Additional item to the Work Programme

On 5 December 2018, the Minister wrote to the Chairperson requesting that the CLRG examine the regulation of receivers under specific terms of reference. This additional item was formally adopted as part of the CLRG's work programme 10 December 2018 and a special report delivered to the Minister in May 2019.

3.4 Decision-making process of the Company Law Review Group

The CLRG meets in plenary session to discuss the progression of the work programme and to formally adopt its recommendations and publications.

3.5 Committees of the Company Law Review Group

The work of the CLRG is largely progressed by the work of its Committees. The Committees consider not only items determined by the work programme, but issues arising from the administration of the Companies Act 2014 and matters arising such as court judgements in relation to company law and developments at E.U. level. This Report is the product of work by the Part 23 Committee chaired by CLRG Chairperson Paul Egan.

4. Company law issues arising from the implementation of the EU Central Securities Depositories Regulation 909/2014 (CSDR)

4.1 Introduction

4.1.1 Defined terms

In this Report:

"**1996 Regulations**" means the Companies Act 1990 (Uncertificated Securities) Regulations 1996 (SI 68/1996);

"**2006 Regulations**" means European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006 (S.I. No. 255/2006);

"**2019 Act**" means the Migration of Participating Securities Act 2019;

"**2020 Regulations**" means the European Union (Shareholders' Rights) Regulations 2020 (S.I. No. 81/2020), which transpose SRD II;

"**Committee**" means the Review Group's Part 23 Committee, the membership of which is set out in Appendix 1 of this Report;

"**Companies Act**" or "2014 Act" means the Companies Act 2014;

"**CSDR**" means the EU Central Securities Depositories Regulation 909/2014;

"**Department**" of "**DBEI**" means the Department of Business, Enterprise and Innovation;

"**SRD**" or "**Shareholders Rights Directive**" means the EU Shareholders' Rights Directive 2007/36/EC;

"**SRD II**" means Directive (EU) 2017/828 of 17 May 2017 which amends SRD.

References to sections of an Act are to sections of the Companies Act 2014, unless otherwise stated.

4.1.2 Background

The Migration of Participating Securities Act 2019, commenced by SI 26/2020 as of 29 January 2020, enables issuers of participating securities (largely, but not all, quoted companies) to opt into the new intermediated system of share holding and dealing that is required in order to comply with CSDR. A company can opt in by passing a special resolution and otherwise complying with the 2019 Act.

The Part 23 Committee met on 4 occasions in 2019 and twice in 2020 in order to consider issues arising from the intermediated system, which it approached under four broad headings:

1) Shareholders' rights to information;

2) Shareholders' rights to compel actions by a company

   (i) pursuant to the EU Shareholders' Rights Directive 2007/36/EC (**SRD**) and Directive (EU) 2017/828 of 17 May 2017 (**SRD II**); and

   (ii) pursuant to the Companies Act 2014;

3) Shareholders' rights to make applications to court pursuant to the Companies Act 2014;

4) Enforcement of company law.

An indicative list of the rights arising under the Companies Act, not based in EU law, is set out in Appendix 2 of this Report.

The CLRG and the Department have been in communication with Euroclear Bank, the depository that plans to service the Irish market for depository services for equity securities and exchange traded funds when the CREST system of share holding and transfer terminates in March 2021. The Review Group sought clarification from Euroclear as to how shareholders' rights at (1), (2) and (3) may be exercised under the new intermediated arrangements.

With the exception of rights at (2)(i) arising under the Shareholders Rights Directive, as amended by SRD II, the solution proposed by Euroclear it is for the underlying shareholder to exit the Euroclear intermediated system and become a registered shareholder in order to exercise those rights.

The precise steps to be undertaken by all relevant persons in order to enable the beneficial owner of a share to exit the intermediated system to become a registered shareholder and vice versa along with accompanying timescales continues to be examined by the Part 23 Committee.

Neither the Review Group nor the Part 23 Committee has examined item (4), the enforcement of company law, but that will be considered in due course, where the key input will be from the Office of the Director of Corporate Enforcement.

4.1.3 Submission seeking company law changes by Euroclear Bank

Euroclear Bank approached DBEI with a submission seeking a number of changes to company law in order to facilitate the implementation of the 2019 Act and CSDR, in the context of the design of Euroclear's service offering. These requests were referred to the Review Group's Part 23 Committee, which considered them at meetings held on 3 February 2020 and, by electronic means, on 9 April 2020. The ensuing recommendations of the Committee were adopted by the Review Group at its meeting on 24 June 2020.

4.1.4 Recommendations apply to traded companies

The Review Group's conclusions and recommendations are proposed to apply only to companies whose securities migrate to the new intermediated system of shareholding and dealing. That said, there may be merit in their being applied more broadly but the Review Group has not considered such broader application for the purposes of this report.

4.2. Share Certificates

4.2.1 Companies Act 2014

Section 99(2) provides:

> A company shall, within 2 months after the date—
>
> (a) of allotment of any of its shares or debentures; or
>
> (b) on which a transfer of any such shares or debentures is lodged with the company,
>
> complete and have ready for delivery the certificates of all shares and debentures allotted or, as the case may be, transferred, unless the conditions of issue of the shares or debentures otherwise provide.

4.2.2 Migration of Participating Securities Act 2019

Section 11(3)(b) of the 2019 Act provides:

> notwithstanding section 99(2) of the Act of 2014, the participating issuer is not required to issue share certificates to the nominated central securities depository (or, as the case may be, to the foregoing body nominated by that depository) on the migration taking effect under subsection (2) on the live date and title of the nominated central securities depository (or, as the case may be, of the foregoing body nominated by that depository) to the relevant participating securities shall be evidenced by the recording of the name and address of that depository or body, as appropriate, in the register of members of the participating issuer, and subsection (4) supplements this paragraph.

Section 11(4) of the 2019 Act adds:

> Paragraph (b) of subsection (3) operates to disapply section 99(2) of the Act of 2014, with respect to the matters referred to in that paragraph, both on the live date concerned and at all times thereafter.

4.2.3 Analysis

It appears that section 11(3)(b) of the 2019 Act disapplies the requirement to issue a share certificate only in respect of transfers on the live date, in March 2021 when participating securities are transferred en bloc to the Euroclear Bank nominee, rather than on an ongoing basis. There is a nuanced view which suggests that section 11(4) may operate to disapply the requirement following the live date but then only in respect of the tranche of shares that have transferred to the depository, i.e. excluding new issues of shares.

4.2.4 Euroclear Bank submission

Euroclear Bank requested a change in the law to disapply the section 99(2) requirement to issue share certificates for shares registered in the name of a CSDR-authorised / recognised depository or its nominee.

4.2.5 Recommendation

It is open to a company to provide in its articles of association that the conditions of issue of its shares are such as to exempt it from issuing share certificates in particular circumstances, in this case, where the allottee or transferee is a CSDR-authorised / recognised depository. It is however an open point as to whether the “conditions of issue” of existing shares can be amended in the same way as rights attaching to shares can be varied. Whereas rights attaching to shares are largely a matter between the company and the holder, the right to a share certificate is pursuant to a legal enactment.

Accordingly, the Review Group agrees that this change is merited and recommends that the law be amended accordingly.

4.3 Transfers by CSDR-authorised depositories

4.3.1 Companies Act 2014

Section 94 provides:

> (1) Subject to any restrictions in the company's constitution and this section, a member may transfer all or any of his or her shares in the company by instrument in writing in any usual or common form or any other form which the directors of the company may approve.
>
> (4) A company shall not register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company.

4.3.2 Companies Act 1990 (Uncertificated Securities Regulations) 1996

These Regulations amend the Companies Act where the ownership of shares is operated through the CREST system. Regulations 4 and 5 provide:

> 4. (1) Notwithstanding section 79 or section 81 of the 1963 Act [the equivalent of section 94 of the 2014 Act] or section 2 (1) of the Stock Transfer Act, 1963 , title to securities may be evidenced and transferred without a written instrument provided that such title is evidenced and transferred in accordance with these regulations...
>
> 5. Section 6 of the Statute of Frauds Act (Ireland), 1695 and section 28 (6) of the Supreme Court of Judicature (Ireland) Act, 1877 and any other rule of law requiring the execution under hand or seal of a document in writing for the transfer of property, shall not apply (if they would otherwise do so) to any transfer of title to uncertificated units of a security through a relevant system.

4.3.3 Analysis

There are legal precedents for the disapplication of the requirement for a written instrument of transfer. The 1996 exception is made subject to the operator of the CREST system having an agreement with the Revenue Commissioners dealing with the imposition and payment of stamp duty on chargeable transfers.

A bespoke disapplication of the requirement was enacted in the Anglo Irish Bank Corporation Act 2009, under which shares in Anglo Irish Bank were acquired by the State.

4.3.4 Euroclear Bank submission

Euroclear Bank have requested that provision be made for transfers of shares out of a book entry system operated by a CSDR-authorised / recognised depository to be given effect to without the need for a written instrument in order to transfer legal title to the transferee (albeit that a share certificate will be issued to the transferee). In addition, in the event of there being more than one depository registered as holder of shares, transfers between those depositories should not require a written instrument.

4.3.5 Recommendation

In light of the precedents and logic for such a provision, the Review Group agrees that these changes are merited and recommends that the law be amended accordingly.

4.4. Scheme of Arrangement shareholder majorities

4.4.1 Companies Act 2014

A scheme of arrangement under Part 9, Chapter 1 of the Companies Act, whereby a shareholder's rights are varied or compromised, most notably by shares being cancelled in a takeover scheme, requires the passing of a shareholder resolution by a "special majority".[1]

Section 449(1) defines a "special majority" as

> "a majority in number representing at least 75 per cent in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the scheme meeting. "

4.4.2 Analysis

The requirement for there to be a majority in number of registered shareholders is already troublesome and illusory, and is viewed by many lawyers as being of no merit. A majority of shares in most quoted companies are held by financial intermediaries or their nominees. In the case of the "2009 companies"[2] that were formed to acquire North American companies then headquartered in offshore locations such as the British Virgin Islands, the Cayman Islands and Bermuda, all but a handful of shares are registered with The Depository Trust Company (**DTC**).

This has meant that whenever the special majority comes to be satisfied, in many cases, the votes of substantial shareholders – and in the case of all 2009 companies, the votes of DTC – do not count towards the satisfaction of the majority-in-number requirement, as votes for and against by the persons for whom those substantial shareholders or DTC hold shares cancel out their votes. This has resulted in artificial devices being employed to ensure that the majority-in-number requirement is satisfied e.g. by allotting or transferring shares to obedient nominees who will vote as required to get the scheme approved.

The important point is that a scheme of arrangement must be approved by the Court; this is a more significant requirement than there being a requirement for there to be a majority in number. Prior to the enactment of section 47 of the Company Law Enforcement Act 2001[3] there was a similar requirement under the winding-up provisions of the prior Companies Acts, whereby resolutions e.g. to dislodge a liquidator appointed by a company required a majority in number as well as in value.

Independently of the Euroclear Bank request, the CLRG's Corporate Governance Committee had considered a submission that there be an additional and alternative requirement to satisfy the definition of a "special majority". That is that the resolution be passed as a special resolution at a meeting at which the quorum is one-third of the class of shares whose holders' rights are affected by the scheme. This would be aligned with (i) the quorum requirement for a special resolution to vary class rights of shares under section 88 of the 2014 Act and (ii) the quorum requirement under section 8(a) of the 2019 Act.

[1] Part 9 Chapter 1 of the 2014 Act also provides for schemes of arrangement whereby creditors' rights may be varied or compromised. This Report is not considering any change to the law with respect to such schemes.
[2] Companies established under and availing of the provisions of the Companies (Miscellaneous Provisions) Act 2009 to use internationally recognised accounting standards other than that those generally accepted accounting principles and policies used in the State.
[3] This inserted a new section 267(3) into the Companies Act 1963, now section 588(6) of the Companies Act 2014.

4.4.3 Euroclear Bank submission

Euroclear Bank requested that the requirement for a scheme of arrangement to have approval by a majority in number be disapplied by amending the definition of "special majority" set out in section 449(1) of the 2014 Act, at least with respect to securities a portion of which is held through an authorised / recognised depository.

4.4.4 Recommendation

For the reasons set out above, the Review Group agrees that a change is merited, and recommends the creation of an alternative to the majority-in number requirement in the definition of "special majority", being that the special resolution is passed at a meeting at which the quorum is one-third of shares of the class affected.

4.5 Takeover offer acceptance majorities

4.5.1 Companies Act 2014

Section 457 gives the right to an offeror for a company to acquire all the shares in a company where its offer has been accepted by the holders of at least 80% of the shares not held by the offeror. Section 458 adds an additional requirement where the offeror (and its subsidiaries together) hold(s) 20% or more of the shares when making the offer. In those circumstances "[t]he additional requirement ... is that the assenting [i.e. accepting] shareholders, besides holding not less than 80 per cent in value of the shares affected, are not less than 50 per cent in number of the holders of those shares."

4.5.2 Analysis

As mentioned above, shares are at present frequently held through nominees, who hold shares for a great number of beneficial owners. In such cases, the nominees only count as one holder for the purpose of this majority.

In practice, offerors for a company are rarely existing shareholders of a company or a subsidiary of an existing shareholder. Frequently it will be a parent company of an existing shareholder or a fellow subsidiary of a holding company of an existing shareholder that makes the offer, thereby circumnavigating the objective of the additional requirement.

A navigation of the section using this structure was commented on in the case of *Duggan v Stoneworth Investment Ltd*[4] by the Supreme Court. Looking at the apparent anomaly that a subsidiary of a shareholder, when making a takeover offer is not considered to already hold shares held by its holding company, whereas a holding company is considered to hold shares held by a subsidiary, Murphy J stated:

> "In my view there is no ambiguity in the interpretation of the exclusionary provisions of subsections 1 and 2 of s.204 of the 1963 Act[5] nor was there any such ambiguity in relation to the comparable provisions contained in s.8 of the Companies Act, 1959. The legislature determined clearly and unequivocally to apply the relevant subsections to the beneficial ownership of shares of the transferor company other than shares "already in the beneficial ownership of the transferee company". Subsection 3[6] extended that exclusion by providing that shares in the beneficial ownership of a subsidiary of the transferee company should be deemed to be in the beneficial ownership of the

[4] [2000] 1 IR 563.
[5] See 2014 Act ss 457, 458.
[6] 2014 Act, s 460(2)(a).

> transferee company itself. It is curious, as Mr Lyndon McCann pointed out at page 201 of his book on the "Companies Acts, 1963-1990" that the deeming provisions were not extended to the case where shares in the transferor company were held by a holding company of the transferee company. However, it is the very fact that the particular exclusionary provisions are expressed to relate to shares in the beneficial ownership of the transferee company and that the legislature consciously extended that exclusion to capture only shares in a subsidiary which makes it impossible to infer an intention to exclude other categories of shareholdings."

The European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006 (S.I. No. 255/2006), regulates takeover offers of companies admitted to trading on an EU regulated market (i.e. the official list). These Regulations do not repeat the requirement for a 50% in number of the shareholders to accept where an offeror already holds 20% or more of the target company's shares.

Finally, section 459(5) of the 2014 Act and Regulation 27 of the 2006 Takeover Bids Regulations enables a shareholder to apply to the Court to retain its shares, such that there is redress available to a shareholder who has been wrongly disadvantaged.

4.5.3 Euroclear Bank submission

Euroclear Bank requested the removal of the requirement for assenting shareholders to constitute more than 50% in number of assenting shareholders where the offeror (and subsidiaries) hold(s) 20% or more of the shares subject to the offer.

4.5.4 Recommendation

For the reasons set out above, the Review Group agrees that a change is merited, and recommends the repeal of the requirement for assenting shareholders to constitute more than 50% in number of assenting shareholders.

4.6 Takeover offer acceptances

4.6.1 Existing Law

The interaction of the Companies Act 2014, the 1996 Regulations, the Powers of Attorney Act 1996 and the Takeover Rules made under the Irish Takeover Panel Act 1997 operate so as to require:

- paper documents of transfer in the case of takeovers of companies even when shares are dematerialised; and
- a power of attorney to be given by the registered shareholder to the acquirer of the company being taken over.

4.6.2 Analysis

The 1996 Regulations do not make provision for takeover notices under the EU Takeover Directive 2004/25/EC, otherwise transposed by the 2006 Regulations. Where shares are to be held and dealt in a paperless environment, it is anomalous for there to be a requirement for a depository to execute takeover acceptances.

Regulation 43 of the UK's Uncertificated Securities Regulations 2001 (broadly comparable to the 1996 Regulations) provides:

> (1) This regulation applies where the terms of an offer for all or any uncertificated units of a participating security provide that a person accepting the offer creates an

irrevocable power of attorney in favour of the offeror, or a person nominated by the offeror, in the terms set out in the offer.

(2) An acceptance communicated by properly authenticated dematerialised instruction in respect of uncertificated units of a security shall constitute a grant of an irrevocable power of attorney by the system-member accepting the offer in favour of the offeror, or person nominated by the offeror, in the terms set out in the offer….

(4) A declaration in writing by the offeror stating the terms of a power of attorney and that it has been granted by virtue of this regulation and stating the name and address of the grantor shall be prima facie evidence … and any requirement in any enactment, rule of law, or instrument to produce a copy of the power of attorney, or such a copy certified in a particular manner, shall be satisfied by the production of the declaration or a copy of the declaration certified in that manner…

4.6.3 Euroclear Bank submission

Euroclear Bank requested where the terms of an offer for all or any shares of a participating security held through an authorised / recognised depository provide that a person accepting the offer creates an irrevocable power of attorney in favour of the offeror, or a person nominated by the offeror, in the terms set out in the offer, then acceptances communicated by instructions within or from an authorised / recognised depository should constitute a grant of an irrevocable power of attorney by the relevant participants in the depository accepting the offer in favour of the offeror, or person nominated by the offeror, in the terms set out in the offer .

4.6.4 Recommendation

The Review Group agrees that the change is merited and recommends that the law be amended accordingly.

4.7. Change of Voting Record Time

4.7.1 Companies Act 2014

Section 183 subsections (5) and (6) provides:

(5) The instrument of proxy ... shall be deposited at the registered office of the company concerned or at such other place within the State as is specified for that purpose in the notice convening the meeting, and shall be so deposited not later than the following time.

(6) That time is—

(a) 48 hours (or such lesser period as the company's constitution may provide) before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote; or

b) in the case of a poll, 48 hours (or such lesser period as the company's constitution may provide) before the time appointed for the taking of the poll.

Section 185 provides:

(1) A body corporate may, if it is a member of a company, by resolution of its directors or other governing body authorise such person (in this section referred to as an "authorised person") as it thinks fit to act as its representative at any meeting of the company or at any meeting of any class of members of the company…

(3) An authorised person shall be entitled to exercise the same powers on behalf of the body corporate which he or she represents as that body corporate could exercise if it were an individual member of the company, creditor or holder of debentures of the company.

(4) The chairperson of a meeting may require a person claiming to be an authorised person within the meaning of this section to produce such evidence of the person's authority as such as the chairperson may reasonably specify and, if such evidence is not produced, the chairperson may exclude such person from the meeting.

4.7.2 Companies Act 1990 (Uncertificated Securities Regulations) 1996

Regulation 14 provides:

(1) For the purposes of determining which persons are entitled to attend or vote at a meeting, and how many votes such persons may cast, the participating issuer may specify in the notice of the meeting a time, not more than 48 hours before the time fixed for the meeting, by which a person must be entered on the relevant register of securities in order to have the right to attend or vote at the meeting.

(2) Changes to entries on the relevant register of securities after the time specified by virtue of paragraph (1) shall be disregarded in determining the rights of any person to attend or vote at the meeting, notwithstanding any provisions in any enactment, articles of association or other instrument to the contrary.

4.7.3 Analysis: timing

There are several issues that arise under these provisions.

(a) Timing

Section 3(1) of the 2014 Act provides:

Where the time limited by any provision of this Act for the doing of anything expires on a Saturday, a Sunday or a public holiday, the time so limited shall extend to and the thing may be done on the first following day that is not a Saturday, a Sunday or a public holiday.

This can be interpreted to mean that general meetings on Mondays and Tuesdays would be affected such as to extend the time for delivery of Forms of Proxy, in the case of Monday meetings, until the commencement of the meeting and for Tuesday meetings, until 23:59 on the Monday. Where there is a public holiday on the Monday, this would apply to Tuesday and Wednesday meetings mutatis mutandis.

(b) Inclusion of weekend hours in computation of time

The purpose of the 48-hour cut-off is to facilitate administrative procedures in companies. The UK recognises this in their law. Section 327 (2) and (3) of the UK Companies Act 2006 provides as follows:

(2) (Any provision of the company's articles is void in so far as it would have the effect of requiring any such appointment or document to be received by the company or another person earlier than the following time—

(a) in the case of a meeting or adjourned meeting, 48 hours before the time for holding the meeting or adjourned meeting;

(b) in the case of a poll taken more than 48 hours after it was demanded, 24 hours before the time appointed for the taking of the poll;

(c) in the case of a poll taken not more than 48 hours after it was demanded, the time at which it was demanded.

(3) In calculating the periods mentioned in subsection (2) no account shall be taken of any part of a day that is not a working day.

(c) Time to address nationality conditions

The Euroclear Bank platform, as at present disclosed, does not provide for verification of nationality of beneficial ownership on proxy votes and is based on a "trust-us" tick-the-box procedure.

The nationality of beneficial owners is relevant for particular industries as the votes of shares of non-EEA beneficial owners may need to be disenfranchised for general meetings in order that a licence or authorisation in not revoked or conditions in it breached.

The mechanism for companies to ascertain the identity of beneficial owners is set out in Article 3a of the Shareholders Rights Directive as inserted by SRD II. This provides for intermediaries to identify the beneficial owners of shares, as follows:

1. Member States shall ensure that companies have the right to identify their shareholders. Member States may provide for companies having a registered office on their territory to be only allowed to request the identification of shareholders holding more than a certain percentage of shares or voting rights. Such a percentage shall not exceed 0,5 %.

2. Member States shall ensure that, on the request of the company or of a third party nominated by the company, the intermediaries communicate without delay to the company the information regarding shareholder identity.

3. Where there is more than one intermediary in a chain of intermediaries, Member States shall ensure that the request of the company, or of a third party nominated by the company, is transmitted between intermediaries without delay and that the information regarding shareholder identity is transmitted directly to the company or to a third party nominated by the company without delay by the intermediary who holds the requested information. Member States shall ensure that the company is able to obtain information regarding shareholder identity from any intermediary in the chain that holds the information.

Member States may provide for the company to be allowed to request the central securities depository or another intermediary or service provider to collect the information regarding shareholder identity, including from the intermediaries in the chain of intermediaries and to transmit the information to the company.

Member States may additionally provide that, at the request of the company, or of a third party nominated by the company, the intermediary is to communicate to the company without delay the details of the next intermediary in the chain of intermediaries…

Article (6) of EU Commission Implementing Regulation 2018/1212 provides for the timeframe within which intermediaries must provide information as to ownership:

6. The request to disclose shareholder identity made by an issuer or third party nominated by the issuer shall be transmitted by intermediaries, in accordance with the scope of the request, to the next intermediary in the chain without delay and no later than by the close of the same business day as the receipt of the request. Where the intermediary receives the request after 16.00 during its business day, it shall transmit the information without delay and no later than by 10.00 of the next business day.

The response to the request to disclose shareholder identity shall be provided and transmitted by each intermediary to the addressee defined in the request without delay and no later than during the business day immediately following the record date or the date of receipt of the request by the responding intermediary, whichever occurs later.

The deadline referred to in the second subparagraph shall not apply to responses to requests or those parts of requests, as applicable, which cannot be processed as machine-readable and straight-through processing, as provided for in Article 2(3). It shall also not apply to responses to requests that are received by the intermediary more than seven business days after the record date. In such cases, the response shall be provided and transmitted by the intermediary without delay and in any event by the issuer deadline.

Where listed issuers e.g. air carriers registered in Ireland are seeking to verify the nationality of underlying shareholders for the purpose of establishing whether their shares can vote, even with the short timescales envisaged by this law, it will be necessary for some time before the meeting to be available when this is checked

4.7.4 Analysis: particular industries

(a) Air carriers

EU law requires airlines which are granted operating licences by Member State authorities to be majority owned and controlled by EEA nationals in order for them to benefit from the right to operate intra-EU air transport services. Air carriers registered in an EU member state will routinely have provisions in their constitutional documents which disapply voting rights for non-EEA shareholders and in some cases entitle the carrier to dispose of shares of shareholders whose non-EEA domicile would imperil its air carrier licence. The nationality of shareholders is therefore of great importance to any issuer that has an air carrier licence.

(b) Energy

Under rules governing the internal market of the electricity sector under EU Directive 2007/72 (transposed S.I 16/2015 - European Communities (Internal Market in Natural Gas and Electricity) (Amendment) Regulations 2015). Under Article 11(1) of the Directive, where a transmission system owner or operator is controlled by a person or persons, from a third country or countries, the national regulator is obliged to first decide if it is appropriate to grant them a certification and also subsequently to consult the European Commission on whether to grant a certification.

The regulator drafts a decision based on whether i) the applicant complies with the requirements outlined in Article 9 of the Directive and ii) Granting certification to the applicant would not put at risk the security of energy supply of the Member State or the community at large at risk. This decision is then submitted to the Commission for approval, where the Commission will analyse the decision in respect of the concerns i) and ii) above. This may in effect mean that the Member State Regulatory Authority will be required to refuse certification where it has not been certified that the

third country ownership of the operator will not put at risk the security of the energy supply of the Member State or the community.

The verification of nationality of shareholders is therefore of importance to any issuer in this sector, to ensure that conditions in any licence are not imperilled by non-compliance with conditions referable to nationality of beneficial owners.

(c) Hydrocarbons

Directive 94/22/EC-Conditions for Granting and Using Authorisation for the Prospection, Exploration and Production of Hydrocarbons (as amended by Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018)

Article 2(1) of the amending Regulation obliges Member States to ensure that when an area within their territory is made available for the exercise of the activities of prospecting, exploring for and producing hydrocarbons, they must ensure that no discrimination between entities as regards access to and exercise of these activities occurs. Despite this, Member States retain the ability to refuse, on the grounds on national security, to allow access to and exercise of the above activities to any entity which is effectively controlled by third countries or third country nationals.

The verification of nationality of shareholders is therefore of importance to any issuer in this sector, to ensure that conditions in any licence are not imperilled by non-compliance with conditions referable to nationality of beneficial owners.

(d) Foreign direct investment

On the 11 April 2019 Regulation 2019/452/EU on the screening of foreign direct investment into the European Union came into effect with provisions that will be effective from 11 October 2020. Member States are to establish a contact point between the Member State and the Commission to allow for the transfer of information in respect to Foreign Direct Investment. This information includes the following:

- the investor's identity and target company;
- the countries in which the investor and target company currently operate;
- the source of funding and;
- the value of investment.

The exchange of such information gives both the Commission and Member States the opportunity to highlight concerns where they see fit. In circumstances whereby an investment may affect a project of interest within the European Union or may act as a threat to either the security or public order of more than one Member State, the Commission is authorised to issue an opinion. The opinion of the Commission will be non-binding however, Member States are urged to give them "due consideration"

Commentary on this new law point to this being likely to affect investment in areas of critical infrastructure (e.g. telecoms, energy, and water), technology (e.g. AI, robotics, semiconductors), defence and food security.

The verification of nationality of shareholders is therefore of importance to any issuers affected by any Commission opinion to ensure that with conditions referable to nationality of beneficial owners are no breached.

(e) Restrictive provisions

Trade with and asset ownership by individuals and entities domiciled in particular countries are subject to Irish, EU and United Nations restrictive measures. Countries at present in focus are Iran, Russia, Venezuela and North Korea. In some cases, the verification of nationality of shareholders may be of importance to ensure compliance with such measures.

4.7.5 Euroclear Bank submission

At present the time usually fixed as the record time for voting is the close of business on the day that is 48 hours before the time of the meeting. E.g. if a meeting is being held on a Thursday at 11:00 a.m., the proxy cut-off time will be 48 hours before that – Tuesday at 11:00 am and the record time will be close of business – 6:30 pm on the Tuesday. This gives the registrars one clear day to verify that those who have delivered forms of proxy are indeed registered members.

Euroclear Bank requested that the record time for voting should be set up to 10 business days before the meeting.

The following illustration gives an overview of what would be proposed, where for example a meeting was taking place on a particular Thursday:

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
			M-10 Proposed record time	M-9		
M-8	M-7	M-6	M-5	M-4		
M-3	M-2 Record time at COB	M-1	Meeting			

4.7.5 Recommendation

The Review Group's conclusions are these:

(a) The proposed increase from 48 hours to 10 business days – effectively 2 weeks – for all companies is unsatisfactory. The proposed change to voting entitlement qualification would affect the economic interest of shareholders and would impact both companies and investors alike. .

Companies would also be in the dark as to how votes were cast. At present, financial intermediaries e.g. brokers' firms typically send their forms of proxy with voting instructions to the proxy (usually the meeting's Chairperson) on the day, the close-of-business of which was the record time – i.e. at the last minute.

(b) An increase in time of up to 3 business days may be justified, subject to further explanation of the processes to be undertaken by companies, registrars intermediaries and depositories.

(c) An increase in time may be justified for any listed issuer whose continuance in business is contingent on ascertaining nationality thresholds, such as air carriers.

(d) At present, financial intermediaries routinely allow their clients, the beneficial owners, to attend meetings as representatives of the financial intermediaries' nominee companies in respect of the beneficial owner's shareholding, as provided by section 185 of the 2014 Act. Euroclear Bank should provide the same facility to its participants by way of a general proxy to a voting service provider.

(e) At present issuers are able to appoint a voting service provider in the manner set out in the CREST reference manual. The CREST system itself has functionality which enables CREST members to send the electronic equivalent of a proxy card to an agent acting for the issuer, which agent collects proxy instructions for the meeting where the entitlement to vote has arisen. The CREST voting service has other functionality such as announcements of meeting and of results. Euroclear Bank should either provide this service or facilitate another entity doing so.

(f) There is merit in amending section 183 of the 2014 Act to exclude hours at weekends and on public holidays from the computation of the 48-hour period, aligning the law with that of the UK and the Review Group accordingly recommends that the law be amended accordingly.

4.8 Voting by show of hands.

4.8.1 Companies Act 2014

Section 187 (7), a provision that applies save to the extent that the company's constitution provides otherwise, provides unless a poll is demanded in accordance with section 189, at any general meeting a resolution put to the vote of the meeting is to be decided on a show of hands.

The UK Governance Code (**UKGC**) requires that the Chairperson's proxy vote count be announced after a vote on a show of hands.

4.8.2 Analysis

Euroclear Bank did not make any submission on this point but the Committee noted that the Companies Act / UKGC model of:

- appointment of proxy;
- voting by proxy by a show of hands; and
- announcement of shares in respect of which the Chairperson holds forms of proxy;

is surreal, in that for practical purposes, the appointor of a proxy effectively definitively "votes" at the point of submitting its form of proxy to the company. It is routinely the case that the Chairperson will hold proxies for close to 99% of the shares in issue, with a tiny minority of shares legally passing the resolutions at general meetings. The Committee did not arrive at any particular conclusions but it will merit further discussion. Accordingly the Review Group does not at this stage make any recommendation.

4.9. Definition of the word "shareholder" in the European Union (Shareholders' Rights) Regulations 2020 SI 81/2020

4.9.1 Legal background

The European Union (Shareholders' Rights) Regulations 2020 (S.I. No. 81/2020) amend the Companies Act, transposing the amendments made by SRD II to the Shareholders Rights Directive. This is done by the insertion of four new Chapters into Part 17 of the 2014 Act:

Chapter 8A: Rights of shareholders

Chapter 8B: Transparency of institutional investors, asset managers and proxy advisors

Chapter 8C: Remuneration policy, remuneration report and transparency and approval of related party transactions

Chapter 8D: Offences and penalties

The legal environment is completed by Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 (the Commission Regulation), which lays down minimum requirements implementing the provisions of SRD and SRD II as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights.

4.9.2 Analysis

The set of amendments in the new Chapter 8A relating to rights of shareholders that gives rise to an interpretative issue. It not clear whether the term "shareholder" in the 2020 Regulations refers to:

- the ultimate beneficial owner of a share;

  or

- the registered holder of that share.

As a result, shareholding intermediaries, such as brokers and central securities depositaries can consider that they are not obliged to facilitate the exercise of share rights by any person other than a registered member as a matter of law, even if it is facilitated as part of the service offering, as is the case with Euroclear Banks service description.

The principal obligations under Chapter 8A that are addressed to intermediaries (MiFID investment firms, banks and central securities depositaries) are in summary:

- Section 1110B (Identification of shareholders):
  - Traded PLCs may request "information regarding shareholder identity" from intermediaries.
  - Intermediaries receiving such requests must respond, either with the requested information (if they have it) or with details of the next intermediary(ies) in the chain of intermediaries of which they are aware.

  These provisions are set out above in section 4.7 at pages 18-19.

- Section 1110C (Transmission of information)
  - Intermediaries must transmit to shareholders (or to the next intermediary(ies) in the chain of intermediaries) any information they receive from traded PLCs with respect to the exercise of share rights.

- Section 1110D (Facilitation of exercise of shareholder rights)
    - Intermediaries must "facilitate the exercise of the shareholder's rights" by either:
        - making necessary arrangements for the shareholder to exercise the rights directly; or
        - exercising the rights upon the shareholder's instruction.

Standardised formats and deadlines for each of the foregoing communications are set out on the Commission Regulation.

4.9.3 Meaning of "shareholder" in Irish law

If the term "shareholder" is interpreted as referring solely to registered members, then the above-mentioned obligations of an intermediary extend only to transmitting information and facilitating voting rights to the member appearing on the register in respect of those shares. In the case of a central securities depositary, e.g. Euroclear, this means that the transmission will go no further than the registered nominee of the central securities depositary.

In the original Irish transposition of the Shareholders Rights Directive, the term "member" was substituted for the term "shareholder" in the context of provisions that related to general meetings and notices, where a distinction as between registered member and beneficial owner was not perceived as relevant.

The 2014 Act does not itself provide a statutory definition of the term "shareholder". Definitions in SRD and SRD II are imported into Chapter 8A via Section 1110A(2). The imported definition of "shareholder" is as follows:

> "'shareholder' means the natural or legal person that is recognised as a shareholder under the applicable law"

The absence of a statutory definition in Irish company law creates an ambiguity as to whether the term "shareholder" refers to a registered shareholder/member only, or if it extends to a beneficial owner.

With respect to migration of the settlement of Irish securities, Euroclear Bank has communicated to the Department that it interprets the term "shareholder" to refer to a registered shareholder/member. As a result, Euroclear Bank considers that its future SRD II obligations will extend only to enabling its nominee (Euroclear Nominees Limited) to exercise share rights on Euroclear Bank's behalf. Euroclear Bank has stated that it does not consider that the latter obligation extends to beneficial holders in the Euroclear Bank system.

In the Euroclear Bank service description version 3 in relation to shareholder identification it is stated:

> [F]ollowing the Shareholders Right Directive II (SRD II) process - pursuant to existing Irish corporate law and the implementation of SRD II into Irish law, Euroclear Bank's Nominee, as the person recorded in the register of members, is the 'shareholder' for the purposes of SRD II- in-scope Irish corporate securities held by Euroclear Bank Participants. However, we offer the service to issuers of Irish corporate securities, upon their request, to disclose the underlying Euroclear Bank Participants following the SRD II shareholder identification processing principles.

4.9.4 Meaning of "shareholder" under European law

The reasoning for and intentions of SRD II are set out in its Recital 4

> Shares of listed companies are often held through complex chains of intermediaries which render the exercise of shareholder rights more difficult and may act as an obstacle to shareholder engagement. Companies are often unable to identify their shareholders. The identification of shareholders is a prerequisite to direct communication between the shareholders and the company and therefore essential to facilitating the exercise of shareholder rights and shareholder engagement. This is particularly relevant in cross-border situations and when using electronic means. Listed companies should therefore have the right to identify their shareholders in order to be able to communicate with them directly. Intermediaries should be required, upon the request of the company, to communicate to the company the information regarding shareholder identity. However, Member States should be allowed to exclude from the identification requirement shareholders holding only a small number of shares."

In this light, it is difficult to dispute that the Commission's intention in adopting SRD II was to facilitate engagement between listed companies and their ultimate beneficial shareholders. It is also difficult to maintain that a definition of the term "shareholder" that encompasses only registered members would achieve this result.

The lack of clarity in the definition of "shareholder" has been recognised in the Final Report of the High Level Forum on the Capital Markets Union published in June 2020. At page 79 it recommends a change to the law:

> "The Commission is invited to … put forward a proposal for a Shareholder Rights Regulation to provide a harmonised definition of a 'shareholder' at EU level in order to improve the conditions for shareholder engagement;"

It justifies this recommendation as follows:

> .. SRD2 relies on Member States' definitions of "shareholder", meaning that the entity entitled to receive and exercise the rights associated with a security will depend on the country of issuance (as defined in national laws). The lack of an EU definition of "shareholder" makes it more complex, risky and thus costly for issuers and intermediaries to identify who has to be informed and who is entitled to exercise the rights associated with the ownership of a security. As a result, shareholders continue to face significant difficulties in exercising their rights, especially in a cross-border context, making it a strong case for an EU harmonised definition of shareholder.

4.9.5 Conclusion

The Review Group notes that this issue will require further examination and proposes to liaise with DBEI and with the Department of Finance to establish the frame of reference of such further examination in the context of possible EU law developments.

Appendix 1

Part 23 Committee of the Review Group

Membership as at June 2020

Paul Egan	Chairperson
George Brady	Matheson
Neil Colgan	CRH
Helen Curley	DBEI
David Fitzgibbon	Matheson
David Hegarty	ODCE
Rosemary Hickey	Office of the Attorney General
Tanya Holly	DBEI
Will Joyce	Dept. of Finance
Alan Kelly	Revenue Commissioners
Gillian Leeson	Euronext Dublin
Vincent Madigan	Ministerial Nominee
Dara McNulty	Central Bank of Ireland
Joe Molony	Computershare
Pat O'Donoghue	Link
Kevin O'Neill	The Courts Service
Mark Talbot	William Fry
Therese Walsh	DBEI

Appendix 2

Indicative list of shareholder rights under Irish company law not directly exercisable by a member under an intermediated system of shareholding

No.	Irish legal right	Section of the Companies Act 2014	Person(s) entitled to exercise
1.	To have a copy of the constitution sent to the member	37(1)	"any member"
2.	To apply to Court to have a variation of share rights cancelled	89(1)	"not less than 10 per cent of the issued shares of that class, being members who did not consent to or vote in favour of the resolution for the variation"
3.	To apply to Court to have overdue share certificates issued	99(4)	"the person entitled to have the certificates"
4.	To apply to Court to have an invalid creation, allotment, acquisition or cancellation of shares received	100(2)	"any member or former member"
5.	To inspect a contract of purchase of the company's own shares	105(8); 112(2)	"the members"
6.	To be sent copies of representations from directors the subject of a resolution to be removed	146(6)	"every member of the company to whom notice of the meeting is sent"
7.	To apply to Court to rectify the register of members	173(1)	"any member"
8.	To object to the holding of a general meeting outside the State	176(2)	"unless all of the members entitled to attend and vote at such meeting consent in writing"
9.	To convene an EGM	178(2)	"not less than 50 per cent (or such other percentage as may be specified in the constitution) of the paid up share capital of the company as, at that time, carries the right of voting at general meetings of the company"
10.	To require the directors to convene an EGM	178(3) (as modified by 1101 in the case of a regulated market PLC)	"not less than 5 per cent [10 per cent for non-regulated market PLCs] of the paid up share capital of the company, as at the date of the deposit [of the requisition] carries the right of voting at general meetings of the company"

Appendix 2 – Shareholder Rights under Irish Company Law

No.	Irish legal right	Section of the Companies Act 2014	Person(s) entitled to exercise
11.	To apply to court for an order requiring a general meeting to be called	179(1)	"a member of the company who would be entitled to vote at a general meeting of it"
12.	To receive notice of every general meeting	180(1)	"every member"
13.	To object to the holding of a meeting on short notice	181(2)	"if it is so agreed by ... all the members entitled to attend and vote at the meeting"
14.	To vote at general meetings	188(2)	"every member"
15.	To demand a poll at a general meeting	189(2)	"(c) any member or members present in person or by proxy and representing not less than 10 per cent of the total voting rights of all the members of the company concerned having the right to vote at the meeting; or (d) a member or members holding shares in the company concerned conferring the right to vote at the meeting, being shares on which an aggregate sum has been paid up equal to not less than 10 per cent of the total sum paid up on all the shares conferring that right"
16.	To apply to court for a declaration that a director is personally responsible for the company's liabilities where a solvency declaration is given without reasonable grounds	210(1)	"a ... member"
17.	To apply to court to cancel certain special resolutions	211(3)	"one or more members who held, or together held, not less than 10 per cent in nominal value of the company's issued share capital, or any class thereof, at the date of the passing of the special resolution and hold, or together hold, not less than that percentage in nominal value of the foregoing on the date of the making of the application"
18.	To apply to Court to complain that the affairs of the company are being conducted or that the powers of the directors of the company are being exercised (a) in a manner oppressive to him or her or any of the members (including himself or herself), or (b) in disregard of his or her or their interests as members,	Section 212(1)	"Any member of a company"

Appendix 2 – Shareholder Rights under Irish Company Law

No.	Irish legal right	Section of the Companies Act 2014	Person(s) entitled to exercise
19.	To inspect and obtain copies of documents and registers: (a) the copies of directors' service contracts and memoranda; (b) the copies of instruments creating charges; (c) the directors' and secretaries' register; (d) the disclosable interests register; (e) the members' register; and (f) the minutes of meetings.	Section 216	"a member"
20.	To receive (a) the statutory financial statements of a company for the financial year concerned, (b) the directors' report in relation to it, including any group directors' report, for that financial year, (c) the statutory auditors' report on those financial statements and that directors' report.	Section 338(1) See also s 1119	"every member of the company (whether that person is or is not entitled to receive notices of general meetings of the company),"
21.	To be sent copies of representations from auditor to be displaced by a resolution to appoint another	Section 397(2)	"every member of the company to whom notice of the meeting is sent"
22.	To be sent copies of representations from auditor the subject of a resolution to be removed	Section 398(2)	"every member of the company to whom notice of the meeting is sent"
23.	To apply to Court for directions in relation to any matter in connection with the performance or otherwise by a receiver of property of the company	Section 438(1)	"a member of the company"
24.	To drag along dissenting shareholders in a scheme contract or offer to acquire the company or a class of share in the company	Section 457(3)	"not less than 80 per cent in value of the shares affected"
25.	To drag along dissenting shareholders in a scheme contract or offer to acquire the company or a class of share in the company, where offeror has 20% or more of target company	Section 458(3)	"the assenting shareholders, besides holding not less than 80 per cent in value of the shares affected, are not less than 50 per cent in number of the holders of those shares"

Appendix 2 – Shareholder Rights under Irish Company Law

No.	Irish legal right	Section of the Companies Act 2014	Person(s) entitled to exercise
26.	To petition the Court for the appointment of an examiner	Section 510(1)(d)	"a member or members of the company holding at the date of the presentation of the petition not less than one tenth of such of the paid-up share capital of the company as carries at that date the right of voting at general meetings of the company"
27.	To apply to Court for an order requiring the directors to co-operate in the preparation of the report of the independent expert	Section 513(5)	"a member or members of the company holding at the date of the presentation of the petition not less than one tenth of such of the paid-up share capital of the company as carries at that date the right of voting at general meetings of the company"
28.	To apply to Court to determine any question arising in the winding up of a company (including any question in relation to any exercise or proposed exercise of any of the powers of the liquidator).	Section 631(1)	"(b) any contributory or creditor of the company;"
29.	To convene a meeting of members in a winding up to (a) remove the liquidator, (b) appoint a liquidator to replace or act with the existing liquidator, or (c) appoint a liquidator to fill a vacancy in the office of liquidator.	Section 636(1)	"any member of it with the written authority of not less than one-tenth in number of the members"
30.	To apply to Court in relation to the remuneration of a liquidator	Section 648	"any member or creditor of a company"
31.	To apply to Court for the appointment of inspectors	Section 747(2), as amended by s 1126	"(b) not less than 100 members of the company; (c) a member or members holding one-tenth or more of the paid up share capital of the company (but shares held as treasury shares shall be excluded for the purposes of this paragraph);"
32.	To apply to Court for the whole or part of the proceeds of sale of following court-ordered sale of shares	Section 774(1)	"any person interested in the shares"
33.	To apply to Court for a determination as to whether information sought in an inspection is privileged legal material	Section 795(5)	"a person compelled to disclose information" [including a shareholder]

Appendix 2 – Shareholder Rights under Irish Company Law

No.	Irish legal right	Section of the Companies Act 2014	Person(s) entitled to exercise
34.	To apply to Court for relief from all or any conditions or restrictions imposed on shares	Section 811(4)	"Any person whose interests are affected by any conditions or restrictions imposed on shares or debentures"
35.	To apply to Court to cancel a special resolution abandoning, restricting or amending any existing object or adopting a new object	Section 1013(3)	"(a) by the holders of not less, in the aggregate, than 15 per cent in nominal value of the PLC's issued share capital or any class thereof, or (b) by the holders of not less than 15 per cent of the PLC's debentures, entitling the holders to object to alterations of its objects"
36.	To request the directors to conduct a valuation of relevant assets being consideration for the allotment of shares	Section 1032(6)	"One or more members who hold, or together hold, not less than 5 per cent of the issued shares of the PLC"
37.	To apply to Court for relief against the restriction of enforceability of rights or interests in PLC shares by reason of non-notification of interests	Section 1060(4)	"any person in default as is mentioned in that subsection or any other person affected by such restriction"
38.	To require a PLC to exercise its powers under section 1062 to make an investigation into persons who are or have been interested in shares comprised in the PLC's relevant share capital	Section 1064(1)	"not less than one-tenth of such of the paid-up capital of the company as carries at that date the right of voting at general meetings of the company"
39.	To apply to Court for an order directing that shares shall cease to be subject to a restriction order, for failure to respond to a section 1052 notice seeking disclosure	Section 1066	"any person aggrieved by the [restriction] order"
40.	To apply to Court to direct a PLC to remove an entry from the register of individual and group acquisitions	Section 1067(6)	"a person who is identified in the register as being a party to a share acquisition agreement"
41.	To receive forms of proxy by post	Section 1103(5)	"every member"
42.	To receive summary financial statements	Section 1119(4)	"every member"
43.	To require a PLC to convene a general meeting to consider the common draft terms of merger	Section 1137(9)	"One or more members of the successor company who hold or together hold not less than 5 per cent of the paid-up capital of the company which carries the right to vote at general meetings of the company (excluding any shares held as treasury shares)"

No.	Irish legal right	Section of the Companies Act 2014	Person(s) entitled to exercise
44.	To require a PLC to convene a general meeting to consider the common draft terms of division	Section 1159(9)	"One or more members of the successor company who hold or together hold not less than 5 per cent of the paid-up capital of the company which carries the right to vote at general meetings of the company (excluding any shares held as treasury shares)"
45.	To apply to Court to cancel a resolution to re-register as a LTD or DAC	Section 1287(1)	"(a) the holders of not less in the aggregate than 5 per cent in nominal value of the PLC's issued share capital or any class of the PLC's issued share capital (disregarding any shares held by the PLC as treasury shares), or (b) not less than 50 of the PLC's members."

ANNEX 3

COMPANY LAW REVIEW GROUP

REPORT ADVISING ON A LEGAL STRUCTURE FOR THE RESCUE OF SMALL COMPANIES

22 OCTOBER 2020

Contents

Chairperson's Letter to the Minister for Business, Enterprise and Innovation

Mr Leo Varadkar T.D.
Tánaiste and Minister for Business, Enterprise and Innovation
23 Kildare Street
Dublin 2
D02 TD30

22 October 2020

Dear Tánaiste,

I refer to your letter of 8 July 2020 and am pleased to present to you a Special Report of the Company Law Review Group (**CLRG**) on potential company law amendments to insolvency structures supporting the rescue of the SME sector.

The Review Group affirms the analysis in your letter that the examinership process, 30 years old as of August this year, is internationally recognised and has proven a successful tool for restructuring in its current form. However, for a number of reasons, this process has not proved as useful for the SME sector and, in particular, for small companies.

In parallel with this, the Review Group is also aware that the impact of any amendments to corporate rescue extends far beyond a company seeking rescue, its directors and shareholders, and has implications for creditors, often other (creditor) companies, the Revenue Commissioners, employees and competitors, who may be unfairly disadvantaged by a statutory corporate rescue process. Thirty years of experience with the examinership legislation has led to considerable expertise on balancing these issues.

The issues arising in constructing a process are complex. The examinership legislation is itself set out in 50 sections taking up 35 pages of the Companies Act 2014, supplemented by detailed Rules of Court. In the interests of a timely delivery of this Report, the Review Group's recommendations highlight issues that will require further examination, or which will benefit from further consideration.

I would like to acknowledge and thank the members of the CLRG's Corporate Insolvency Committee who attended 8 intensive meetings and made numerous submissions and drafting recommendations. Professor Irene Lynch Fannon, Chair of the Committee, chaired the discussions and, working with me as Chair of the CLRG, led the analysis giving rise to the Committee's recommendations which in turn have been adopted and approved by the Review Group.

I would also like to thank the Department of Business, Enterprise and Innovation for their support, in particular, Secretary to the Group, Ms. Tara Keane.

Yours sincerely,

_____

Paul Egan SC
Chairperson
Company Law Review Group

1. Introduction to the Report

1.1 The Company Law Review Group

The Company Law Review Group ("**CLRG**") is a statutory advisory body charged with advising the Minister for Business, Enterprise and Innovation ("**the Minister**") on the review and development of company law in Ireland. It was accorded statutory advisory status by the Company Law Enforcement Act 2001, which was continued under section 958 of the Companies Act 2014. The CLRG operates on a two-year work programme which is determined by the Minister, in consultation with the CLRG.

The CLRG consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and trade unions), regulators (implementation and enforcement bodies) and representatives from government departments including the Department of Business, Enterprise and Innovation ("**the Department**" or "**DBEI**") and the Revenue Commissioners. The Secretariat to the CLRG is provided by the Company Law Development and EU Unit of the Department.

1.2 The Role of the CLRG

The CLRG was established to "monitor, review and advise the Minister on matters concerning company law." In so doing, it is required to "seek to promote enterprise, facilitate commerce, simplify the operation of the Act, enhance corporate governance and encourage commercial probity" (section 959 of the Companies Act 2014).

1.3 Policy Development

The CLRG submits its recommendations on matters in its work programme to the Minister. The Minister, in turn, reviews the recommendations and determines the policy direction to be adopted.

1.4 Contact information

The CLRG maintains a website www.clrg.org. In line with the requirements of the Regulation of Lobbying Act 2015 and accompanying Transparency Code, all CLRG reports and the minutes of its meetings are routinely published on the website. It also lists the members and the current work programme.

The CLRG's Secretariat receives queries relating to the work of the Group and is happy to assist members of the public. Contact may be made either through the website or directly to:

Tara Keane
Secretary to the Company Law Review Group

Department of Business, Enterprise and Innovation
Earlsfort Centre
Lower Hatch Street
Dublin 2 D02 PW01

Tel: (01) 631 2675

Email: tara.keane@dbei.gov.ie

2. The Company Law Review Group Membership

2.1 Membership of the Company Law Review Group

The membership of the Company Law Review Group at the date of this Report is provided below.

Paul Egan SC	Chairperson (Mason Hayes & Curran LLP)
Alan Carey	Revenue Commissioners
Barry Conway	Ministerial Nominee (William Fry)
Bernice Evoy	Banking & Payments Federation Ireland CLG
Ciara O'Leary	Irish Funds Industry Association CLG (Maples and Calder LLP)
Dr David McFadden	Ministerial Nominee (Companies Registration Office)
Doug Smith	Irish Society of Insolvency Practitioners (Eugene F Collins)
Eadaoin Rock	Central Bank of Ireland
Emma Doherty	Ministerial Nominee (Matheson)
Gillian Leeson	Euronext Dublin (The Irish Stock Exchange PLC)
Gillian O'Shaughnessy	Ministerial Nominee (Byrne Wallace)
Ian Drennan	Director of Corporate Enforcement
Prof. Irene Lynch Fannon	Ministerial Nominee (School of Law, University College Cork)
James Finn	The Courts Service
John Loughlin	Consultative Committee of Accountancy Bodies – Ireland (CCAB-I) (PricewaterhouseCoopers)
John Maher	Ministerial Nominee (DBEI)
Kathryn Maybury	Small Firms Association Ltd (KomSec Limited)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Máire Cunningham	Law Society of Ireland (Beauchamps)
Marie Daly	IBEC (Irish Business and Employers' Confederation)
Maureen O'Sullivan	Ministerial Nominee (Registrar of Companies)
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Maura Quinn	The Institute of Directors in Ireland
Neil McDonnell	Irish Small and Medium Enterprises Association CLG (ISME)
Richard Curran	Ministerial Nominee (LK Shields Solicitors LLP)
Rosemary Hickey	Office of the Attorney General

Salvador Nash	The Chartered Governance Institute (KPMG)
Shelley Horan	Bar Council of Ireland
Tanya Holly	Ministerial Nominee (DBEI)
Vincent Madigan	Ministerial Nominee

3. The Work Programme

3.1 Introduction to the Work Programme

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, in consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items of work to the programme as matters arise. The most recent work programme began in June 2020 and will run until the end of May 2022. The work programme is focused on continuing to refine and modernise Irish company law, with a strong emphasis on the area of insolvency. The statutory mandate of the CLRG to monitor, report and advise the Minister on matters concerning company law remains current at all times.

3.2 Company Law Review Group Work Programme 2020-2022

The Review Group's current Work Programme is as follows:

1	Consider the Companies Act in the context of creditors' rights under the following headings: • Review whether the legal provisions surrounding the liquidation of companies effectively protect the rights of workers. • Review the Companies Act with a view to addressing the practice of trading entities splitting their operations between trading and property with the result being the trading business (including jobs) go into insolvency and assets are taken out of the original business. • Examine the legal provision that pertains to any sale to a connected party following insolvency of a company including who can object and allowable grounds of an objection.
2	Provide ongoing advice to the Department of Business, Enterprise and Innovation on potential amendments to company law in light of the Covid-19 pandemic and the consequent effects on companies' administration, solvency and compliance with the Companies Act 2014.
3	Provide ongoing advice to the Department of Business, Enterprise and Innovation on the migration of participating securities in light of Brexit, and any consequential company law amendments arising.
4	Examine the possible impacts of the increased use of Artificial Intelligence in the context of the Companies Act 2014, with particular regard to corporate governance matters.
5	Provide ongoing advice to the Department of Business, Enterprise and Innovation on request in relation to EU and international proposals on company law.
6	Examine and make recommendations on whether it will be necessary or desirable to amend company law in line with recent case law and submissions received regarding the Companies Act 2014.

7	Review the enforcement of company law and, if appropriate, make recommendations for change.
8	Review the CLRG's recommendation from its 2017 Report on the Protection of Employees and Unsecured Creditors' in relation to "self-administered liquidation" and make further recommendation as to how this might be implemented.
9	Review the obligations outlined in relation to the directors' compliance statement in the Companies Act 2014, and, if appropriate, make recommendations as to how these might be enhanced in the interest of good corporate governance.

3.3 Additional item to the Work Programme, addressed in this Report

On 8 July 2020, the Minister wrote to the Chairperson requesting that the CLRG examine the issue of rescue for the SME sector under the following headings:

1	Examine and make recommendations as to how the statutory scheme of arrangement provisions of the Companies Act 2014 might be adapted to provide a rescue framework for SMEs.
2	Examine and make recommendation as to ways in which key elements of the examinership process, including a stay on enforcement proceedings and a cross class cram down, might be incorporated into a rescue framework for SMEs.
3	Other EU Member States provide for voluntary restructuring processes, with a strong emphasis on creditor agreement. Examine and make recommendation as to whether such a process is desirable in an Irish context with particular emphasis on the French framework (mandate ad hoc procedure).
4	Any other recommendations the CLRG consider appropriate.

This Report is concerned with this subject matter

3.4 Decision-making process of the Company Law Review Group

The CLRG meets in plenary session to discuss the progression of the work programme and to formally adopt its recommendations and publications.

3.5 Committees of the Company Law Review Group

The work of the CLRG is largely progressed by the work of its Committees. The Committees consider not only items determined by the work programme, but issues arising from the administration of the Companies Act 2014 and matters arising such as court judgements in relation to company law and developments at E.U. level. This Report is the product of work by the Corporate Insolvency Committee chaired by Professor Irene Lynch Fannon. The Committee's members are set out in Appendix 1 on page 38.

4. A Rescue Plan for SMEs

4.1 Introduction

4.1.1 Defined terms

In this Report the following defined terms and expressions are used:

"**2014 Act**" or "**Companies Act**" means the Companies Act 2014 (as amended);

"**CLRG 2012 Report**" means the Report of the Company Law Review Group on proposals to reduce the cost of rescuing viable small private companies;

"**CLRG Covid-19 Report**" means the Report of the Company Law Review Group to the Minister dated 25 June 2020 on measures to address company law issues arising by reason of the Covid-19 pandemic;

"**COMI**" means the centre of main interests of a company, which is defined by reference to Article 3(1) of the EU Insolvency Regulation as the place where the company conducts the administration of its interests on a regular basis and which is ascertainable by third parties. This is presumed to be the registered office of the company in the absence of proof to the contrary;[1]

"**EU Insolvency Regulation**" means Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (EIR recast);[2]

"**EU Preventive Restructuring Directive"** means Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132;[3]

"**examinership**" means the corporate insolvency rescue process introduced by the Companies (Amendment) Act 1990, now regulated by Part 10 of the 2014 Act;

"**micro company**" means a company that, in its most recent financial year fulfils 2 or more of the following requirements:

(i) the amount of turnover of the company does not exceed €700,000;

(ii) the balance sheet total of the company does not exceed €350,000;

(iii) the average number of employees does not exceed 10; [4]

"**ODCE**" means the Office of the Director of Corporate Enforcement;

"**Part 9 scheme**" means a compromise or settlement, referred to as a scheme of arrangement made under Chapter 1 of Part 9 of the 2014 Act;

[1] Article 3(1) of the EU Insolvency Regulation.

[2] OJ L 141, 5.6.2015, p. 19.

[3] OJ L 172, 26.6.2019, p. 18.

[4] Definition taken from Companies Act 2014, section 280D.

"**Part 10 scheme**" means proposals for a compromise or scheme of arrangement made in an examinership pursuant to Part 10 of the 2014 Act;

"**small company**" means a company that, in its most recent financial year, fulfils 2 or more of the following requirements:

(i) the amount of turnover of the company does not exceed €12 million;

(ii) the balance sheet total of the company does not exceed €6 million;

(iii) the average number of employees does not exceed 50;[5]

"**SME"** or "**small or medium-sized enterprise**" means a company or group of companies, having:

(i) fewer than 250 employees; and

(ii) an annual turnover of not more than €50 million *and/or* a balance sheet total of no more than €43 million.[6]

4.1.2 Framework of analysis

In its concluding remarks in the CLRG Covid-19 Report, the Review Group noted that that there is a need to examine corporate rescue structures suitable for smaller companies and to consider the development of a simplified process for such companies. It was agreed by the Review Group that this issue would be examined as part of a second phase of work to deal with medium-term stabilisation measures required to aid economic recovery.

4.1.3 Key Elements to a rescue framework

In its deliberations on a potential legal framework for a rescue process for the SME sector the Review Group considered current rescue processes available under Irish law, namely examinerships under Part 10 of the Companies Act 2014 and Part 9 Schemes of Arrangement. Based on consideration of these processes and the experience of practitioners and stakeholders, in its Covid-19 Report the Review Group highlighted four elements which are typically found in a successful and robust rescue process:

- the granting of a stay or moratorium;
- support for new and interim financing.
- support for negotiation with creditors and, where necessary, equity holders, through the introduction of cram down provisions which might include cross class cram down provisions;
- a final approval of a restructuring agreement through an official body - in Ireland, the High Court or in some cases, the Circuit Court.

These elements are present in the examinership process and are regularly cited as being central to its success. They are also recognised and included as options available to Member States in the EU Preventive Restructuring Directive.

[5] Definition taken from Companies Act 2014, section 280A.

[6] This definition is consistent with that adopted by the European Commission in its Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises. O.J. L124 20 May 2003 p 36.

In addition, the CLRG Covid-19 Report made the following observations:

1. The suitability of examinership for the SME sector has been the subject of previous CLRG consideration leading to the CLRG's 2012 Report. One of that Report's recommendations, subsequently enacted[7], providing for examinership for small companies to be operated under the jurisdiction of the Circuit Court, has not led to a significant uptake in small companies availing of examinership. It has been suggested that moving examinership to a Circuit Court outside Dublin has in some cases tended to increase rather than reduce costs. The issue of Court jurisdiction is considered in paragraph 4.5.22 of this Report.

2. It is generally considered that examinership, as a process for restructurings for larger companies and groups, has been relatively successful. However, the uptake is relatively low compared with the incidence of insolvencies, and the consequent pursuit of alternative insolvency processes, in particular voluntary liquidations. A second point on which there has been little analysis concerns the failure and success rate of the process.[8] To date there has been little analysis of the relatively high failure rate of examinerships – about one third of all examinerships fail and there is little data on the continued success of rescued companies. It was suggested that there has been an increased international interest on the part of lawyers and policy makers in examinerships in light of the requirement imposed on other EU Member States to adopt rescue processes under the EU Preventive Restructuring Directive where in some cases the Member State does not have any process of this kind. However, from a practical perspective, because examinership is listed in Annex A to the EU Insolvency Regulation, it is not normally possible for international companies to avail of this process because of the rules on COMI (Centre of Main Interests) in the Regulation which determine questions of jurisdiction. The Review Group took the view that adjustment of examinership for SMEs would not be appropriate in that context.

3. Consequently, the view of the CLRG is that a rescue framework more suited to the SME or small enterprise sector should be a standalone process separate from and independent of the examinership process, although mirroring key elements of the examinership legislation which, as described above is informed by 30 years of practical experience since its first enactment.

4. In England and Wales, the scheme of arrangement provisions in Part 26 of the UK Companies Act 2006, which are broadly similar to the Irish scheme of arrangement provisions in Chapter 1 of Part 9 of the 2014 Act, have led to considerable restructuring and turnaround success in England and Wales.[9] In contrast to examinership, these provisions are not subject to the EU Insolvency Regulation and in fact cannot be listed in Annex A of that

[7] Companies (Miscellaneous Provisions Act 2013), section 2 amending section 2 of the Companies (Amendment) Act 1990, now Companies Act 2014, section 509(7).

[8] Deloitte monitors the use of the various insolvency processes. In recent years the number of examinerships is around 3% of all insolvencies as compared with figures for creditors' voluntary liquidations being over around 70% each year between 2017 and 2019. www2.deloitte.com.

[9] See further McCann L, and Lynch Fannon I, in Courtney (Ed.) *Bloomsbury's Professional Guide to the Companies Act 2014* Chapters 6, 7 and 8. See also Payne J: Schemes of Arrangement: Theory, Structure and Operation (CUP, 2014) for a treatment of the English legislation and its success in recent years. See also Lynch Fannon and Murphy: *Corporate Insolvency and Rescue* (Bloomsbury Professional 2012) Chapter 14 for a consideration of Irish case law on these provisions.

Regulation. Therefore, these provisions are not subject to the jurisdiction rules determined by the COMI provisions in the EU Regulation. For this reason, London became a forum of choice for corporate restructurings during the last recession[10].[11]

4.2 Existing Law on Corporate Rescue in Ireland.

4.2.1 Introduction

Currently in Ireland, the examinership process presents the most commonly used framework in which corporate rescue and restructuring takes place. In addition, Part 9 of the Companies Act 2014 (which re-enacts provisions from the 1963 Companies Act) provides a process which can be used to restructure companies in certain situations. After deliberation**,** the Review Group determined that its efforts should be focussed on modelling the new process on the examinership framework rather than focussing on Part 9 Schemes. This section provides a summary of its observations in this regard.

4.2.2 What is a Part 9 scheme?

As the Tánaiste's mandate to the Review Group is to consider the appropriateness of a Part 9 Scheme as a possible rescue process, this section 4.2 and Appendices 2 and 3 contain information on the law and procedure involved in such Schemes, which has informed the Review Group's analysis of the corporate rescue and restructuring processes currently available under Irish law.

A Part 9 scheme of arrangement is a proposal originated by the directors of a company to restructure the ownership and/debts of a company, whether public or private. In non-insolvency situations, it can also be used to migrate an Irish-incorporated company to another jurisdiction, to make an offer for its shares or to effect a complete takeover. In insolvent situations its equivalent provisions have been used as a debt and financing restructuring tool in England and Wales. A number of Irish registered corporates have availed of the Irish provisions in the same manner.

The stages in a Part 9 scheme can be summarised as follows:

- A scheme must be devised and a circular to affected shareholders and/or creditors prepared.
- The meetings of shareholders and/or creditors must be convened.
- The meetings of shareholders and/or creditors must pass the resolutions approving the scheme.
- The company must apply to the High Court for the scheme to be sanctioned.
- The Court Order must be delivered to the Registrar of Companies.

[10] In light the judgment in European Court of Justice Case C-311/18 *Data Protection Commissioner v Facebook Ireland and Maximillian Schrems* and the possibility of a comparable application of the legal principles to the transfer of data outside the EU to the UK as a third country, it is possible that London may have difficulties in repeating this in the recovery from the Covid-19 pandemic.

[11] See further Payne *ibid.* There is some evidence that Ireland has become of interest as a possible jurisdiction for this kind of restructuring work post Brexit. See recent Irish cases such as *Re Ballantyne Re plc* [2019] IEHC 407 and *Re Nordic Aviation Capital DAC* [2020] IEHC 445 where amongst other issues the question of jurisdiction was considered.

4.2.3 Shortcomings of Part 9 schemes for companies

The potential difficulties arising from the use of a Part 9 scheme as a means of SME rescue include the following:

- The absence of an automatic stay on proceedings.
- The requirement for significant majorities across all classes of creditors in order for it to work. If English case law were followed this might not be necessary, where it is arranged (for a variety of commercial reasons) that there is usually only one class of creditors.[12]
- The vulnerability of the company's constitution of classes of creditors to being reopened by the Court when the scheme comes to be approved.
- It is generally not used for trading companies and in practice is used for holding or 'TopCo' companies.

4.2.4 Deliberations of the Corporate Insolvency Committee and the Review Group on Part 9 Schemes.

The Committee initially considered the Part 9 Scheme procedure and concluded, based on the observations of practitioners involved with Part 9 Schemes, that it did not provide a suitable model for a restructuring or rescue process for smaller trading companies. The Review Group was informed by practitioners on the Corporate Insolvency Committee that the process was most appropriately used to restructure 'TopCos'. Nevertheless, it was agreed that some aspects of the procedure warranted further consideration including:

- the manner of commencement of a process and the absence of an automatic stay on proceedings during the currency of the process; (See paragraph 4.5.9.)
- the consideration of constitution of classes of creditors under Part 9 Schemes which has also influenced the consideration of the same issue in some examinership cases and is similarly relevant to the design of any new rescue process. (See paragraph 4.5.12.)

A more detailed outline of the Part 9 Scheme process is set out in Appendix 2.

4.3. Rescue processes in other jurisdictions

The Review Group was provided with an outline of comparable procedures in France, the Netherlands and the United Kingdom, set out in Appendix 4. While it was instructive to consider these processes, the Review Group is of the opinion that its design of the rescue process outlined in the succeeding sections of this Report is more suitable for Irish circumstances and the Irish legal landscape.

4.4 Key questions in designing a rescue process

Following the framing of its analysis as described above, the approach of the Committee and the Review Group, was to consider a number of key questions, which would lead to the design of a potential procedure:

[12] See "The rise and rise of the English scheme of arrangement", Allen & Overy, 21 December 2015. https://www.allenovery.com/en-gb/global/news-and-insights/publications/the-rise-and-rise-of-the-english-scheme-of-arrangement

1. Should any new process be designed as a short-term measure to deal with the consequences of the Covid-19 pandemic only or should it be a long-term solution to ongoing problems regarding the suitability of existing processes to the SME sector.

2. What should be the scope of a new process? Should it be available to all SMEs?

3. What is the purpose of the new process? Should it be focused on a rescue of the company or only the salvageable enterprise of the company?

4. Should there be limits on the availability of such a process? For example, should companies be able to avail of the process once only, once every few years or as frequently as they see fit if the particular company meets the criteria for use of the process?

5. How would this process interact with other insolvency or rescue processes such as examinership in terms of availability to the debtor company?

6. What tests should the debtor company satisfy in terms of future viability? [13]

7. What might a new process be called?

8. Should there be a role for a qualified insolvency practitioner, as required in examinerships and liquidations? Or should the process proceed without one as in a Part 9 Scheme?

9. How might a process be commenced – unilaterally by the company or by leave of some authority or Court?

10. Should there be a statutory stay on proceedings, execution and enforcement of security?

11. What might be the timeframe for the process – the 70 – 100 days of an examinership that is somewhat mirrored in a Part 9 scheme – or some alternative timeframe?

12. Should the process recognise different classes of creditors? If so, how should classes of affected creditors be constituted?

13. What voting majority and quorum should be required in any creditor vote?

14. Should there be any limitations on participation in votes, etc., by particular classes of creditors, e.g. connected creditors?

15. How should onerous contracts be addressed?

16. Should there be cross class cram down included in the framework?

17. If cross class cram down is to be allowed, do particular classes of creditors require special consideration, e.g. employees, the Revenue Commissioners or connected creditors? What is the treatment of new and interim financing?

18. Will the tests of 'unfair prejudice' as applied in examinerships apply? Should the legislative framework articulate the 'best interests of creditors' test as described in the EU Preventive Restructuring Directive?

19. How should a scheme become binding – by the fact of creditor approval or by order of the Court?

[13] Questions 2- 6 are important 'threshold' questions regarding the availability of the process. The threshold questions also include viability tests.

20. What protections could be engineered into such a process, for example, to deal with miscreant directors and officers?

21. What protections should there be for guarantors and the holders of guarantees?

22. Which Court should have jurisdiction over the process?

23. What role, if any, should there be for a statutory regulatory body? Which body should discharge any such role?

The deliberations and Review Group's conclusions on these questions are outlined in the next section.

4.5 Design of a potential process

Having regard to the time available to complete this review, it was decided to limit consideration of the issues to the design of a rescue process that was largely modelled on examinership but structured in a manner which would be simplified and considerably less expensive to implement. This builds on a previous report of the CLRG in 2012 and responds to the current context of financial and economic difficulties caused by Covid-19 and the anticipated continued economic difficulties.[14]

4.5.1 Duration of a new process [Question 1]

Members considered whether the Group should confine itself to the Covid-19 period or more generally and beyond that period. While there were differing opinions as to the merits of each, it was generally acknowledged that there is a de facto gap in available procedures for the rescue of small companies as highlighted in the CLRG's 2012 Report; Covid-19 has merely exacerbated the pre-existing issue and brought it the fore. It was agreed that the rescue of SMEs was to be considered generally and not to confine any recommendations to the Covid-19 period. However, in taking this approach and given the timeframe for completion of deliberations, the Review Group recognises that there will inevitably be issues and points of detail which require further consideration by the Department.

It was also agreed by the majority, that any process recommended was not by reason of specific defects in examinership legislation (although there were some points of procedure that might be reformed) but rather that the cost associated with examinership causes a consequential barrier to access for smaller companies.

4.5.2 Scope of a new process. [Question 2]

Detailed consideration was given to the scope of any new process and, in particular, to whether any new process recommended should be available to small and medium enterprises or just to small enterprises. Definitions of small and medium[15] enterprises are established in EU law[16] and reflected

[14] This is an important policy imperative in its own right. Evolving economic figures suggest a 35% increase in insolvencies as a result of Covid-19.

[15] The qualifying conditions for a medium sized company are satisfied by a company in relation to a financial year in which it fulfils two or more of the following requirements: (a) the amount of the turnover of the company does not exceed €20million; (b) the balance sheet total of the company does not exceed €10million; and (c) the average number of employees of the company does not exceed 250. Section 350 (6) Companies Act 2014.

[16] European Commission in its Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises. O.J. L124 20 May 2003 p 36.

in the Companies Act (as amended). The CLRG 2012 Report formed the view that medium sized companies were of sufficient scale that they could avail of examinership. Accordingly, it confined the scope of its recommendations to apply only to small companies – companies which under this definition would satisfy two of the then three criteria – turnover of €8.8 million or less, a balance sheet of €4.4 million or less and 50 or fewer employees. For the purposes of application of the preparation and filing of financial statements, the Companies Act, now defines a small company as:

> "a company if, in relation to a financial year, it fulfils 2 or more of the following 3 requirements:
>
> (a) the amount of turnover of the company does not exceed €12 million;
>
> (b) the balance sheet total of the company does not exceed €6 million;
>
> (c) the average number of employees does not exceed 50.[17]

Consideration was given as to whether the requirement for any new or streamlined process existed primarily at small company level. The CLRG 2012 Report had considered that "examinership, in the form currently available to small private companies (SPCs), is inadequate by reason of the costs involved which are prohibitive"[18]. Companies with turnover, balance sheet total or employees above two of these thresholds would be companies of significant size, even if they qualify as "medium sized". Accordingly, the Review Group concludes that any new process ought to be available only to small companies as defined in the Companies Act (to include micro companies).

It should be noted that some members of the Review Group expressed concern that the proposal in the CLRG 2012 Report, which was subsequently enacted allowing for examinerships to be operated in the Circuit Court for small companies, has not supported the medium sized enterprise sector. The examinership process is still run through the High Court for these companies. It was observed in fact that the majority of companies availing of the examinership process are medium sized companies, yet the numbers remain low. One reason for this is the cost of the process. Accordingly, ISME were of the view that not including medium sized companies could leave a gap of support which should be available to such companies. ISME highlighted that medium sized companies are often operating on narrow margins despite their turnover or number of employees and are ill-placed to bear the costs of examinership.

One way of addressing this would be to extend Circuit Court jurisdiction to this sector. However, the current difficulties with the exercise of this jurisdiction by the Circuit Court are further considered in paragraph 4.5.22 below.

As an alternative, and whilst acknowledging that there were mixed views amongst the Review Group on this question, there may be merit in the Department considering the extension of this new simplified process to medium enterprises following an assessment of its success or otherwise with small companies should it be implemented.

4.5.3 **What is the purpose of the new process? Should it be focused on a rescue of the company or only the salvageable enterprise of the company? [Question 3]**

The Review Group is of the view that the purpose of any new process should be to save the enterprise and any jobs provided by it. This should be the primary objective rather than to help

[17] Companies Act 2014 section 280A(1), inserted by Companies (Accounting) Act section 15.

[18] Report, page 1 para 1.

shareholders whose investment has proved to be unsuccessful. In principle, the rationale behind any process ought to be similar to that of examinership and focus on saving the enterprise and jobs. However, given that the process is targeted at small businesses and accordingly, the objective is also to simplify the process to the extent possible, it is considered that in most cases, saving the company will mean saving the enterprise.

The Review Group is also of the view that seeking to differentiate between the company and the undertaking carried out by the company added a level of complexity that was not proportionate given that the new process would only be available to small companies. Accordingly, the Review Group recommends that the process should be one that rescues the company and the jobs it provides (which is predicated on the assumption that the survival of the company would also facilitate the survival of the undertaking).

4.5.4 Availability of process [Question 4]

The potential for the successive availability of various insolvency processes must be considered. This can be divided into two issues: first, whether a new process itself should be in any way delimited in terms of multiple use and secondly, whether there should be any limitation either on its use after an examinership or on an examinership after its use. The second of these issues is dealt with at paragraph 4.5.5.

- While there is not a limit on the number of attempts to enter examinership, it is believed that of those companies that have availed of examinership more than once, the directors have changed or the Part 10 Scheme (namely the rescue scheme) addressed this issue with the addition/removal of directors. With smaller companies/family run businesses, it is unlikely that this would be a realistic option.

- The personal insolvency process under the Personal Insolvency Act 2012 is limited to once only for an individual debtor.

There are two distinct positions of members of the Review Group. The legal and accounting practitioners on the Review Group largely prefer there to be no limitations on use. Between the experience of the small number of companies that had undergone more than one examinership and their observations of market practice, they anticipate that the understandable caution of any insolvency practitioner putting his or her reputation on the line in a second use of the process was sufficient protection. In addition to this, it is unlikely that creditors would support the repeated use of the process. The position of the ODCE, the Revenue Commissioners, ICTU and some other members is that there ought to be a limitation on its use, at the very least that it should not be used more than once in any five-year period.[19]

The Review Group has not come to a consensus view on this point and considers it a matter of policy for the Minister to determine. However, should the Minister consider it appropriate to allow companies avail of the procedure repeatedly, all Review Group members agree that there must be sufficient anti-abuse measures to ensure that the assets and funds of the company are not depleted to the detriment of creditors. The issue of safeguarding is considered at 4.5.11.2.

[19] Section 288 of the Companies Act has the effect of restricting companies from changing their financial year within a 5-year period.

4.5.5 Interaction of a new process with other insolvency or rescue processes [Question 5]

There is the possibility that access, particularly if not carefully delimited, to a variety of processes might create a risk of inappropriate "forum shopping" and confer a tactical advantage to the applicant and disadvantage the company's creditors to a greater or lesser degree. For example, a company availing of a proposed new process might subsequently avail of an examinership. Any new process would have the potential for use in addition to an examinership or scheme of arrangement or indeed for serial use. At present there is no restriction on a company using a Part 9 Scheme and then proceeding to examinership or indeed availing of an informal debt write down and then proceeding to examinership as in *Re Kitty Hall Holdings Ltd and others*[20].

In the case of the proposed new process being followed by an examinership, the Review Group does not propose that there be any express limitation, in particular because the commencement of an examinership requires an order of the Court. The Court acts as gate keeper and will ensure that successive attempts at rescue through use of the examinership process does not amount to an abuse of process.

In the case of an examinership followed by the proposed new process, the positions of Review Group members are as outlined in 4.5.4. Accordingly, there was a divergence of opinion as to whether companies who have availed of examinership should be afforded the opportunity to avail of this process

In favour of allowing access, some practitioners on the Review Group articulated that the administrative safeguards discussed at 4.5.11.2, and the fact that creditors have the right to object to the scheme and go to Court act as a sufficient barrier to abuse. It was highlighted that once in Court, the insolvency practitioner would be required to outline to the Court all previous rescue attempts made by the company and the Court would factor this into its decision. Additionally, practitioners highlighted that the practical commercial difficulty of attracting new investment following a failed examinership so as to be in a position to avail of a subsequent attempt at rescue via the new process would act as a natural deterrent to those seeking to abuse the process.

Those opposed to allowing access primarily highlighted concerns in respect of the impact on creditors, in particular whether availing of the new process following a failed examinership simply delayed the inevitable and would ultimately cause the position of creditors to deteriorate.

4.5.6 Should there be a test of viability for the debtor undergoing the process?

As described in paragraph 4.5.9 below, a number of criteria relevant to the commencement of the process will be replicated from the examinership legislation. These include the requirement that the debtor company must have a reasonable prospect of survival[21]. The establishment of the future viability of the enterprise will occur in accordance with the process described below in paragraph 4.5.9 on the commencement of the process and paragraph 4.5.11.2 on safeguarding measures.

[20] [2017] IECA 247.

[21] An opportunity could be taken at drafting stage of any measures to implement this Report's recommendations to outline the details of what it means for a company to have 'a reasonable prospect of survival' and for such criteria to be considered for application in examinerships also. It should be noted that in examinership, this test is actually considered on two occasions. The Examiner will need to give an initial view as to the company's prospect of survival and case law outlines that when a company exits the process the Court will again need to consider whether there is a reasonable prospect of survival.

4.5.7 Name for a new process [Question 7]

The Review Group is unanimous in rejecting the use of "examinership" in any form. A number of suggestions were tabled: "mediated process", "supervised process", statutory rescue and transition process" ("START process") or "Preventive Restructuring Framework for Small Companies".

The Review Group concludes that a suitable name would be a "Summary Rescue Process". This would echo the expression "summary approval procedure", introduced as a definition by the Companies Act and, as in that case, denoting an abridgement of what might otherwise be a more protracted procedure.

4.5.8 Qualified insolvency practitioner [Question 8]

Whilst a Part 9 scheme is commenced without the legal requirement for an insolvency practitioner in a formal role, it is not unusual for a report from such a person to be presented at the Court hearing to sanction the scheme. Examinerships in contrast commence with the appointment of the Examiner by the Court. The Review Group envisages a requirement for significant input from a qualified insolvency practitioner into any new procedure.

Section 633(1) of the Companies Act sets out the classes of persons eligible to be appointed a liquidator of a company, which can be summarised as follows:

1. accountants who are members of a prescribed accountancy body;
2. practising solicitors;
3. members of other professional bodies recognised by IAASA;
4. individuals entitled, under the laws of another EEA state, to act as liquidator in insolvency proceedings; and
5. individuals authorised by IAASA under grandfathering provisions for liquidators without formal qualifications.

The Review Group concludes that an insolvency practitioner – for the purpose of this Report, referred to as a "Process Adviser" [22] – falling within any of the above classes should be involved in the Summary Rescue Process. The role of the Insolvency Practitioner ["Process Adviser"] is further described in the relevant sections below.

4.5.9 Commencement of process [Question 9]

There was a view, expressed in particular by practitioners present at the Corporate Insolvency Committee's deliberations, that one of the barriers to access to examinership for small companies is the cost of the process generally, including costs relating to the commencement of the process. In Committee discussions, a minimum figure of €18,000 was cited as necessary to commence the examinership process to cover the costs of the independent expert, solicitors' fees, counsel's fees, advertising costs and stamp duty, and so forth. It was suggested that costs can be much higher in some cases.

[22] This is similar to the restructuring expert or observer required under the new Dutch WHOA procedure. The descriptive term for such insolvency practitioner is not finalised.

In that context the consideration of how an alternative rescue process could be commenced was driven by the need to reduce costs. This is the first of a number of design proposals which are driven by this consideration.

It was agreed that any new process should be commenced by the debtor company through a resolution of the directors of the company rather than by an application to the Court.

Prior to the formal commencement of the process, the directors would seek advice from an insolvency practitioner, the Process Adviser-designate, who would:

- be furnished with a full statement of affairs of the company, prepared under a duty of utmost good faith and sworn by affidavit, by the directors of the company. Considerable emphasis on the duty of utmost good faith being imposed on directors in this context is stressed by the Review Group; and
- form a view on this basis and other information available to him or her and advise the directors of the company, in writing, that the company appears to have a reasonable prospect of survival in accordance with interpretation of that phrase under section 509 of the Companies Act 2014 as it relates to the examinership procedure.

Additional conditions outlined in section 509(1) Companies Act 2014 should be repeated, and stated in this commencement process, namely that the company is unable or likely to be unable to pay its debts, that no resolution subsists for the winding up of a company and no order for the winding up of the company has been made.

The statement of affairs[23] would be in a format to be prescribed, avoiding the format in the Rules of the Superior Courts, which was considered to be unfit for this purpose.

Once the above-mentioned steps are followed the company would then proceed as follows:

- The directors of the company would pass resolutions:
    - to appoint the Process Adviser;
    - to publicly issue a notice of suspension of payments other than debts incurred during the process (which includes *inter alia* continued payment of employee remuneration including PAYE and levies in respect of that remuneration);
    - to commence and / or continue discussions with creditors with a view to convening creditors' meetings;
    - to commence and / or continue discussions with potential investors and financiers with a view to obtaining more capital;
- The company would give immediate notice of:
    - the suspension of payment of debts; and
    - payments necessary to the continued operation of the business (such as payment to crucial suppliers) including the payment of employees will not be suspended. [24]

[23] ICTU suggested that the statement of affairs be supplemented by a due diligence report on the terms and conditions of employment of employees which is consistent with the statutory statement under the Terms of Employment Information Act 1994.

- appointment of the Process Adviser:

This notice would be given in the prescribed form to the following:

- the CRO;
- the Revenue Commissioners;
- employees;
- creditors;

and by notice in Iris Oifigiúil and on the company's website.

In light of the disproportionate costs of newspaper advertising in a process for a small company, it is not proposed that there be a requirement to publish notice in a newspaper.

The notice would also be filed in the office of the relevant Court (High Court or Circuit Court in accordance with considerations in paragraph 4.5.22 below) to provide for the filing of various matters which might arise, and which are summarised in the safeguarding measures which are considered in paragraph 4.5.11.2 below.

This notice would be accompanied by the statement of affairs as described above.

In addition, a report in relation to the company as described under section 511 of the Companies Act 2014 with modifications would be furnished with the notice.

4.5.10 Stay on proceedings, execution and enforcement of security [Question10]

There was considerable debate around whether there should be an automatic stay on proceedings and enforcement as in an examinership or simply an ability on the part of the company to apply for a stay as in the case of a Part 9 Scheme.

Arguments in favour of a stay included these:

- it draws a line in the sand which distinguishes pre-process debts from post-process liabilities;
- without a stay, the process may be rendered futile if a number of creditors act precipitously including creditors who may exercise the right to appoint a receiver, creditors with reservation-of-title clauses or creditors with particular enforcement rights such as sequestration of assets (for example the Revenue) enforce their entitlement to resume possession of their inventories;
- it prevents fixed charge holders enforcing their security to avoid costs (e.g. as in the case of Examiner's costs) reducing the net amount recoverable under their security.

The principal argument against such an automatic stay is that it would clearly require the involvement of the Court at the commencement of the process, thereby adding significantly to the costs of the process. Whilst a winding up, with accompanying discontinuance of payment of debts and a stay on proceedings and enforcement, is commenced unilaterally, that will be in the context of the trade of the company being terminated.

[24] Section 521 of the Companies Act 2014 deals with the payment of pre-petition liabilities in examinership and the process outlined is guided by the principles contained in this section.

Following extensive discussion, the prevailing view of the Review Group is that there should not be an automatic stay but that there should instead be an ability, as in a Part 9 scheme scenario, for the company to apply to Court for such a stay, if required, as a defensive measure against any move by a particular creditor. It was also reiterated that as negotiations would have begun then pragmatically creditors would not move within a particular stated time frame below.[25]

4.5.11 Timeframes for the process and deadlines [Question 11]

Initially, consideration was given as to whether the process should mirror the 70-day time frame applicable to examinership, which in turn is not hugely different from a typical Part 9 Scheme timetable, both of which are illustrated in Appendix 3.

The following suggested timetable is modelled on that timeline, although it aims to arrive at a conclusion earlier than in either of those processes.

Before Day 1	Company prepares Statement of Affairs Proposed Process Adviser delivers advice to company Resolution to commence process is passed and Proposed Process Adviser is appointed.
Day 1	Notification of commencement of process and the suspension of payments is sent in the prescribed formats to the following: - the CRO; - the Revenue Commissioners; - employees; and - creditors. - the Court office (see below under additional safeguards) This notice is accompanied by the statement of affairs and the report based on a section 511 structure as described above.
	Company and Process Adviser work to prepare a draft rescue plan along the lines of section 539 of Companies Act 2014 as above.
No later than day 42:	Notices are issued convening creditors' meeting(s) on 7 days' notice, including the report modelled on sections 511 and the report of the scheme proposals modelled on ss. 534 and 539 of the Companies Act 2014 together with up to date statement of affairs.
7 days after notice of meeting(s)	Creditors' meeting(s)

[25] ICTU's position on this particular point is that there should be no stay at all on proceedings and enforcement of employee claims and point to the precedent of section 678 of the Companies Act 2014, the EU Preventive Restructuring Directive, in particular Article 6.5, the comparatively short limitation periods for referral of complaints to the Workplace Relations Commission (WRC), the benefits of WRC dispute resolution as well as the general vulnerability of workers.

Business day following meeting(s)	Notice of approval of scheme is communicated in the prescribed form to: - the CRO; - the Revenue Commissioners; - employees; and - creditors. - the Court (see below additional safeguards)
14 days waiting period	In the absence of a notice of objection to the Process Adviser, by any creditor or the Revenue Commissioners, copied to the Court, the Scheme becomes binding on all parties, subject to a filing procedure in the Court. See below at paragraph 4.5.19
	OR
Alternatively, within 7 days following meeting(s)	Company applies to Court for approval of the scheme See further below para. 4.5.17

4.5.11.1 Proposals for Compromise or Scheme of Arrangement.

Once the process commences, the Process Adviser would:

- set about exploring options for the rescue of the company and negotiating with any parties critical to the design of a rescue plan for the company;
- prepare the rescue plan for approval by the creditors in keeping with the steps provided for in section 534(1), (5) and (6) of the Companies Act as it relates to the proposals of the Examiner in examinership;
- prepare proposals, the contents of which will be governed by section 539 of the Companies Act as it pertains to an Examiner's proposals;
- following this and in keeping with the provisions of section 534(5)(a) of the Companies Act, supply a copy of his or her report to the company.

This Process Adviser's report would be filed with the Court, consistent with the proposed commencement papers being filed in the Court office, as discussed in the next section.

Prior to the issue of notices for the meetings of classes of creditors in accordance with the provisions of section 534(2) of the Companies Act 2014 (constituted in accordance with developed principles) and called to approve the scheme, the Process Adviser would deliver an updated report to the company with a copy to the creditors along the lines of the Report described in section 539 of the Companies Act 2014 in addition to a statement to the following effect:

- the proposed scheme satisfies a 'best interest of creditors' test, namely that the creditors would get at least as good as what they would get in an alternative scenario; (see section 511(3)(g))
- no creditor is being unfairly prejudiced;
- [the continuance (if such be the case) of equity ownership by some or all shareholders is justified by new equity introduced by them and/or the circumstances of the company.]

4.5.11.2 Additional administrative safeguards.

Initial meeting of creditors.

It was debated as to whether the commencement of the process should be accompanied by particular administrative steps.

It was suggested that there should be a facility in place, possibly by convening an initial creditors' meeting to allow creditors object or raise concerns with the commencement of the process. This would mean that the directors might convene a creditors' meeting immediately following the commencement of the process, so as to enable more information as to the reasons for the insolvency to be made known. The Revenue Commissioners noted that the dialogue and exchanges at creditors' meetings are valuable in enabling the Revenue to formulate their position in relation to a company in an insolvency process. The ODCE, based on its experience of creditors' meetings in liquidations, was strongly of the opinion that creditors' meetings provide valuable context to the issues facing a company and often result in the disclosure of facts of which the insolvency practitioner may not be aware.

However, practitioners on the Corporate Insolvency Committee highlighted that holding a meeting at this stage in the process added little value as there is nothing for the creditors to consider at this point.

As a middle ground, it was suggested that on serving notice of the commencement of the process (as described in the above timeline), the Process Adviser would also have an obligation to write to all creditors and provide them with an opportunity to disclose any pertinent or additional information. In the context of reducing costs and simplifying the process for creditors, this could be done via the circulation to all creditors of a standard response form. Any material facts disclosed would then be required to be addressed in the insolvency practitioner's report.

The Review Group tentatively concludes that there is merit in providing a facility for creditors to highlight concerns and any material facts which might impact the progression of the process, though there was a difference in opinion as to the vehicle that might be used for this process.

Pre-notification to Court

It was proposed that the commencement notice of the process described above would also be filed in the relevant Court office (High Court or Circuit Court- see above, paragraph 4.5.9). This means that a record number will be attached to the process from the outset which will support the filing of further applications, objections from creditors and so forth.

It is envisaged that the Court will have several potential roles in this process:

- to hear applications regarding the assumption of executive powers by the Insolvency Practitioner
- to hear applications for a stay, for example on the part of the debtor, where creditors or others objected to the notice of cessation of payments and commencement of the process.
- to hear other general applications from creditors, *inter alios*;
- to hear applications relating to other matters for example:

- to facilitate applications for repudiation of contracts, if these are to be accommodated in the proposed process;[26]
- to approve the rescue plan;
- to hear any general applications, including objections from creditors generally or moving from the process to an examinership or winding up.

The Review Group tentatively concludes that this is a good idea and would have the effect of having a relatively more frictionless ability for applications to Court to be made.

Mirroring personal insolvency process

There was consideration as to whether there was merit in disallowing the process as in a personal insolvency process[27], where 25 per cent or more of his or her debts (other than excluded debts) were incurred during the period of 6 months ending on the date on which the process starts. Advocates of this proposal noted that there have been examinership cases where is appears that the company may have deliberately ceased paying taxes (and other debts) in the months prior to applying for examinership and using these funds as the new "investment" required for the scheme If this were to be applied as a condition, then it would appear that Covid-19-related debts would require to be excluded. The Review Group ultimately concludes that, with appropriate safeguards in place, this proposal is not required.

Directors' duty to creditors

It is also important to note in terms of preventing abuse that the statement that a company is unable or likely to be unable to pay its debts is a triggering point for directors' duties to be owed to creditors in accordance with the principles outlined by the Supreme Court in *Re Frederick Inns Ltd*[28]. These duties are also the subject matter of discussion in the CLRG Report on the Rights of Employees and Unsecured Creditors 2017 which recommends the codifying of these duties under a proposed section 224A of the Companies Act 2014.

The Review Group endorses this previous CLRG recommendation and notes that it was signalled for inclusion in the General Scheme of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 although not included in the Bill as initiated or the Act as enacted.

Additional safeguards included in the design of the process include the provisions addressed in paragraphs 4.5.20 and 4.5.23.

Duty to act in utmost good faith

Review Group members place particular emphasis on the directors' duty to act in utmost good faith throughout the process in particular when preparing the statement of affairs, which must be sworn by affidavit The entire process, as described in paragraph 4.5.9 above would be subject to a 'good faith' test in line with section 518 of the Companies Act in respect of examinership.

[26] See section 4.5.15.

[27] Personal Insolvency Act 2012 section 91(5).

[28] [1994] 1 ILRM 387.

4.5.12 Constitution of classes of creditors [Question 12]

The Review Group noted that in the UK, it had been possible for schemes of arrangement under Part 26 of their Companies Act 2006 to be facilitated by votes of creditors within a single class. This was in the context of negotiations being concluded with creditors which in certain instances would be preferential to those available to the general body of creditors.[29]

There was discussion as to whether classes of creditor might be codified in the law, even on a non-exhaustive basis. As described in Appendix 2, case law around the constitution of classes of creditors has been developed in English and Irish law and in that context, codification might not provide the required flexibility on this question. In that context it is crucial to differentiate between creditors with a common ranking and rights of recovery on the one hand and, on the other, creditors with a particular distinct interest: a proprietary director and a supplier might rank pari passu as to rights, but their respective interests are quite different.

Currently this is a matter for the Court in in both Ireland and in England and Wales. [30]

4.5.13 Quorum and voting majorities [Question 13]

Part 9 Schemes require that resolutions be passed by a special majority – 75% in value being a majority in number of those voting at the scheme meeting. Part 10 schemes require a simple majority. European models such as the Dutch WHOA procedure require a 66⅔% (although it was noted that this was a very new procedure and has largely been untested to date). After considerable debate, it was agreed that a simple majority-in-value vote was most appropriate, with the issues of constitution of class being more relevant.

The issue of quorum was also considered. There are precedents for there being a requirement for a quorum for significant corporate events. Most recently under the Migration of Participating Securities Act 2019, the migration of a company to the new intermediated system of shareholding requires a quorum of one third of the share capital involved. That in turn reflects the Companies Act default of a one-third-of-capital quorum for variation of rights attaching to shares[31], which is analogous to a creditor varying its rights. Quora are not required in existing rescue processes considered in accordance with the principles guiding the discussion. Accordingly, it was decided not to recommend any quorum for the meetings at which a scheme would be approved.

4.5.14 Limitation on connected creditors in participation in votes [Question 14]

The exercise of voting rights by connected parties is probably the most contentious issue that arises in creditors meetings to wind up a company.

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[29] The ICTU position on this point is that employees should be constituted in a class of their own because of their commonality of interest (EU Preventive Restructuring Directive, Article 9.4), their rights are not dissimilar, the nature of their contractual relationship with the employer, the underpinning of their rights by both contract and statute, their continuing and almost total financial dependent relation with the employment, the particular vulnerability of non-union employees and the fact that they do not have the benefit of limited liability.

[30] The case law on constitution of classes is discussed in Lynch Fannon and Murphy: *Corporate Insolvency and Rescue* (Bloomsbury Professional, 2012). Chapter 14 pp. 627-635. See however, the decision of Barniville J in *Re Ballantyne Re: plc* [2019] IEHC 407 and *Nordic Aviation Capital DAC* [2020] IEHC 445

[31] See section 88 of the 2014 Act.

This issue is considered further in relation to particular classes of creditors in paragraph 4.5.17 below.

In addition, in Appendix 5 is an exploration of a possible description of a connected creditor which may be of use in formulating a statutory definition for this purpose.

4.5.15 Onerous contracts [Question 15]

Under section 537 of the Companies Act it is possible for application to be made to the Court for the repudiation of onerous contracts.

There were two different views expressed by the Review Group members on this point.

Firstly, some members considered the repudiation of contracts too complex an issue to be dealt with in a simplified process aimed at smaller companies. It was highlighted that any company in the position to cover the cost of repudiation should use the existing examinership framework.

Others felt that repudiation should be available where it is necessary to ensure the survival of the company. It was highlighted that in most cases this issue is settled without Court involvement and suggested that where Court involvement was required, this process could aim to limit costs.

The Review Group did not reach a consensus on the issue and consider it to be a matter of policy for the Minister to determine.

4.5.16 Cross class cram down [Question 16]

The Tánaiste's brief to the Review Group requested, inter alia, that there should be an examination and recommendations on how a cross class cram down of creditors might be incorporated into a recue process. In submissions received and in Review Group deliberations it was acknowledged that a key element of any robust rescue process was the ability for there to be cross class cram down as in an examinership. In an examinership process this means that if one class of impaired creditors votes in favour of the scheme, then the scheme can be presented for approval to the Court and can be imposed on other classes of creditors as long as the tests outlined in section 541 of the Companies Act are complied with, inter alia, that the scheme is not unfairly prejudicial to the rights of any interested party (which includes creditors) and that the scheme is otherwise fair and equitable in relation to any class of members or creditors.

4.5.17 Consideration of exclusion of particular classes of creditor [Question 17]

In the context of approval of any compromise or scheme and the proposed operation of cross class cram down, particular classes of creditors were discussed:

- *Employees*[32]*:*

  It was noted that Article 13 of the EU Preventive Restructuring Directive specifically protects workers and that the WHOA procedure introduced in the Netherlands excludes workers. Article 13 does however defer to national legislation. In addition, Recitals 13 and 16 and Article 4(5) state that Member States may maintain or introduce other restructuring processes in addition to processes introduced in compliance with the Directive.[33]

[32] ICTU's position is that employees should be excluded from a cross class cram down.

[33] Prior to the Covid-19 crisis, the Corporate Insolvency Committee had been considering the implementation of the Preventive Restructuring Directive 1023/2019 at the request of the Department as part of the Review Group's Work Programme. The examinership legislation was being considered in the context of suitable

- *Revenue Commissioners:*

  The potential for Revenue to be in an excludable class in relation to the process on the basis of both the model provided for under the Personal Insolvency Act 2012 and to accommodate current debt warehousing/stimulus arrangements during Covid-19, was discussed. Revenue explained that as a creditor Revenue could 'opt-in' to the Personal Insolvency Arrangement or remain outside it (and thereby be "excluded"). The decision to remain outside such an Arrangement could only be made in certain circumstances, such as where there was an ongoing failure to make returns, the debtor was under audit or there were other matters such as fraud to be addressed.

  With regard to debt warehousing/stimulus arrangements relating to Covid-19, it was noted that, as what was being considered was the design of a process for long term implementation, any such potential exclusion on this basis would have to be included in the legislation on a temporary basis. It was agreed that the most appropriate way to deal with this was to provide an option to the debtor to either accept a debt warehousing/stimulus arrangement or consider negotiating with Revenue.

  The question of including an 'excludability option' needs to be considered further.

- *Connected creditors*

  The exercise of voting rights by connected parties is probably the most contentious issue that arises in creditors meetings to wind up a company. The ODCE reported that it regularly receives complaints to the effect that connected creditors have used non-verified debts and even spurious debts as a basis to outvote other creditors, particularly on the votes for the appointment of a liquidator (presumably on the basis that they expect their choice to give them more favourable treatment than a liquidator supported by the other creditors). Given that it is being proposed that the connected creditors will be the people appointing and paying the Process Adviser in this process, other creditors are likely to have concerns that any proposals emerging could be unduly favourable to the connected creditors. Clearly such creditors have a massive conflict of interest in the process and stand to gain most out of the rescue of their company. It is not unreasonable that they should have to convince the majority of other creditors of the merits of their scheme. If they cannot, then the scheme should fail.

It was noted that in examinership proceedings no particular creditor or class of creditor is automatically excluded. This is also the case under the Part 9 Scheme of Arrangement process. The underlying aim of reducing costs of the process is important in this context.

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implementation of the Directive. It is not the case that the Directive requires that all rescue processes comply with the Directive. Rather, Member States are required to introduce a rescue process following the proposals of the Directive and is particularly relevant to Member States including Germany and Austria as important economies, which currently have no preventive restructuring processes. Article 4.5 of the Directive states "The preventive restructuring framework provided for under this Directive may consist of one or more procedures, measures or provisions, some of which may take place out of Court, without prejudice to any other restructuring frameworks under national law. Member States shall ensure that such restructuring frameworks affords debtors and affected parties the rights and safeguards provided for in this Title in a coherent manner". (It should be noted that ICTU has expressed strong reservations on the interpretation of this Article, particularly in the context of the CLRG designing a process for the majority (98%) of businesses which employ 69% of all employees) and especially the protections afforded to employees including information and consultation contained in the EU Preventive Restructuring Directive.

The majority view of the Review Group is that the exclusion of creditors as a class (as distinct from the recognition of particular creditors as being part of a particular class) would not be acceptable.

New and Interim Financing.

At the outset of this Report the importance of addressing new and interim financing supporting a rescue process is mentioned in paragraph 4.1.3. This is also addressed in Articles 17 and 18 of the EU Preventive Restructuring Directive. In Ireland the examinership legislation addresses the certification of Examiner's expenses, costs and remuneration in section 554 of the 2014 Act and therefore provides that remuneration, costs and expenses of the Examiner (and liabilities incurred by the company in accordance with section 529 of the 2014 Act) will be paid in full and before all other claims in any scheme or compromise or subsequent receivership or winding up. The priority of these claims depends on sanction by order of the Court. It is proposed that the same provision should be mirrored in relation to the sanction by the Court of a scheme under this process following the proposed structure in paragraph 4.4.19 below. It is anticipated that most schemes under this process would involve cross class cram down and therefore an approval by a Court.

Similarly, section 529 of the 2014 Act provides that liabilities deemed to be incurred by the Examiner in the course of the protection period and certified under that section as being necessary to the survival of the company as a going concern during the protection period will be treated as expenses under section 554 of the 2014 Act. This addresses the issue of interim financing. It is proposed that these provisions are mirrored in this new process.

As regards new financing, in a successful rescue or restructuring the position of the new financier will be the subject matter of the compromise and is a matter of agreement between the debtor and creditors.]

4.5.18 Will the tests of 'unfair prejudice' as applied in examinerships apply? Should the legislative framework articulate the 'best interests of creditors' test as described in the Preventive Restructuring Directive? [Question 18]

The key criteria against which a scheme is considered by the Court under the examinership legislation are:

- whether the scheme has been accepted by at least one class of creditors whose rights are impaired;
- whether the proposed scheme is fair and equitable in relation to any class of creditors or members that has not accepted the proposal and whose interests are being impaired by the proposals;
- whether the proposals are unfairly prejudicial to the interests of any interested party; and
- whether the sole or primary purpose of them is to avoid the payment of tax[34].

It is envisaged that these tests would be applied in this context under the approval process described above. In relation to the issue of the best interests of creditors' test as described in the Preventive Restructuring Directive 1023/2019 this test relies on a comparative consideration of the position of a creditor or class of creditors in alternative scenarios such as winding up and the comparative

[34] Section 541(4) of the Companies Act provides that "the Court shall not confirm any proposals …… if the sole or primary purpose of them is the avoidance of payment of tax due" and it is recommended that this be replicated for this new process.

consideration of a creditor or class of creditors in relation to other creditors and how they would fare in alternative scenarios, balanced against the question of rescue. This test has been articulated by the Courts in Ireland under the examinership process.[35]

4.5.19 How a scheme should become binding [Question 19]

Both a Part 9 Scheme and a Part 10 Scheme in an examinership become binding only when approved by order of the Court. As described above the inclusion of the possibility of a cross class cram down which is available in examinerships was considered to be important to preserve in this process. A number of options present themselves in these circumstances which vary in accordance with whether a cross class cram down is operated or not:

1. Court approved rescue plan with cross class cram down:
   - the Scheme becomes binding when approved by 50% + 1 of a required class of impaired creditors and approved by the Court if a cross class cram down is being proposed;
2. Creditor-approved rescue plan with cross class cram down:
   - the Scheme becomes binding when approved by 50% +1 of a required class of impaired creditors and a cross class cram down is notified to all parties following which a cooling off period expires without a creditor serving a notice of objection on the Process Adviser, with a copy to the Court. Where a creditor serves such a notice of objection an automatic obligation on the debtor company is triggered requiring the company to go to Court and demonstrate that the scheme satisfies the normal criteria outlined in paragraph 4.5.18. i.e. that it is not unfairly prejudicial and complies with other considerations as set out etc.;
3. All-class creditor-approved rescue plan
   - the Scheme becomes binding when approved by all classes of creditors where a majority rule applies, as with above a 50%+1, (sometimes called an intra class cram down) and a cooling off period expires without a creditor serving a notice of objection on the Process Adviser with a copy to the Court. Where a creditor serves a notice of objection an automatic obligation on the debtor company is triggered requiring the company to go to Court and demonstrate that the scheme satisfies the normal criteria outlined in paragraph 4.5.18. i.e. that it is not unfairly prejudicial and complies with other considerations as set out etc.

In both the second and third cases a period of 14 days from notification of the scheme in accordance with the provisions described above would require to pass without a notice of objection being filed

[35] See for example the following paragraph 30 from the Supreme Court decision in *Re McInerney Homes Ltd*:

"In this case, the trial judge's approach to the question was to view the scheme against the likely return to affected creditors under the likely alternative in the event that there was no examinership, and no successful scheme. I agree that that is a vital test. Furthermore, as the trial judge recognised, there may well be circumstances where a creditor may be required to accept less than would be obtained in such circumstances on liquidation or a receivership, but those circumstances would normally require weighty justification. However, as this case illustrates, there may remain considerable difficulty in determining the value which a creditor, and in particular a secured creditor, might otherwise obtain, by reference to which the proposal can be judged." *McInerney Homes Limited & ors and the Companies (Amendment) Act 1990* [2011] IESC 31.

with the Court by an objecting creditor. It is envisaged that where there is no notice of objection, the rescue plan would be recorded by a Court Office procedure similar to that in the case of a judgment in default of appearance or defence.

In light of current legislative frameworks, it is the view of the Review Group that the approval of the Court may be required where a cross class cram down of any kind is part of the proposal. This is not only because the obvious moral hazard but for potential constitutional law reasons; where the unilateral adjustment of property rights may be repugnant to Article 40.3.2 of Bunreacht na hÉireann. The Review Group notes that the Department will be required to further consider potential constitutional issues arising with the Office of the Attorney General when examining these proposals.

All 3 options allow for the inclusion of a Court hearing, albeit through different procedural means.

There is a statutory precedent for a scheme or compromise with creditors to become binding in a similar manner to the model proposed above, where creditors approve the scheme unless the Court approval process is triggered (initiated) in the manner described. Under section 676 of the Companies Act a scheme which is proposed after the company has gone into liquidation, but which is not approved by the Court may nonetheless become binding on creditors. The statutory provision is as follows:

> "s. 676 (1) Any arrangement entered into between a company about to be, or in the course of being, wound up and its creditors shall, subject to the right of appeal under this section, be binding on the company if sanctioned by a special resolution and on the creditors if acceded to by three-fourths in number and value of the creditors.
>
> (2) Any creditor or contributory may, within 21 days after the date of completion of the arrangement, appeal to the Court against it, and the Court, on the hearing of the appeal, may, as it thinks just, amend, vary or confirm the arrangement.
>
> (3) This section is in addition to the circumstances in which a compromise or arrangement in relation to a company may become binding under Chapter 1 of Part 9."

What is interesting about this provision is that it does not differentiate between classes of creditors – it simply needs a special resolution and for 75% in value and 75% in number of all creditors to accede to it – and the passing of a 21-day cooling off period during which time an aggrieved creditor can apply to Court for redress.

4.5.20 Dealing with miscreant directors and officers [Question 20]

As described in paragraph 4.5.9 above on the commencement of the process, the entire process would be subject to a "good faith" test similar to section 518 in relation to examinerships.

The Summary Rescue Process has the potential to be a very significant insolvency process and could have a profound impact on struggling small businesses and how they interact with the rest of the economy.

It seems reasonable to assume that a significant number of companies that would otherwise go into liquidation will seek to avail of this process. As well as companies in financial difficulty going into liquidation, there is also a cohort of companies who manage to struggle through their financial difficulties, generally by injecting personal funds into the company, cutting costs and reaching informal forbearance or write-off arrangements with individual creditors. As this category of companies does not currently engage with any official insolvency process, the extent of this situation is not known. Depending on their perception of the process, the attendant costs and the consequences involved, such companies may also seek to avail of this process. To the extent that

the latter category chooses to avail of the process, this will represent an additional negative impact on their creditors.

Currently, the actions taken, or not taken, by directors of a company that goes into liquidation are subject to review; initially by the liquidator, with the liquidator's report being reviewed by the ODCE. The directors can face restriction or, in more serious cases, disqualification and/or criminal prosecution. The ODCE file reviews have found that some 90% of company directors are considered to have acted honestly and responsibly and no further action arises in their cases leaving them free to engage in new enterprises. This system is in place for about 17 years and is generally considered to be a fair, reasonable and proportionate response to business failure and is well regarded internationally.

Where a company does not go into liquidation but manages to work its way through its financial difficulties, the question of director behaviour does not usually come to be reviewed. In a small number of cases, allegations of improprieties by such directors may be made to the ODCE by creditors or other interested parties, which can lead to an investigation by the ODCE of the circumstances of the case.

The circumstances leading up to a decision to enter the Summary Rescue Process will be identical for a company that would otherwise go into liquidation. Accordingly, there is a real danger that, if the directors do not face the same level of scrutiny, they may be tempted to enter the process in order to avoid or delay the level of scrutiny that would otherwise occur. Given that 90% of directors do not face any sanction, this should not pose any threat to the process for honest and responsible directors while, conversely, the other 10% should not be facilitated in avoiding scrutiny and, where appropriate, sanction.

Similarly, it is important that the process does not result in company directors - who might otherwise work to ensure the survival of the company - perceiving the Summary Rescue Process as an 'easy' option with no downsides for them. It would be most unwelcome if companies that are capable of surviving without going through a formal insolvency process were incentivised into Summary Rescue Process because it was seen as being so favourable to companies that can demonstrate that they meet the "entry" criteria.

Against this background, it is recommended that the Process Adviser overseeing the process should be required to submit a report to the ODCE along the lines of the current section 682 report[36] and that the current requirements in respect of restriction applications should also apply. This has the significant advantage of building on a tried and tested system that is familiar to all the relevant stakeholders and is backed up with substantial jurisprudence so that people can have a reasonable expectation of how the system will treat their particular set of circumstances.

4.5.21 Guarantors [Question 21]

The position of guarantors was discussed. As a general principle the Review Group has taken the view that matters of this kind should be treated in a manner which is similar to the approach taken in examinerships under Part 10 of the Companies Act. Section 547(a) describes how subsequent provisions of the particular chapter of the Act have effect in relation to the liability of "(a) any person (the 'third person") whether under a guarantee or otherwise;"

[36] The CLRG's 2017 Report on the Protection of Employees and Unsecured Creditors recommended that the provisions regarding the liquidator's report ought to be amended to include a specific question on the treatment of employees. While the CLRG notes that this recommendation has not yet been progressed, it would like to further endorse it in the context of this Report.

Section 548 describes a general rule that the liability of the 'third person', in this case the guarantor, is not affected by a compromise or scheme of arrangement. However, the enforcement by a creditor of this kind of liability which includes guarantees is dependent on the serving of notice in a time period determined by receipt of the notice of the creditors' meetings. The notice provisions are described in section 549(1) of the 2014 as follows:

> "(a) if 14 days or more notice is given of such meeting, at least 14 days before the day on which the meeting is convened under section 540[5] to consider the proposals is held, or
>
> (b) if less than 14 days' notice is given of such meeting, not more than 48 hours after he or she has received notice of such meeting…."

Further details are provided in the section.

It is proposed that as a general principle regarding matters of specific contracts provisions of the examinership legislation are mirrored in any proposed legislation unless otherwise addressed.

4.5.22 Which Court should have jurisdiction for the process? [Question 22]

There was discussion as to the appropriate Court to have jurisdiction over the process. A view was expressed that current experience would indicate that the provisions of section 509(7)(b) of the Companies Act providing for the Circuit Court to have jurisdiction over examinerships involving companies of a smaller size determined by turnover and employees has not been successful as a general policy strategy.

A number of reasons were canvassed for this situation. In that light the Review Group's deliberations tended to support continuing jurisdiction for the High Court. However, the ODCE expressed the view that the Circuit Court should have jurisdiction to deal with all aspects of the process. This process is intended to be used by small companies and to be a relatively low cost and simple process. It was generally acknowledged that a structured move to Circuit Court jurisdiction could address the objective of reducing costs in contrast to the continued situation of the process being dealt with through the High Court using specialist professionals (who are mainly based in Dublin) with the costs that would be associated with such an outcome. Some consideration to the creation of a specialist Circuit Court permanently sitting in Cork and Dublin was mooted.

4.5.23 Role for a Supervisory Authority [Question 23]

Consideration was given as to what role, if any, there should be for a statutory regulatory body and if so, which body should discharge any such role.

4.5.23.1

In the first instance, consideration was given to the Insolvency Service of Ireland that has certain supervisory functions in relation to personal insolvency.

In the CLRG 2012 Report a possible extended role for the Insolvency Service of Ireland was contemplated but the Review Group noted this consideration was prior to the establishment of the Insolvency Service of Ireland. The Irish Society of Insolvency Practitioners suggested a role for the Insolvency Service of Ireland on the basis that this agency was accustomed to a rehabilitative role and also had a series of appropriate forms which could be adapted to an efficient process. On reflection, the Review Group concludes that it does not at this stage envisage a role for the Insolvency Service of Ireland and that it is preferable for personal and corporate insolvency to remain distinct from one another. It is important to note both in relation to this observation and the following observation regarding the ODCE that the final role of the supervisory authority would be decided on completion of the full design of the legislative framework.

4.5.23.2

The ODCE has a crucial role in dealing with insolvency matters. The task of the ODCE's Insolvency Unit is to enforce the responsibilities of the Director of Corporate Enforcement under company law in relation to insolvent companies by:

- supervising liquidators in the proper discharge of their duties;
- assessing directors' conduct in insolvent liquidation situations; and
- sanctioning fraudulent or abusive behaviour.

Liquidators of insolvent companies must report to the ODCE and must also apply to the High Court for the restriction of each of the directors of those companies unless they are relieved of that obligation by the ODCE. However, the ODCE noted that about 90% of directors of insolvent companies do not face restriction and are, therefore, free to restart in business following liquidation. The liquidation framework is designed to ensure that honest and responsible company directors are not penalised for genuine business failure. This aligns with the EU's policy on "second chance".

The ODCE would not have any role to examine the merits of any rescue plan: that should be a matter for the directors, the Process Adviser and the creditors, and ultimately the Court in the circumstances outlined above in paragraph 4.5.19. However, it would have a role in relation to following up on miscreant directors as in a winding up as described in paragraph 4.5.20.

5. Conclusion

5.1 Summary of recommendations

The Review Group recommends the introduction of a new corporate rescue process.

- The process should be distinct from examinership and have a separate name, which the Review Group recommends be the "Summary Rescue Process".
- The procedure should be available to "small companies" as defined in the Companies Act, meaning companies that satisfy two of these three criteria:
  - annual turnover of up to €12 million;
  - a balance sheet total of up to €6 million;
  - up to 50 employees.
- The procedure should commence by a resolution of the company's directors rather than by an application to Court as in examinership.
- Instead of running for 70 to 100 days (or longer under the Companies (Miscellaneous Provisions) (Covid-19) Act 2020, which enables up to 150 days) as in examinership, the procedure should aim to conclude within a shorter period.
- The company's directors should commence the process following advice from a qualified insolvency practitioner as to the company's viability, subject to a compromise with creditors and/or introduction of new capital.
- The insolvency practitioner should oversee the procedure and assist the company's directors in preparing a rescue plan for approval by creditors.
- A vote of the creditors to support a rescue plan should be required, by a 50% +1 majority in value as in examinership, rather than the 75% vote required in a scheme of arrangement under Part 9 of the Companies Act.
- Cross class cram down of debts should be available as part of the procedure.
- Court approval of any cross class cram down should be required in the formats proposed, designed with a view to reducing costs.
- The possibility of approval of a rescue plan without an application to Court should be examined, provided there is no objection from any creditor involved.
- The safeguards against irresponsible and dishonest behaviour of directors that apply in liquidation should apply to this process.

The Review Group notes that these proposals will require further consultation with the Office of the Attorney General should they be progressed.

5.2 Comparisons with Part 9 Schemes and examinership

5.2.1 Part 9 Schemes

A Summary Rescue Process would differ from a Part 9 scheme by:

- having a qualified insolvency practitioner negotiate and develop the rescue plan;
- having a more detailed commencement process;

- having specific filing obligations as described above;
- adjusting the majority required to approve the scheme from the "special majority" of majority in number and 75% by value to 50%+1 in value only;
- having different approval criteria mirrored on the examinership process
- having different possibilities in relation to Court approval processes.
- having a more prescribed engagement with a supervisory authority, with the CRO and with the Revenue Commissioners.

5.2.2 Examinership

A Summary Rescue Process would differ from an examinership by:

- not requiring commencement by order of the Court;
- having particular commencement stages as described above;
- not having an automatic stay – but note the proposal for a requirement for Court consent to issue or progress proceedings;
- having different filing requirements with CRO and Revenue;
- having different approval processes;
- potentially not including the repudiation of onerous contracts, which is possible in an examinership.

Appendix 1

Corporate Insolvency Committee of the Review Group

Membership as at October 2020

Prof. Irene Lynch Fannon	Chairperson
Jill Callanan	Alternate of CLRG member Richard Curran (L K Shields Solicitors LLP)
Marie Daly	CLRG member, IBEC CLG (Irish Business and Employers' Confederation)
Matthew Day	Department of Business, Enterprise and Innovation (DBEI)
Michael Halpenny	CLRG member, Irish Congress of Trade Unions (ICTU)
David Hegarty	Nominee of CLRG member, Director of Corporate Enforcement (ODCE)
Rosemary Hickey	CLRG member, Office of the Attorney General
Tanya Holly	CLRG member, Department of Business, Enterprise and Innovation (DBEI)
Barry Lyons	Nominee of CLRG member Neil McDonnell, Irish Small and Medium Enterprises Association CLG (ISME)
Vincent Madigan	CLRG member
Neil McDonnell	CLRG member, Irish Small and Medium Enterprises Association CLG (ISME)
Tony O'Grady	Alternate of CLRG member Emma Doherty (Matheson)
Conor O'Mahony	Alternate of CLRG member the Director of Corporate Enforcement (ODCE)
Paddy Purtill	Alternate of CLRG member, Revenue Commissioners
Amy Reville	Alternate of CLRG member, Revenue Commissioners
Eamonn Richardson;	Invitee of Committee Chairperson (KPMG)
Ruairi Rynn	Alternate of CLRG member Barry Conway (William Fry)
Doug Smith	CLRG member (Eugene F Collins)
Declan Taite	Nominee of CLRG member Kathryn Maybury (Duff & Phelps)
Kieran Wallace	Invitee of Committee Chairperson (KPMG)

Appendix 2

Outline of the law and procedure of a Part 9 Scheme

A2.1 Stages of a Part 9 Scheme

There are five stages in putting forward a Part 9 scheme:

- A scheme must be devised and a circular to affected shareholders and/or creditors prepared.
- The meetings of shareholders and/or creditors must be convened.
- The meetings of shareholders and/or creditors must pass the resolutions approving the scheme.
- The company must apply to the High Court for the scheme to be sanctioned.
- The Court Order must be delivered to the Registrar of Companies.

A2.2 Devising of scheme and preparation of scheme circular

In order for there to be a scheme of arrangement, there must be clarity in what is proposed. As a matter of law there must be a "compromise or arrangement" between the company and its shareholders or a class of them or its creditors or a class of them.[37]

Care must be taken when composing the classes of shareholder and creditor. The case law makes it clear that the Courts will look through literal classifications where there are genuinely differing and competing interests in ostensibly the one class. In the case of shareholders, the principle was stated thus:

> "Normally the classes that will have to be considered in the case of a proposal affecting members are the ordinary and preference shareholders; … but there may be further categories to be considered and the criteria to be applied in considering whether a particular category of members or creditors constitutes a "class" within the meaning of the section"[38]

Mr Justice Keane in his *Company Law in Ireland* states:

> "It seems plain that we must give such a meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."[39]

In considering the constitution of classes this broad principled-based approach has been followed in Irish case law including by Laffoy J in *Re Millstream Recycling Ltd*,[40] where the

[37] Companies Act 2014, section 450(1).

[38] Bowen LJ in *Sovereign Life Assurance Co v Dodd* [1892] 2QV 573 at p 583.

[39] *Keane on Company Law,* 5th Edition 2016, Brian Hutchinson. 32.13

[40] *Re Millstream Recycling Ltd* [2009] IEHC 571.

Court placed a great deal of emphasis on the judgment of Costello J in the High Court in *Re Pye (Ireland),* and in *Ballantyne Re plc*[41] where a number of different issues were at stake.

Following some discussion of the particular issue of Revenue debts in *Re Pye (Ireland) Ltd*, section 23(5) of the Companies (Amendment) Act 1990 explicitly gave the Revenue Commissioners the power to compromise and agree to a scheme in an examinership. This has been re-enacted to apply to Part 9 schemes in section 453(4) of the Companies Act and applies to examinerships under section 540(6) of the Companies Act. This is relevant to the design of the process proposed in this document.

Whilst the (full) board of the company moves a Part 9 Scheme forward, a committee of independent directors (distinct from continuing directors) is generally needed for the purposes of considering the interests of shareholders whose shares are to be acquired.

The scheme is put to shareholders in the form of a circular[42], usually put together by financial and legal advisers to the company appointed for the purpose of the scheme with heavy input from the company's independent board directors.

A2.3 Convening of the meetings of shareholders and/or creditors

A company has a choice in either proceeding to convene the meeting or meetings or to apply to Court to do so. Prior to the commencement of the 2014 Act on 1 June 2015 it was necessary to apply to Court for the meetings to be convened. Even though a Court application is no longer required, it is not unusual for application to be made to the High Court, with a view to seeking to fireproof the appropriate classification of shareholders and/or creditors; notwithstanding that the substance of any issue as to composition of classes will only be dealt with at the hearing where sanction of the scheme is sought.[43]

Where an Order is sought, it is routinely given, on the basis of the following documents:

- a Notice of Motion, a technical document specifying the details of when and where the meeting should be held;
- a Grounding Affidavit, which states the reasons why the scheme is being proposed, and is typically made by the Chairman, the Chief Executive or the Company Secretary
- an advanced and an as-near-as-possible final draft of the scheme circular.

The Court hearing to hear this application is normally routinely heard 7 to 14 days after the papers are filed in Court. The Court hears no evidence other than the affidavit. The Order which is usually given is for the meeting to be held between 4 to 5 weeks following the date of the Court hearing.

Where the company itself convenes the meeting it will give at least the same notice as it would for a meeting at which a special resolution is proposed, namely 21 clear days.

[41] *Re Ballantyne RE plc and the Companies Act 2014 [*2019] IEHC 407.

[42] Companies Act 2014 section 452(1).

[43] Companies Act 2014, section 450(5).

There is no automatic stay on proceedings when a Part 9 scheme is proposed but application can be made to the High Court for such a stay by the company, its directors, a member, a creditor and where the company is in liquidation, by the liquidator.[44]

A2.4 Meetings of shareholders and/or creditors

The meeting or meetings will be chaired by a Director, usually the Chairperson of the Board of directors.

In order for a resolution to approve a Part 9 scheme to be passed, it must be approved by a "special majority" which is defined as:

> "a majority in number representing at least 75 per cent in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the scheme meeting"[45]

This means that a group of creditors or shareholders constituting a majority in number can in effect veto a scheme resolution. In this context it is worth noting that the Review Group, in its June 2020 Report on certain company law issues arising under the EU Central Securities Depositories Regulation 909/2014 has recommended an amendment to this provision in relation to Part 9 schemes used for takeovers of publicly traded companies. In those cases the Review Group has recommended as an alternative to the majority-in-number requirement, a company would satisfy the special majority where the resolution is passed at a meeting at which at least one third of the shares in issue are represented.[46] This alternative to the majority-in-number requirement is separately being considered by the Review Group's Corporate Governance Committee in relation to Part 9 schemes for all companies.

It is noteworthy in this context that section 47 of the Company Law Enforcement Act 2001[47] removed the requirement for a vote by majority in number (as well as in value) to pass a resolution to remove a company-appointed liquidator. However, the Committee is of the opinion that any adjustment of the quorum or majorities required for an SME rescue procedure should be analysed distinctly (as set out in section 4.4).

A2.5 Application to Court for approval of a Part 9 scheme

Once the Scheme resolution or resolutions are passed, an application is made to Court. The documents required are:

- a petition to approve the scheme – a formal request to the High Court for the Part 9 scheme to be approved or, as it is termed in the 2014 Act "sanctioned";
- copies of newspaper advertisements of the petition;

[44] Companies Act 2014, section 451.

[45] Companies Act 2014, section 449(1).

[46] Consistent with the requirement to pass a migration special resolution under section 8 of the Migration of Participating Securities Act 2019.

[47] This inserted a new section 267(3) into the Companies Act 1963, now section 588(6) of the Companies Act 2014.

- a (further, detailed) Grounding Affidavit;
- supporting affidavits from the a financial adviser (in the case of a takeover scheme) or an accountant (in the case of a scheme compromising creditors' claims) to the company;
- the actual scheme circular as sent; and
- minutes of meeting of shareholders

There are at this stage, two outings to Court. The first is concerned merely with fixing the date of the hearing, which usually takes place within 7 to 14 days following filing of papers. The Court will, if requested, (although there is no requirement for it) direct as to how the shareholders, and creditors, are to be notified of the proposed application to approve the scheme.

The second and final hearing will take place between 3 to 5 weeks later and usually takes between 1 and 2 hours (in the absence of objections). At this hearing the fairness and justification for the scheme must be proven, and evidence is again heard on affidavit, rather than viva voce.

The tests that the Court applies when considering whether to approve a scheme are these:[48]

1. sufficient steps have been taken to identify and notify all interested parties;
2. the statutory requirements and all directions of the Court have been complied with;
3. the classes of members or creditors, as the case may be, have been properly constituted;
4. there is no improper coercion of any of the members concerned; and
5. the scheme is such that an intelligent and honest person, being a member of the class concerned, acting in his or her interest, might reasonably approve of it.

Subject to the Court being happy to give the order, it will give an order approving the resolution to approve the scheme and any ancillary orders – e.g. a reduction of capital where there is a company takeover.

A2.6 Register Order

Once the Order issues, the technical term used being when it is "perfected", it must be delivered to the Registrar of Companies within 21 days, whereupon it becomes binding on all persons concerned.

A2.7 Part 9 schemes and Part 10 schemes contrasted

The following table sets out the areas of difference and similarity between a Part 9 scheme outlined above and a Part 10 scheme where a company emerges successfully out of examinership.

[48] In Re Ballantyne plc [2019] IEHC 407 (Barniville J.)

Appendix 2 – Outline of the law and procedure of a Part 9 Scheme

	Part 9 scheme	**Part 10 scheme**
Who originates it?	Originated by (full) Board of Directors of the company using existing advisers. Scheme proposals sent to company shareholders or creditors for approval.	Examinership is usually initiated on the application of the directors of the company. [49] The Examiner, having been appointed by the High Court (or Circuit Court as described above) originates the scheme.
Is there an insolvency practitioner to supervise the process	No.	Yes, the Examiner.
Is an independent expert's report required	No, but it is usual when the Court is finally considering whether to approve the scheme, where there are continuing directors.	Yes, as part of the application to commence the examinership.[50]
Who are the "independent directors"?	Directors unconnected with the continuing shareholders (the acquirer or investor in a restructuring) constitute themselves as a committee of independent directors, taking advice as to the fairness of the scheme from an independent financial adviser or accountant.	Unusual for there to be such a Committee.

[49] A petition to commence an examinership may be made by: "(a) the company; (b) the directors of the company; (c) a creditor, or a contingent or prospective creditor (including an employee), of the company; (d) a member or members of the company holding at the date of the presentation of the petition not less than one tenth of such of the paid-up share capital of the company as carries at that date the right of voting at general meetings of the company." Companies Act 2014, section 510.

[50] Some legal practitioners have expressed the opinion that there is no legal reason preventing the Examiner-designate from being the independent expert and that the practice of having a separate person is the result of a misinterpretation of the law. This adds to the cost of an examinership and arguably removes an incentive for the Examiner to use best endeavours to ensure a successful exit from examinership; the independent expert takes no responsibility for the outcome of the examinership and the Examiner takes no responsibility for the analysis of the independent person in his or her report.

	Part 9 scheme	Part 10 scheme
What majorities are required for the proposal to succeed?	(i) A majority in number of the voting shareholders or creditors, as the case may be (ii) which majority must hold at least 75% of the shares of the voting shareholders or 75% of the debt of the voting creditors.	A simple majority in value of one class of creditor whose rights have been impaired under the proposed scheme
Can the vote of one class affect the rights of another class	No. However in English schemes there is only usually one class of creditors given the flexibility of the schemes which enables (i) the payment of crucial creditors and (ii) the disregard of 'out-of-the-money' creditors. [51]	Yes.
What Court approvals are necessary?	Court approval is required: (i) to obtain approval of the scheme; (ii) if a stay on proceedings is sought.	Court approval is required (i) to commence an examinership (ii) to continue the period of protection beyond 70 days; (iii) to approve the scheme.
Is there a stay of proceedings against the company	No, save as may be ordered by the Court upon special application by the company, its directors, a member, a creditor and where the company is in liquidation, by the liquidator.[52]	Yes, automatically upon the company going into examinership.

[51] See for example *Sea Assets v PT Garuda Indonesia* [2001] EWCA Civ 1696 and *Re Bluebrook Ltd* [2010] 1 BCLC 338

[52] The latter is not relevant to the use of a Scheme in a restructuring, where it is used to avoid the stigma of insolvency.

Appendix 2 – Outline of the law and procedure of a Part 9 Scheme

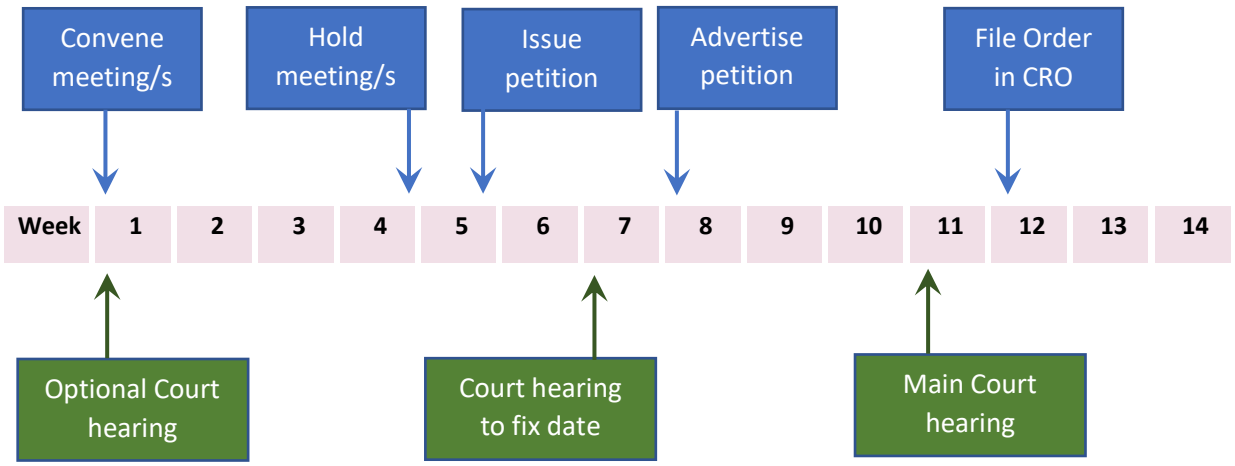
	Part 9 scheme	Part 10 scheme
What is the effect of there being separate classes of or distinctions between shares and types of creditor?	The company is responsible for constituting proper classes of shareholders or creditors, as the case may be. This may be approved by the Court but does not have to be post 2014. Proprietary directors always constitute a separate class.[53]	The Examiner will constitute the classes of shareholders and creditors. The class of shareholders is usually irrelevant as they will have their interest nullified economically. Each class of creditor will receive a dividend from the scheme, as proof that it is a better outcome than a winding up.
What is the Court's approach to the fairness or otherwise of a proposal?	A Court will approve the scheme where it is satisfied that the scheme is fair to shareholders or creditors, as the case may be. A similar unfair prejudice test can be used as with examinerships.	A Court will approve the scheme where it is satisfied that the scheme provides a better outcome for creditors than a winding up and that the company has a reasonable chance of survival.
Who pays the fees?	The company.	The company
What dictates the timetable?	Timetable affected by Court dates.	Timetable laid down by statute.

[53] But see English case law on 'out of the money' classes. Similarly as in an examinership, an English scheme of arrangement used as an insolvent restructuring process will not necessarily include shareholders who have no economic interest; and again as in an examinership, out of the money creditors will not be paid.

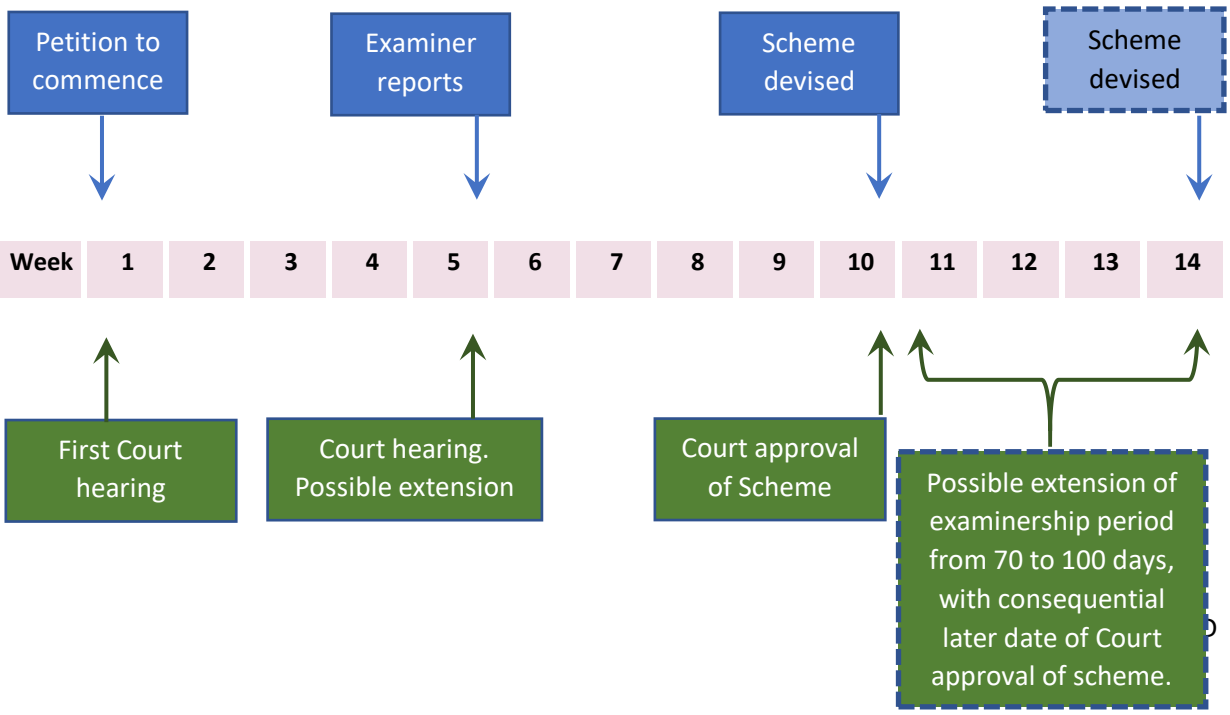
Appendix 3

Illustration of Part 9 scheme and examinership timeframes

Part 9 scheme timetable



Examinership timetable



Appendix 4

Some comparable EU Member State and other voluntary restructuring processes

A4.1 Preliminary

Other EU Member States provide for voluntary restructuring processes, with a strong emphasis on creditor agreement. The recommendations contained in the Report are informed by a consideration of the processes available in these two jurisdictions which are less formal than an examinership process and therefore less costly. The recommendations of the group are also informed by the standards incorporated in the EU Preventive Restructuring Directive (PRD) Directive 1023/2019.

A4.2 Overview of the French procedure

The French law for protection of companies ("loi de sauvegarde des entreprises") gives companies that are facing economic, legal or financial difficulties and that are not yet in a situation of insolvency ("cessation de paiements") (where the company is not able to pay its debts) the means to deal with these difficulties in a preventive way.

Three preventive restructuring procedures are now available to companies facing financial difficulties but not yet insolvent (companies which are described as being "en cessation de paiements"):[54]

(1) the ad hoc mandate (mandat ad hoc);

(2) the conciliation (conciliation); and

(3) the safeguard (sauvegarde), with its two variants, the accelerated financial safeguard and the accelerated safeguard.

Of these the first two preventive procedures can be used: the "ad hoc mandate" and the "conciliation", as out-of-court settlement proceedings ("règlement amiable").

In each procedure, the company's management seeks to negotiate the company's debts with the company's creditors, under the aegis of a third party intermediary, who, depending on the procedure, will be either:

- the ad hoc agent – "mandataire ad hoc"; or
- the mediator – "conciliateur" and will be appointed by the President of the Court.

The company's manager can only apply to the Court if the company has not made a declaration of cessation of payments ("déclaration de cessation de paiements") and if the company has not been able to pay its debts for less than 45 days.

The company's management stays in place and their powers and responsibilities are not displaced by the appointment of either the ad hoc agent or the mediator. There is no stay on proceedings under either procedure. The main difference between the ad hoc mandate and the conciliation is that a conciliation agreement will either be approved by the Court

[54] Ordinance No 2014-326 of 12 March 2014 and Law No 2016-1547 of 18 November 2016

(constatation), which means that confidentiality is retained, or will be sanctioned by the Court (homologation), which renders the judgement public. The adverse effect of publicity, which is attached to the sanctioning of the agreement, is mitigated by the fact that such sanctioning confers more legal advantages than a mere approval in the event of subsequent insolvency proceedings being opened (e.g. protection for new money).[55]

A4.3 Differences between the ad hoc mandate and the conciliation

These two procedures are carried out in different ways even though they have the same objective, which is to provide a confidential and out-of-court negotiation of the company's debts. An ad hoc agent or a mediator, appointed by the President of the Court, assists the debtor.

The mediator's appointment is for a maximum period of four months, renewable for one additional month, similar to the duration of the Irish examinership. This procedure can be useful for companies that already have started negotiations with creditors. It can end on the approval by the Court of a draft agreement between the company and its creditors.

The ad hoc agent's appointment can be longer than that of the mediator. He or she is usually appointed for three months, renewable several times if necessary. The agent's mission ends with the drafting of an agreement negotiated between creditors and partners. The Court does not need to approve this agreement.

A4.4 Dutch WHOA procedure

The WHOA[56] is modelled on the English scheme of arrangement and has been enacted in light of the EU Preventive Restructuring Directive. Whether the process is covered by the Insolvency Regulation seems to be a matter of choice of the debtor. Interestingly, comparative elements include the cessation of payments process, the idea of shareholders and creditors being divided into classes and a majority vote. However, in the Dutch process if shareholders representing at least two-thirds of the value of the issued capital in the debtor vote in favour the vote is carried and similarly a creditor's class is deemed to have voted in favour of the debt restructuring agreement if creditors representing at least two-thirds of the value of the outstanding claims vote in favour of the plan. It is envisaged that only those affected by the restructuring will vote. There is also a cross cram down possibility, but the Court must approve this plan.

A4.5 Adaptability of a French or Dutch Procedure for Ireland?

In both the French and Dutch jurisdictions there has been a move to increase the availability of rescue processes in anticipation of the implementation of the preventive restructuring Directive 2019/1023. In both jurisdictions less formal processes begin with a cessation of payments process initiated by the company itself and which is treated as a stay of sorts. The

[55] See www.ucc.ie/en/JCOERE for further details on France in the French Report https://www.ucc.ie/en/media/projectsandcentres/jcoereproject/bannerimages/France_FINAL_PDF_.pdf

[56] Wet Homologatie Onderhands Akkoord (Homologation of Private Agreement Act) or "WHOA", which became law in the Netherlands in June 2020. See further https://www.ucc.ie/en/media/projectsandcentres/jcoereproject/bannerimages/TheNetherlands_FINAL_PDF.pdf

process then goes on to involve an informal renegotiation of liabilities which is conducted in a manner which is transparent to existing creditors. However, even in these informal processes Court approval is necessary for the plan to become binding beyond an informal debt write down agreement.

A4.6 United Kingdom

In March 2020 the Corporate Insolvency and Governance Act was passed in the UK, which provides for some interim measures to address the difficulties of businesses and companies arising from Covid-19 effects. It also introduces an examinership-like statutory rescue process in a new Part 26A of their Companies Act 2006. (Part 26 deals with the scheme of arrangement provisions which are similar to Part 9 of the Irish Companies Act 2014). The key characteristics of this new process which is simply described as an arrangement or reconstruction, are these:

- a commencement process that is out of court
- a court order for the calling of classes of creditors and members
- voting by creditors, with approval by a 75% majority,
- sanction by the Court of the compromise, and a cross class cram down.

There is a moratorium (stay) available which is linked to the moratorium available under Part 1A of the Insolvency Act 1986 but it is not automatic, and does not seem to be envisaged as being automatic. The Review Group did not consider that this model would provide any useful rescue process for small companies.

Appendix 5

A possible definition of connected creditor

In relation to a company, a connected creditor is:

(a) a person who within 12 months of the commencement of the process is or was a director of the company, its holding company, its subsidiary company or fellow subsidiary of its holding company;

(b) a person who within 12 months of the commencement of the process is or was a secretary of the company, its holding company, its subsidiary company or fellow subsidiary of its holding company;

(c) the trustees of any employees' share scheme or pension fund established for the benefit of any directors and employees of the applicant and its subsidiary undertakings; or

(d) any person who under any agreement has a right to nominate a person to the board of directors of the applicant; or

(e) a person who alone, or acting in concert with any person with a present or contingent disclosable interest (as defined in section 257 of the Companies Act) in:

   a. 5% or more of the issued share capital; or

   b. 5% or more of the issued share capital of any class;

   of the company or of any class of shares, its holding company, its subsidiary company or fellow subsidiary of its holding company;

(f) a person connected (within the meaning of section 220 of the Companies Act) with any of the foregoing

Explanatory note: Paragraphs (c), (d) and (e) adopt similar concepts in an unrelated area of law. Under the UK and Irish listing rules[57], shares are not considered to be in the hands of the public if they are held directly or indirectly by:

(a) a director of the applicant or of any of its subsidiary undertakings; or

(b) a person connected with a director of the applicant or of any of its subsidiary undertakings; or

(c) the trustees of any employees' share scheme or pension fund established for the benefit of any directors and employees of the applicant and its subsidiary undertakings; or

[57] UK Listing Rule 6.14.3; Irish Listing Rule 2.2.27.

(d) any person who under any agreement has a right to nominate a person to the board of directors of the applicant; or

(e) any person or persons in the same group or persons acting in concert who have an interest in 5% or more of the shares of the relevant class;

Appendix 6

Examinership statistics provided by the Revenue Commissioners

Revenue Records - Examinerships		
	2019	**2018**
Petitions	25	32
- Successful	*18*	*26*
- Failed	*7*	*6*
Revenue Division		
- LCD	2	0
- MED	13	11
- Other^	10	21
Debt/Dividend		
Total Debt €m	2.7	2
Paid	61%	85%
- Super Pref. €m	*0.1*	*0.2*
Paid	*100%*	*100%*
- Pref. €m	*1.3*	*1.6*
Paid	*77%*	*87%*
- Unsecured €m	*0.9*	*0.1*
Paid	*23%*	*16%*
- Other €m	*0.4*	*0.1*
Paid	*86%*	*100%*

^ While Revenue sizes differ from normal definitions, all cases in other have turnover < €2m

Appendix 6 – Examinership statistics provided by the Revenue Commissioners

Revenue Records - Examinerships								
	2019	**Trading***	**2018**	**Trading***	**2017**	**Trading***	**2016**	**Trading***
Petitions	25	19	32	26	15	6	27	13
- Successful	*18*	*18*	*26*	*25*	*7*	*6*	*12*	*11*
- Failed	*7*	*1*	*6*	*1*	*8*	*-*	*13*	*-*
- Withdrawn	*-*	*-*	*-*	*-*	*-*	*-*	*2*	*2*
Practitioners								
- Hughes Blake	*10*		*8*		*11*		*11*	
- Moore Stephens	*-*		*-*		*-*		*1*	
- KPMG	*2*		*-*		*-*		*5*	
- Whiteside Cullinan	*-*		*-*		*-*		*1*	
- McStay Luby	*-*		*-*		*-*		*2*	
- Friel Stafford	*1*		*-*		*-*		*1*	
- Grant Thornton	*3*		*3*		*2*		*5*	
- Deloitte	*-*		*-*		*-*		*1*	
- Joseph Walsh	*5*		*3*		*2*		*-*	
- PwC	*1*		*17*		*-*		*-*	
- Crowes	*-*		*1*		*-*		*-*	
- Kirby Healy	*2*		*-*		*-*		*-*	
- Collins Garcia	*1*		*-*		*-*		*-*	

* Trading as at March 2020

ANNEX 4

COMPANY LAW REVIEW GROUP

REPORT ON POTENTIAL IMPACT OF ARTIFICIAL INTELLIGENCE ON COMPANY LAW IN THE CONTEXT OF CORPORATE GOVERNANCE

22 December 2020

Contents

Chairperson's Letter to the Minister for Enterprise Trade and Employment

Mr Leo Varadkar

Tánaiste and Minister for Enterprise, Trade and Employment

23 Kildare Street

Dublin 2 D02 TD30

22 December 2020

Dear Tánaiste,

I am pleased to deliver the Company Law Review Group's Report on the potential impact of artificial intelligence (AI) on company law in the context of corporate governance, which is included at item 4 in the Review Group's work programme and which is to feed into Ireland's National Strategy for AI.

The Report was prepared in the first instance as a report by the Corporate Governance Committee of the Review Group, chaired by Mr Salvador Nash. I would particularly like to thank Mr Nash and his Committee for their work on this report. The Report was approved and adopted by the Review Group at its meeting held on 21 December 2020.

I would also like to record the Review Group's thanks to Mr Owen Lewis of KPMG who gave the Corporate Governance Committee a presentation on the use of AI and governance systems currently used by companies and Ms Hanna Hassel of Mason Hayes & Curran LLP for her presentation to the Committee on GDPR and how company directors are held accountable for compliance.

The Committee has concluded that the key challenge for regulators is that legislation is likely to be constantly outpaced by technology. This has led to the primary recommendation that any legislation developed should be modelled on the GDPR and be principle-based with a strong focus on the principles of accountability and demonstrable compliance.

The Review Group also recommends consideration of whether the breadth of general fiduciary duties owed by a company director to the company adequately covers the director's role in monitoring the use of AI by the company, or whether further specific provisions may be required. Any future regulations made in relation to the governance of AI should include sufficient enforcement measures linked to the principle of accountability. The recommendations are at a high level as the Review Group does not consider it appropriate to make specific recommendations in advance of an agreed EU approach.

I would like to take this opportunity at this stage to thank Ms Tara Keane, outgoing Secretary to the Company Law Review Group for her support and help during her time of office.

Yours sincerely,

Paul Egan SC

Chairperson

Company Law Review Group

1. Introduction to the Report

1.1 The Company Law Review Group

The Company Law Review Group ("**CLRG**") is a statutory advisory body charged with advising the Minister for Enterprise, Trade and Employment ("**the Minister**") on the review and development of company law in Ireland. It was accorded statutory advisory status by the Company Law Enforcement Act 2001, which was continued under Section 958 of the Companies Act 2014. The CLRG operates on a two-year work programme which is determined by the Minister, in consultation with the CLRG.

The CLRG consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and trade unions), regulators (implementation and enforcement bodies) and representatives from government departments including the Department of Business, Enterprise and Innovation ("the Department") and Revenue. The Secretariat to the CLRG is provided by the Company Law Development and EU Unit of the Department of Business, Enterprise and Innovation.

1.2 The Role of the CLRG

The CLRG was established to "monitor, review and advise the Minister on matters concerning company law. In so doing, it is required to "seek to promote enterprise, facilitate commerce, simplify the operation of the Act, enhance corporate governance and encourage commercial probity" (section 959 of the Companies Act 2014).

1.3 Policy Development

The CLRG submits its recommendations on matters in its work programme to the Minister. The Minister, in turn, reviews the recommendations and determines the policy direction to be adopted.

1.4 Contact information

The CLRG maintains a website www.clrg.org. In line with the requirements of the Regulation of Lobbying Act 2015 and accompanying Transparency Code, all CLRG reports and the minutes of its meetings are routinely published on the website. It also lists the members and the current work programme.

The CLRG's Secretariat receives queries relating to the work of the Group and is happy to assist members of the public. Contact may be made either through the website or directly to:

Tara Keane

Secretary to the Company Law Review Group

Department of Business, Enterprise and Innovation

Earlsfort Centre

Lower Hatch Street

Dublin 2 D02 PW01

Tel: (01) 631 2675 Email: Tara.Keane@enterprise.gov.ie

2. The Company Law Review Group Membership

2.1 Membership of the Company Law Review Group

The membership of the Company Law Review Group at the date of this report is provided below.

Paul Egan SC	Chairperson (Mason Hayes & Curran LLP)
Alan Carey	Revenue Commissioners
Barry Conway	Ministerial Nominee (William Fry)
Bernice Evoy	Banking & Payments Federation Ireland CLG
Ciara O'Leary	Irish Funds Industry Association CLG (Maples and Calder LLP)
Dr David McFadden	Ministerial Nominee (Companies Registration Office)
Doug Smith	Irish Society of Insolvency Practitioners (Eugene F Collins)
Eadaoin Rock	Central Bank of Ireland
Emma Doherty	Ministerial Nominee (Matheson)
Fiona O'Dea	Ministerial Nominee (DETE)
Gillian Leeson	Euronext Dublin (The Irish Stock Exchange PLC)
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace LLP)
Ian Drennan	Director of Corporate Enforcement
Prof. Irene Lynch Fannon	Ministerial Nominee (School of Law, University College Cork)
James Finn	The Courts Service
John Loughlin	Consultative Committee of Accountancy Bodies – Ireland (CCAB-I) (PricewaterhouseCoopers)
Kathryn Maybury	Small Firms Association Ltd (KomSec Limited)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Máire Cunningham	Law Society of Ireland (Beauchamps)
Marie Daly	IBEC (Irish Business and Employers' Confederation)
Maura Quinn	The Institute of Directors in Ireland

Maureen O'Sullivan	Ministerial Nominee (Registrar of Companies)
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Neil McDonnell	Irish Small and Medium Enterprises Association CLG (ISME)
Richard Curran	Ministerial Nominee (LK Shields Solicitors LLP)
Rosemary Hickey	Office of the Attorney General
Salvador Nash	The Chartered Governance Institute (KPMG)
Shelley Horan	Bar Council of Ireland
Tanya Holly	Ministerial Nominee (DETE)
Vincent Madigan	Ministerial Nominee

3. The Work Programme

3.1 Introduction to the Work Programme

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, in consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items of work to the programme as matters arise. The most recent work programme began in June 2020 and runs until May 2022. The work programme is focused on continuing to refine and modernise Irish company law, with a strong emphasis on the area of insolvency and Brexit related matters.

3.2 Company Law Review Group Work Programme 2020-2022

The Review Group's current Work Programme is as follows:

1. Consider the Companies Act in the context of creditors' rights under the following headings:

- Review whether the legal provisions surrounding collective redundancies and the liquidation of companies effectively protect the rights of workers.

- Review the Companies Acts with a view to addressing the practice of trading entities splitting their operations between trading and property with the result being the trading business (including jobs) go into insolvency and assets are taken out of the original business.

- Examine the legal provision that pertains to any sale to a connected party following insolvency of a company including who can object and allowable grounds of an objection.

2. Provide ongoing advice to the Department of Business, Enterprise and Innovation on potential amendments to company law in light of the Covid-19 pandemic and the consequent effects on companies' administration, solvency and compliance with the Companies Act 2014.

3. Provide ongoing advice to the Department of Business, Enterprise and Innovation on the migration of participating securities in light of Brexit, and any consequential company law amendments arising.

4. Examine the possible impacts of the increased use of Artificial Intelligence in the context of the Companies Act 2014, with particular regard to corporate governance matters.

5. Provide ongoing advice to the Department of Business, Enterprise and Innovation on request in relation to EU and international proposals on company law.

6. Examine and make recommendations on whether it will be necessary or desirable to amend company law in line with recent case law and submissions received regarding the Companies Act 2014.

7. Review the enforcement of company law and, if appropriate, make recommendations for change.

8. Review the CLRG's recommendation from its 2017 Report on the Protection of Employees and Unsecured Creditors' in relation to "self-administered liquidation" and make further recommendation as to how this might be implemented.

9. Review the obligations outlined in relation to the directors' compliance statement in the Companies Act 2014, and, if appropriate, make recommendations as to how these might be enhanced in the interest of good corporate governance.

This Report is concerned with item 4 on the Work Programme to examine the possible impacts of the increased use of Artificial Intelligence in the context of the Companies Act, with particular regard to Corporate Governance.

3.3 Decision-making process of the Company Law Review Group

The CLRG meets in plenary session to discuss the progression of the work programme and to formally adopt its recommendations and publications.

3.4 Committees of the Company Law Review Group

The work of the CLRG is largely progressed by the work of its Committees. The Committees consider not only items determined by the work programme, but issues arising from the administration of the Companies Act 2014 and matters arising such as court judgements in relation to company law and developments at E.U. level. This Report is the product of work by the Corporate Governance Committee, Chaired by Salvador Nash, which is referred to as "the Committee" in this Report.

4. Background to the Report

4.1 Ireland – National Strategy for Artificial Intelligence (AI)

The Department of Enterprise, Trade and Employment (DETE) is leading on the development of a National AI strategy. The Strategy is a deliverable under Future Jobs Ireland 2019,[1] a multi-annual framework for skills and enterprise development.

The strategy is expected to be finalised and published in 2020 subject to Government approval. The timing will also be influenced by developments at EU level and how such developments should be reflected in the national strategy.

The National AI Strategy for Ireland, under the working title of "AI - Here for Good", will provide a high-level direction to the design, development and adoption of AI in Ireland. It will present an integrated, cross-Government framework for the steps needed to ensure that Ireland's use of AI will manage the expected changes to the overall benefit of society. In line with the EU and OECD approaches, it is envisaged that the main areas covered by the Strategy will include: societal opportunities and challenges of AI; enterprise development and deployment of AI; RD&I; ensuring a workforce prepared for AI; data; digital and connective infrastructure; public sector use of AI; as well as ethics, standards, governance and regulatory framework.

The development of the Strategy has involved significant consultation, reflecting the high levels of interest expressed by stakeholders. Consultations are continuing across the Government system, and stakeholder engagements have been carried out with industry, with industry representative bodies, with academic and research communities and with a multi-stakeholder group of experts. An online public consultation has also been conducted.

As part of the Strategy development, a Top Team on New Standards for AI has been established, led by the NSAI. It is anticipated that a Top Team on Enterprise Development and Deployment of AI will also be established soon.

The Company Law Review Group has been asked to examine the use of AI in a corporate setting with a view to informing the development of the strategy in the context of company law.

4.2 Developments at EU level

Both President von der Leyen and Commissioner Vestager made commitments to pursue respectively regulation of and measures to encourage the adoption of AI within the first 100 days of the new Commission. These commitments have since been moderated to the publication of a White Paper setting out the intentions of the Commission in its approach to AI in these two regards and which is also to be treated as a basis for public consultation which will conclude on 14 June 2020.

The Commission's intention is to develop a credible European AI sector to allow Europe to compete on a global level. At the same time, it seeks to ground European AI in our values supporting our rights-based approach not only looking at protecting the individual but also supporting important societal and democratic processes. Thus, the Commission supports a regulatory and investment

[1] https://enterprise.gov.ie/en/What-We-Do/Business-Sectoral-Initiatives/Future-Jobs/

oriented approach with the twin objective of promoting the uptake of AI and of addressing the risks associated with certain uses of this new technology.

The EU White Paper on AI

The White Paper itself is based around two ecosystems, first of excellence and secondly of trust.[2]

The ecosystem of excellence

This is to be created in cooperation with the private sector and encompasses the entire value chain starting with research and promoting the acceleration of adoption of AI solutions at all levels of business.

Key elements will be

A) The **Member State's cooperation** through the working of the EU Coordinated Plan on AI and the maximisation of the impact of investments. The results of consultation around the White Paper will inform a revised version of the Coordinated Plan by the end of 2020.

B) Leveraging the **research and innovation community** to create synergies between and increase the excellence of their facilities to attract the best talent and produce the best technology. The Commission will concentrate on facilitating the creation of excellence and testing facilities and may introduce legislation to support this aim and has proposed appropriate investments in the Digital Europe Programme (DEP).

C) Having the appropriate **skills** is vital in supporting an ecosystem of excellence. Education, including upskilling, is a Member State competency but nevertheless reinforcing skills relevant to AI is a priority under the Coordinated Plan and the DEP. The latter has an advanced skills pillar to support a network of leading third-level institutions capable of attracting essential talent.

D) **Focussing on SMEs** through the activities of European Digital Innovation Hubs and a proportionate equity financing scheme.

E) **A new Public-Private Partnership** in AI, data and robotics will harness the efforts of the private sector through R&I and co-investment.

F) **Public Sector adoption of AI** in sectors such as health and transport where the technology is sufficiently mature will facilitate rapid deployment of AI applications. AN Adopt AI Programme will support public procurement.

G) **Access to data and computing infrastructures** will be vital and the Commission has proposed appropriate funding in the DEP for high performance and quantum computing including edge computing to ensure this as well as setting out a European data strategy.

H) As AI is global in scope, there are clear **international aspects** to considering it, such as international consultation by the High-Level Expert Group in developing its Ethical

[2] European Commission – White Paper on Artificial Intelligence – A European approach to excellence and trust https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf

Guidelines and EU involvement with the OECD in the setting of that organisation's ethical principles on AI. The Commission will continue to engage on a global level to promote cooperation on the basis that supports a fundamental rights-based approach.

The ecosystem of trust

This will be created by key elements of a **future European regulatory framework for AI** and is intended to give citizens confidence to accept AI. These rules must address "high risk" AI systems and will adopt the human-centric approach advocated in the High-Level Expert Group's Ethical Guidelines.

A) Problem Definition

The issues that should be taken into account are set out as risks to fundamental rights, with issues regarding, for example, discrimination, privacy and data protection, as well as safety and liability related risks

B) Scope of a future EU regulatory framework

It is assumed that the framework will apply to products and services relying on AI. This will require a definition of AI that is flexible enough to allow technical progress while also being precise enough to provide legal certainty.

The framework is expected to follow a risks-based approach, focussing on "high-risk applications". Differentiation according to risk helps assure proportionality.

The Commission believes that the definition of high-risk should rely on the combination of the sector ("where, given the characteristics of the activities typically undertaken, significant risks can be expected to occur) and use (where the use is of such a manner that significant risks are likely to occur). Mandatory requirements would only apply to a system which met both factors. The existing acquis would continue to apply to low-risk applications.

By way of illustration the White Paper refers to the use of AI in recruitment processes or that used for remote biometric identification as being always to be considered as high risk.

C) Types of requirements

The HLEG Ethical Guidelines and the results of the piloting process suggest requirements in respect of:

i) Training data – requirements here could be in the areas of ensuring safety, avoiding discrimination and providing privacy/data protection.

ii) Data and record keeping including accurate recording of the data set and how it was selected, the data sets themselves, programming and training methodologies, processes and techniques used to build, test and validate.

iii) Information to be provided – system capability and limitations including purpose, conditions for optimal functionality and expected accuracy. Where it is not obvious that a human is interacting with an AI system, appropriate information to that effect should be provided.

iv) Robustness and accuracy – reproducible outcomes, adequate response to error and resilience to attack and interference.

v) Human oversight examples being prior validation by human before output actioned, post output review/appeal and real-time monitoring and intervention.

vi) Specific requirements for certain particular applications, such as Remote Biometric Identification Systems. which calls for additional considerations of fundamental rights implications, accuracy levels, purported use, relevant safeguards applied and compliance with national/EU law.

D) Compliance and Enforcement

For high-risk AI applications this would mean an independent assessment possibly including the algorithm and the data with the possibility of some support to prevent hardship to SMEs. Existing conformity assessment procedures can be utilised or where unavailable, new procedures drawn up with input from stakeholders and European standards organisations. Any shortcomings in the assessment would need to be addressed, such as retraining on appropriate data where the issue relates to unsuitable training data.

For high and lower-risk applications where negative impact is experienced ex-post assessment recourse to effective judicial process should be available.

E) Governance

The White Paper envisages governance being provided by Member States national authorities supported by specially designated test centres to conduct the conformity assessments including possibly those licensed to provide assessment outside the Community. A European governance structure, incorporating these bodies and involving stakeholder participation, could provide support by sharing information and best practice as well as sourcing a panel of experts. Existing sectoral bodies should be incorporated into this structure.

The Committee considers that the development of Ireland's National Strategy to AI in respect of company law and corporate governance, should be informed by the EU position and not seek to pre-empt it.

5. Artificial Intelligence

5.1 What is artificial intelligence?

There is currently no singular, universally accepted definition of AI. In fact, as one commentator has noted, "AI is an umbrella term, comprised by many different techniques" and notably includes the currently cutting-edge approaches of machine learning and deep learning. John McCarthy, the late Stanford scientist often credited as coining the term artificial intelligence, described AI as "the science and engineering of making intelligent machines, especially intelligent computer programs." While the EU has simply described AI as "a collection of technologies that combine data, algorithms and computing power".

Use of the term AI often conjures up images of super advanced technology and the delegation of human tasks to robots. Indeed, in a corporate context, media reports in recent years have given the impression that AI is on the verge of assuming an important role in corporate management.

In 2014, a Hong Kong based venture capital firm, Deep Knowledge Ventures[3], apparently thrust us into a new age of corporate management. The firm announced in a press release that it "appointed VITAL, a machine learning program capable of making investment recommendations in the life science sector, to its board." Two years later, Finnish IT company Tieto informed the public that it "appointed Artificial Intelligence as a member of the leadership team of its new data-driven businesses unit."[4] Similarly, in early 2018, the CEO of California-based software provider SalesForce revealed that he brings an artificial intelligence machine by the name of 'Einstein' to weekly staff meetings and asks Einstein to comment on proposals under discussion.

Several media outlets reacted quickly, with headlines indicating that an algorithm had become a member of a board of directors, [5] with one newspaper even asking its readers whether they would "take orders from a robot." [6] In the case of the story about VITAL, it turned out that it was technically incorrect because Hong Kong law does not allow non-human entities on boards. It was also exaggerated as Deep Knowledge Ventures later acknowledged that VITAL's role "was a little different from that of human directors," noting that the firm treats the software "as a member of our board with observer status on the basis of an agreement that the board "would not make positive investment decisions without corroboration by VITAL". This was no different from practices at other financial companies that use large data searches to survey markets and generate suggestions for boards or managers.

It is clear from these reports that even the most cutting-edge use of AI in a corporate context is not quite at the level indicated by the initial headlines. Indeed, when we consider the use of AI in a corporate context in Ireland what we're really discussing is the use of algorithms etc. Such instances include the automated system when you call customer care in your bank, prompting you to make various selections or the automatic preparation of data when compiling weekly sales reports etc.

5.2 Categorisation of AI

Prior to assessing the extent to which AI could play a role in company law tasks and corporate management, it is helpful to establish more generally what types of roles AI technology can assume. In this respect, it is useful to think of AI in reference to degrees of autonomy and proactivity. A broad

[3] Deep Knowledge Ventures Appoints Intelligent Investment Analysis Software VITAL as Board Member, CISION PRWEB (May 13, 2014), http://www.prweb.com/releases/2014/05/ prweb 11847458.htm.
[4] Tieto the first Nordic company to appoint Artificial Intelligence to the leadership team of the new data-driven businesses unit, TIETO (Oct. 17, 2016), https://www.tieto.com/news/
[5] E.g., Nicky Burrdige, Artificial intelligence gets a seat in the boardroom, NIKKEI ASIAN REVIEW (May 10, 2017), https://asia.nikkei.com/Business/Companies/Artificialintelligence-gets-a-seat-in-the-boardroom; Algorithm appointed board director, BBC NEWS (May 16, 2014), https://www.bbc.co.uk/news/technology-27426942; Simon Sharwood, Software 'appointed to board' of venture capital firm, THE REGISTER (May 18, 2014), https://www.theregister.co.uk/2014/05/18/software_appointed_to_board_of_ venture_capital_firm.
[6] Ellie Zolfagharifard, Would you take orders from a Robot? An artificial intelligence becomes the world's first company director, DAILY MAIL (May 19, 2014), https://www.dailymail.co.uk/sciencetech/article-2632920/Would-orders-ROBOTArtificial-intelligence-world-s-company-director-Japan.html.

system of categorisation distinguishes between three different types or levels of AI roles[7]. These roles are:

(i) assisted AI;

(ii) advisory AI;

(iii) autonomous AI.

While the boundaries between the three categories are fluid and not without certain overlap between them, this classification offers a useful context for the Committee's deliberations.

Assisted AI.

The first potential role of AI is that of an assistant. In this form, AI has no autonomy or only low autonomy, which also means that productivity gains are more limited compared to other types. Assisted AI applications are often also examples of what can be labelled 'narrow AI' or 'soft AI', that is systems that "can do a better job on a very specific range of tasks than humans can" but because of their limitations they "would never be mistaken for a human."[8] Importantly, while assisted AI may execute tasks on behalf of humans, it does not take any decisions itself as humans remain the sole decision-makers. [9] Examples of commonly used AI systems of this nature are Apple's Siri and its Android rival, Google Assistant, which can support users by carrying out tasks such as placing calls or composing text/email messages based on voice prompts; setting reminders and alarms; keeping track of appointments and schedules; turning on lights and play music; or looking up information on the internet. Applied in a business context, assisted AI could for instance take notes, compile work and meeting schedules, prepare reports, maintain scorecards, or fulfil help desk and customer service functions. Depending on the level of complexity of these systems, they may also be close to or overlap with the next category of assisted AI.

Advisory AI.

The second potential role of AI is advisory in nature. In this demanding role, AI can provide "support in more complex problem solving and decision-making situations by asking and answering questions as well as building scenarios and simulations." [10] Advisory AI has heightened autonomy and leads to increased productivity compared to assisted AI. Still, decision-making rights either remain with the human users or are at most shared between human and machine. (AI) Advisory AI is sometimes called 'augmented intelligence'. The augmentation refers to a combination of artificial and human intelligence, in which AI does not replace human intelligence but leverages or improves it, such as by giving information and advice that would otherwise be unavailable or more difficult and time

[7] UCL Working Paper Series – Corporate Management in the Age of AI, No. 3/2019 at 15.
[8] VIVEK WADHWA & ALEX SALKEVER, THE DRIVER IN THE DRIVERLESS CAR 38 (2017).
[9] Anand Rao, AI everywhere & nowhere part 3 – AI is AAAI (Assisted-Augmented Autonomous Intelligence), PWC NEXT IN TECH (May 20, 2016), http://usblogs.pwc.com/ emerging-technology/ai-everywhere-nowhere-part-3-ai-is-aaai-assisted-augmentedautonomous-intelligence.
[10] KOLBJØRNSRUD ET AL., supra note 44, at 17. Specifically for scheduling and project management, see the tools described in NILS J. NILSSON, THE QUEST FOR ARTIFICIAL INTELLIGENCE 509 (2010). The most advanced software in this respect appears to be the Aurora system, which is marketed as "the world's leading intelligent planning and scheduling software solution that utilizes advanced artificial intelligence" and being capable of "incorporating the judgment and experience of expert human schedulers." Stottler Henke website, https://www.stottlerhenke.com/products/aurora.

consuming to obtain. Augmentation can also mean that "humans and machines learn from each other and redefine the breadth and depth of what they do together." Examples for the category of advisory or augmented AI include IBM's Watson platform. Among others, Watson is known for repeatedly beating two human champions at Jeopardy in 2011.[11] Watson's use, of course, goes far beyond trivia and games. It excels in different environments at a multitude of serious tasks, including medical diagnosis, wealth management and financial advice, legal due diligence, and sales coaching.

Autonomous AI.

The third and most advanced role of AI is that of an actor. AI in this category can "proactively and autonomously evaluate options – making decisions or challenging the status quo."[12] Crucially, in contrast to the previous two categories, when it comes to autonomous AI "the decision rights are with the machine."[13] Today, perhaps the most prominent example of autonomous AI is the concept of the fully self-driving car whose emergence, according to companies such as Alphabet Inc.'s subsidiary Waymo, Tesla, Uber, and others, will soon become reality.[14] In the corporate management context, there are already several specific AI applications in use. They include tasks such as autonomous robotic trading of securities and handling of loan applications.[15] The use of such systems is not yet widespread but, according to one study, "increasingly becoming commonplace."

Administrative tasks versus judgement work

The previous section considered the types of roles that AI can assume in terms of levels of autonomy and productivity. This section is concerned with the types of tasks that might be suitable for AI. An important distinction in this regard, and when thinking about the role AI plays in company law/corporate governance, is between administrative work and judgment work.

A 2016 Accenture survey describes administrative work in the corporate management context as consisting of "administrative and routine tasks, such as scheduling, allocation of resources, and reporting." Administrative work can be broadly contrasted with judgment work. Judgment work in this sense is work that requires creative, analytical, and strategic skills. The Accenture study defines it as "the application of human experience and expertise to critical business decisions and practices when the information available is insufficient to suggest a successful course of action or reliable enough to suggest an obvious best course of action." Judgment can be individual but will often be collective, particularly in more complex situations. It may therefore involve teamwork and "specific

[11] John Markoff, Computer Wins on 'Jeopardy!': Trivial, It's Not, N.Y. TIMES (Feb. 16, 2011), https://www.nytimes.com/2011/02/17/science/17jeopardy-watson.html?.
[12] KOLBJØRNSRUD ET AL., supra note 44, at 17.
[13] Rao, supra note 49.
[14] https://www.thehindu.com/sci-tech/technology/teslas-full-self-driving-beta-releases-next-week-musk-says/article32862804.ece
[15] Examples of existing AI-based software can be found in NILSSON, supra note 50, at 507– 13 and KOLBJØRNSRUD ET AL., supra note 44, at 17. Particularly interesting is the description of a business intelligence tool whose "[c]onclusions are used to communicate policy, late-breaking business opportunities, and needs for action" and which can trigger "automatic actions such as ordering, sending e-mails, and so on." NILSSON, supra note 50, at 510–11. On algorithmic trading, see for example Gregory Scopino, Preparing Financial Regulation for the Second Machine Age: The Need for Oversight of Digital Intermediaries in the Futures Markets, 2015 COLUM. BUS. L. REV. 439 (2015); Tom C.W. Lin, The New Investor, 60 UCLA L. REV. 678, 687–693 (2013).

interpersonal skills; namely, social networking, people development and coaching, and collaboration." In line with the inclusion of interpersonal skills, emotional intelligence can be treated as a subcategory of judgement.

The importance of the distinction between administrative and judgment work lies in the diverging likelihood of the respective tasks being assumed by AI in the future. Based on their research and broad survey of managers, the authors of the Accenture study found that "artificial intelligence will soon be able to do the administrative tasks that consume much of managers' time faster, better, and at a lower cost" and concluded that "AI will put an end to administrative management work."[16]

5.3 Issues arising from the use of AI

Bias

Algorithms are made by humans and rely on the data provided by humans to come to a result/conclusion/answer. However, if data sets are biased to begin with, then the outcomes will also be tainted. For example, if you search online for a stock image of a "CEO" you'll be presented with rows of headshots of mainly white men. Abeba Birhane, an Ethiopian-born cognitive scientist based at University College Dublin, recently helped to uncover racist and misogynistic terms in a Massachusetts Institute of Technology (MIT) image library that was used to train AI. (MIT has since withdrawn the database).

The issue of algorithmic prejudice arising from human bias has particular relevance when you consider the areas of life we are starting to cede to algorithms, for example, job recruitment (filtering applications), policing (suspect identification) and banking (loan approvals) and healthcare (examining x-rays).

Tests have shown that even top-performing facial recognition systems misidentify black people at rates five to 10 times higher than they do whites. Nonetheless, such technology is already being rolled out – including in London where the Metropolitan police began using it earlier this year.[17]

Should a company use an algorithm to screen for potential new managers and the previous managers happened to be white males, the model will replicate that and might conclude that women or people of colour are not suitable for the role.

We need humans to gauge the context in which an algorithm operates and understand the implications of the outcomes.

[16] Accenture surveyed 1,770 managers from 14 countries and 17 different industries. The survey respondents included managers across all levels, from an organisation's top management group to middle managers and front-line managers. According to the survey, these managers overall spend 54% of their time on administrative coordination and control tasks; 30% on solving problems and collaborating; 10% on work involving strategy and innovation; and 7% on tasks relating to developing people and engaging with stakeholders.

[17] Who is more racist, sexist and biased: You or your computer? Joe Humphreys, Irish Times, Thursday, November 19 2020 accessed at **https://www.irishtimes.com/culture/who-is-more-racist-sexist-and-biased-you-or-your-computer-1.4408555**

Transparency

AI can be difficult to explain. It is not always evident whether the modes have been thoroughly tested and make sense, or why particular decisions are made.

It can also be difficult for a company to keep track of the AI models used within its organisation. According to Deloitte, a bank recently made inventory of all their models that used advanced or AI powered algorithms and found a staggering 20,000. Some of these algorithms, like capital regulation models, are under strict scrutiny from regulations. But in most cases advanced or AI powered algorithms are not subject to any kind of external or internal regulation.[18]

5.4 Data Ethics trends

Executives and the public continue to question the trustworthiness of data and analytics. KPMG surveyed over 2,400 C-level executives and found that 92% are worried about the potential impact of data and analytics on reputation, with only 35% of respondents stating they have a high level of trust in their own organisations use of different types of analytics. Also surveyed were over 120 internal auditors. Over 80% of internal auditors stated that they were not confident about the governance in place around AI and 92% question the trustworthiness of data and analytics and are worried about the impact on reputation[19].

It is not surprising that many companies have realised that in order to unlock the full potential of AI, it is necessary to have a supporting governance framework to ensure that AI is being used in an ethical way. Some of the ways in which organisations are currently doing this include:

- **Governance models** – including the use of data for marketing, acquisition of data from 3rd party companies, use case modelling, potential conduct issues and customer outcomes;
- **Commercial models** – reviewing consent, purpose and ownership/licensing of data;
- **Hiring** – hiring experts on Ethics & Behavioural Sciences to supplement existing governance structures within the organisation and challenge these where necessary;
- **Education & Training/Awareness** – establishing education and awareness programmes on the subject of data ethics across the Board, Exco, Top 100-250, Operations and IT; and
- **New Product/Service Development Committees & Reviews** – extending the scope of these committees and sign-off process to include ethics and unforeseen consequences.

While it is to be welcomed that companies are proactively seeking to manage their use of AI, it is clear that specific regulatory guidance would address the issue more comprehensively and encourage consistent compliance.

[18] https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/innovatie/deloitte-nl-innovation-bringing-transparency-and-ethics-into-ai.pdf

[19] KPMG – Presentation to the CLRG on Artificial Intelligence, Dr. Owen Lewis, Partner, Head of Management Consulting

6. Committee's deliberations and recommendations

The Committee quickly concluded that it is difficult for legislation to remain contemporaneous in an ever-evolving area like AI. Therefore, legislators should look to a broad principle-based framework which remains applicable regardless of technological advances. The General Data Protection Regulation is examined in this context. Furthermore, the Committee considered that as only natural persons have responsibility for compliance under the Companies Act there is merit in examining the role of directors' duties in the use of AI.

6.1 General Data Protection Regulation

Background

The GDPR set up an innovative governance system that aims to ensure harmonised interpretation, application and enforcement of data protection rules. It relies on independent national data protection authorities and the European Data Protection Board, composed of the representatives of the national data protection authorities of the EU/EEA countries and of the European Data Protection Supervisor.

At the national level, the GDPR authorises independent data protection authorities with responsibility for the enforcement of the GDPR. To this purpose it provides them with harmonised and strengthened enforcement powers, ranging from warnings and reprimands to administrative fines. Those authorities also provide expert advice on data protection issues and handle complaints lodged against violations of data protection rules.

At the European level, the European Data Protection Board provides a framework for the cooperation between data protection authorities and fosters a consistent application of data protection rules throughout the EU. It issues guidelines on how to interpret core concepts of the GDPR and can issue binding decisions addressed to the data protection authorities on dispute in concrete cases regarding cross-border processing.[20]

6.1.2 Principles-based approach

The GDPR is a principles-based regulation. This means that compliance is not achieved through following a series of prescriptive rules. Instead it is about applying the GDPR principles to how personal data is used in practice. The Committee considers this approach instructive as to how Ireland might legislate for the use of AI in company law.

The seven key data protection principles include:

i. Lawfulness, fairness and transparency

ii. Purpose limitation

iii. Data minimisation

iv. Accuracy

[20] https://ec.europa.eu/info/sites/info/files/gdpr_factsheet-09_en.pdf

v. Storage limitation

vi. Integrity and confidentiality

vii. Accountability.

In the context of AI, the Committee considers a key principle to be that a Board retains responsibility for a company's use of AI. In addition, governance of AI should also include appropriate oversight and in that regard, the principle of accountability is key.

Where there is extensive use of AI it may be appropriate to require a designated company officer with key operational responsibility for the sourcing, use, staff training and security of AI within the company.

Another important principle is that AI should be used to assist directors and companies in the discharge of their duties and functions, rather than replace them, thus retaining Irish company law requirements for both a director to be a natural person and for such natural persons to be ultimately responsible.

Accountability

Accountability is one of the core Data Protection principles[21]. It is the mechanism through which companies and directors are held responsible for the implementation of the GDPR. The concept of accountability requires organisations to take necessary steps to:

1. Implement applicable data protection requirements; and

2. Be able to demonstrate such implementation.

Data controllers are explicitly required to implement appropriate and effective measures to put into effect the principles and obligations of the GDPR and demonstrate this on request. The concept of demonstrable compliance is significant. Companies and their directors must be in a position to show exactly what steps they took to implement the principles, this may include audits, staff training etc. This approach translates well to company law also.

The Elements of Accountability

Accountability-based data privacy and governance programs typically encompass and address each individual element of accountability. They are largely mirrored in Board responsibility and include:

1. Leadership and Oversight

2. Risk Assessment

3. Policies and Procedures (including Fairness and Ethics)

4. Transparency

5. Training and Awareness

[21] Accountability is also a key principle of Better/Smart Regulation as per OECD guidelines.

6. Monitoring and Verification

7. Response and Enforcement

These elements have already been developed and promoted by global organisations, as well as in the Centre for Information Policy Leadership's previous work on accountability. They are also consistent with regulatory guidance, for example, privacy management program guidance from both the Hong Kong and Canadian Privacy Commissioners. Furthermore, these elements are consistent with other areas of corporate law and compliance, including anti-bribery, anti-money laundering (AML), export control and competition. They have been used by organisations, regulators and courts to determine if an organisation has maintained an effective and comprehensive compliance program in any given regulatory area.

The Committee considers that the pace at which AI is advancing presents a particular challenge for legislators and regulators in that legislation will almost certainly find itself outdated by technological developments. Therefore, there is a logic in mirroring the approach taken to the governance of data in line with that provided for by the GDPR.

Such an approach would provide organisations with the guidance required to effectively monitor their use of AI as well as the flexibility to unlock its potential benefits without overly restrictive regulation. Citizens are equally protected through the concept of demonstrable compliance which would impose an obligation on organisations to show how they have complied with any regulations.

Recommendation

The Committee recommends that any legislation progressed to govern the use of Artificial Intelligence be modelled on the approach taken in the General Data Protection Regulation and follow an appropriate principles-based approach. Particular regard should be given to the principle of accountability with an emphasis on demonstrable compliance. In addition, regulatory guidance and codes of practice should be developed, possibly in conjunction with users and developers of AI.

While it is premature to make explicit, detailed recommendations in advance of an agreed European approach, consideration might also be given, in the future, to the role of audit and risk committees in overseeing operational AI. Further consideration might be given to the responsibility of a Board to regularly review the appropriate provision, use and security of AI by the company.

6.2 Directors' duties

The Companies Act

The Companies Act 2014 is the largest piece of legislation ever introduced in the State and provides a corporate legislative framework that reflects international best practice. The Act restructured, consolidated and simplified company law in Ireland, at the time set out in a 1963 Principal Act and 17 amending Acts as well as a series of Statutory Instruments. The Act was a major legislative innovation and provided for the codification of directors' duties.

Legal personality

A company is a legal form of business organisation. It is a separate legal entity and, therefore, is separate and distinct from its shareholders. Only the company can be sued in respect of its liabilities and generally only a company can sue to enforce its rights.

Nevertheless, Irish company law requires natural persons to be involved in the governance of a company. The Companies Act 2014 generally allows one or more persons to form a private company for any lawful purpose by subscribing to a constitution. A private company may have a maximum of 149 members and there is no limit on the number of members of a public company

All company types, with the exception of the Private Company Limited by Shares, must have a minimum of two directors, one of whom is required to be an EEA-resident, and a secretary. A private company limited by shares registered under Part 2 of the Companies Act 2014, on the other hand, may have only one director if they so choose. In a single director company, however, the director cannot also be the secretary.

A director must be a natural person: under section 130 a director cannot be a body corporate or an unincorporated body of persons.

A body corporate may act as secretary to a company. Where the secretary is a body corporate, its name, the register in which it is registered, the number of its registration and its registered office are required to be recorded in the company's register of its directors and secretary (which a company is obliged to keep at its registered office under section 149).

Obligations on natural persons under company law - Directors

All company officers have wide responsibilities in law. These responsibilities are primarily under the Companies Act 2014, Part 5: Duties of Directors and Other Officers.

Specifically, under section 223 of the Companies Act 2014, it is the duty of each director of a company to ensure that the company complies with the requirements of the Companies Act 2014. Thus, while a director is, in general, justified in delegating duties to other officials of the company, this does not obviate ultimate responsibility.

Under section 232, for breaches of certain duties there is liability to account to the company for it and indemnify the company for any loss or damage resulting from that breach.

Committee deliberations

In tackling the issues of bias and transparency in AI, the Committee considered what role the director of a company might play. It seems logical that directors be expected to understand, at a basic level, the types of AI used by the company, purpose of that AI and ensure that there are a sufficient number of experts employed to monitor the AI and brief the Board as appropriate.

Given that directors' duties are already set out in the Companies Act, it may be appropriate to include a specific duty with respect to the use of AI. That could take the form, similar to the requirement for certain companies to form an audit committee, of a committee of the Board, to include at least one member suitably qualified in the use of AI. That committee's responsibility

would be to monitor and review the company's use of AI and report to the Board. The requirement for such a committee could be mandatory or on a "comply or explain" basis.

Recommendation

The Committee considers it premature to make specific recommendation in respect of inserting a new directors' duty which sets out a director's responsibility with regard to the use of AI.

AI is not yet defined as a matter of Irish company law or EU law and there is no body of law which could be pointed to in order to help directors understand the scope of such a new duty.

However, as the European position on AI is developed and agreed upon by Member States, the Tánaiste may wish to consider whether the breadth of general fiduciary duties owed by a director to the company adequately covers the director's role in monitoring the use of AI by the company, or whether further specific provisions are required.

6.3 Enforcement

Offences under the Companies Act 2014

Ireland has considerably strengthened its legislative framework in relation to criminal procedure in recent years, introducing more targeted measures to strengthen the investigation and prosecution of corporate and regulatory crime.

The Companies Act 2014 has a four-tier categorisation of offences: at the higher end of the scale, category 1 offences carry, following conviction on indictment, a term of imprisonment up to 10 years and/or a €500,000 fine. At the other end of the scale, a category 4 offence can only be tried summarily and is punishable by imposition of a Class A fine.

Many of the provisions of the Companies Act, which criminalise default by a company, further provide that any officer of the company who is in default shall also be guilty of an offence. An officer in default is defined as any officer who "authorises, or who, in breach of his or her duty as such officer, permits the default" in question (see section 270).In relevant proceedings, where it is proved that the defendant was aware of the basic facts concerning the default, it shall be presumed that the defendant permitted the default unless the defendant shows that he/she took all reasonable steps to prevent it, or that by reasons of circumstances beyond the defendant's control, was unable to do so.

Committee deliberations

The Committee considered the broad range of enforcement measures contained in the GDPR and consider it appropriate that should such a model be followed in terms of a prinicple-based approach then this should also mirror the relevant enforcement measures.

Recommendation

Any future regulations made in relation to the governance of AI should include sufficient enforcement measures both against the company and directors and be inextricably linked to the principle of accountability.

Appendix 1 – Corporate Governance Committee membership

As at 22 December 2020

Salvador Nash	Chairperson The Chartered Governance Institute (KPMG)
Barry Conway	Ministerial Nominee (William Fry)
Conor O'Mahony	The Office of the Director of Corporate Enforcement
Dr David McFadden	Ministerial Nominee (Companies Registration Office)
Emma Doherty	Ministerial Nominee (Matheson)
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace LLP)
Jacqueline O'Callaghan	The Revenue Commissioners
Kathryn Maybury	Small Firms Association (KomSec Limited)
Máire Cunningham	The Law Society of Ireland (Beauchamps)
Marie Daly	IBEC (Irish Business and Employers' Confederation)
Vincent Madigan	Ministerial Nominee

ANNEX 5

COMPANY LAW REVIEW GROUP

Consultation on Directive (EU) 2019/2121 of 27 November 2019 (the Cross-Border Conversions and Divisions Directive)

Review Group Submission on Member State Options

13 OCTOBER 2020

Public Consultation and this Submission

Directive (EU) 2019/2121 of 27 November 2019 (the Cross-Border Conversions and Divisions Directive) (**the 2019 Directive**) is to be transposed into Irish law by 31 January 2023. On 13 August 2020, the Department of Business, Enterprise and Innovation (**the Department**) launched a public consultation on the Member State options in the Directive.

The Company Law Review Group's Statutory Committee proceeded to consider the 2019 Directive. The Statutory Committee is a Committee convened by the Chairperson inter alia to address company law issues that arise at short notice and to make submissions to public consultations. Membership of this Committee is open to all Review Group members, any of whom may nominate an alternate to participate in Committee deliberations and formation of recommendations. The Statutory Committee has most recently prepared submissions to public consultations in relation to the Limited Partnerships Act 1907 and the Registration of Business Names Act 1963.

The Committee met by Zoom meeting participation software on two occasions in September 2020 and generated this document, originally as a briefing paper to inform the Review Group for the purpose of the preparation of a CLRG submission as part of the Department's public consultation exercise.

At a meeting of the Company Law Review Group held by Zoom on 13 October 2020, this document was approved as the basis on which the Review Group's submission to the public consultation should be prepared. Subsequently to that meeting, the Review Group was informed that this document would itself be accepted as the Review Group's submission.

The 2019 Directive

The 2019 Directive amends Codified Company Law Directive (EU) 2017/1132 of 14 June 2017 by:

- providing for cross-border conversions of limited companies, by the insertion of a new Chapter -1[1] containing new Articles 86a to 86t;
- amending the 2017 Directive's provisions on cross-border mergers of limited companies in Chapter II; and
- providing for cross-border divisions of limited companies, by the insertion of a new Chapter III, containing new Articles 160a to 160u.

The new provisions on cross-border conversions, the newly amended provisions on cross-border mergers and the new provisions on cross-border divisions each give Member States various options in their transposition of them. These options are almost identical across these 3 transactions regulated by Directive (EU) 2017/1132 as now amended. In the case of Irish-registered companies exiting Ireland by means of any of these transactions – conversion, merger, division – there are common principles that apply. The Committee therefore approached its consideration of these Member State options on a unified basis across all three transaction types.

Recommendations

The Review Group makes the recommendations as to Member State options as set out in the following pages and which are summarised on pages 12 and 13. The heading at each option identifies the Article in Directive (EU) 2017/1132 as amended by Directive 2019/2121 that applies to each transaction type.

[1] i.e. minus 1.

The Review Group recommends that the transposition of the Directive be effected with the revocation of the SI No 157/2008 European Communities (Cross-Border Mergers) Regulations 2008 (as amended[2]) and that a new Statutory Instrument be made, consolidating the provisions of SI No 157/2008 and its amendments with the provisions made necessary by the transposition of the 2019 Directive.

The Review Group notes that in-State mergers and divisions are dealt with in the Companies Act in Part 9 and re-registrations and changes of type of companies are dealt with in Part 20 of the Act. Ideally there would be a separate Part of the Act to deal with cross-border mergers, divisions and conversions.

As against that, Directive (EU) 2019/2121 contains provisions dealing with the employer-employee relationship, provisions which in the existing transposition of the cross-border mergers regime was not included into the prior Companies Acts or incorporated into the Companies Act 2014. Similarly, the European Communities (European Public Limited Liability Company) Regulations 2007 (S.I. No. 21/2007), which gave further effect to Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE) contains provisions dealing with the employer-employee relationship and were not included into the prior Companies Acts or incorporated into the Companies Act 2014.

In this context, we would like to note that the Irish Congress of Trade Unions plans to make submissions directly to the Department in relation to the transposition of the 2019 Directive insofar as they relate to the processes of informing and consultation of employees, the potential use of artificial entities and other related matters.

Membership of the Statutory Committee

The membership of the Statutory Committee who prepared this document in the first instance is as follows:

Paul Egan SC	Chairperson
Barry Conway	CLRG member (William Fry)
Richard Curran	CLRG member (L K Shields Solicitors LLP)
Máire Cunningham	CLRG member (Beauchamps)
Sarah Flood	DBEI
Sarah Jayne Hanna	Matheson (alternate of CLRG Member Emma Doherty)
Rosemary Hickey	CLRG member, Office of the Attorney General
Tanya Holly	DBEI
Dr David McFadden	CLRG member, Companies Registration Office
Vincent Madigan	CLRG member
Kathryn Maybury	CLRG member

13 October 2020

[2] Amended by various enactments including S.I. No. 306/2011 - European Communities (Mergers and Divisions of Companies) (Amendment) Regulations 2011.

Option 1	Conversions: 86a(4)	Mergers: 120(4)	Divisions: 160a(5)

Member States may decide not to apply this Chapter to companies which are:

(a) the subject of insolvency proceedings or subject to preventive restructuring frameworks;

(b) the subject of liquidation proceedings other than those referred to in point (a) of paragraph 3, or

(c) the subject of crisis prevention measures as defined in point (101) of Article 2(1) of Directive 2014/59/EU.

Recommendation

This option should not be taken.

Rationale

These potential transactions should be available widely. As they proceed only with the consent of the Court, there is no policy reason to limit their application as might be possible under this option.

Option 2	Conversions: 86e(4)	Mergers: 124(4)	Divisions: 160e(4)

[Report of the administrative or management body for members and employees i.e. director's report]

Member States may exclude single-member companies from the provisions of this Article.

Recommendation

Rather than excluding the application of the Article to single-member companies, provide that a single member may waive the requirement for the production of the directors' report, in the same way that a single member may waive the requirement for the section of the report to members, as provided by the immediately preceding paragraph in the Article.

Rationale

The directors of the company may be distinct from the single member. A single member may require a directors' report for its own purposes or as a matter of good governance. It is not a huge burden on a single member to sign one extra document or add one sentence to another document it signs.

Option 3	Conversions: 86f(3)	Mergers: 125(4)	Divisions: 160f(3)

[Independent expert report]

Member States may exclude single-member companies from the application of this Article.

Recommendation

Rather than excluding the application of the Article to single-member companies, provide that a single member may waive the requirement for the production of the expert's report, in the same way that we recommend that a single member may waive the requirement for the production of the directors' report.

Rationale

A single member may require an expert's report for its own purposes or as a matter of good governance. It is not a huge burden on a single member to sign one extra document or add one sentence to another document it signs.

Option 4	Conversions: 86g(1)	Mergers: 123(1)	Divisions: 160g(1)

[Disclosure of independent expert's report]

Member States may require that the independent expert report be disclosed and made publicly available in the register.

Recommendation

This option should not be taken.

Rationale

The independent expert report is a report to members, not to the world at large.

Option 5	Conversions: 86g(2)	Mergers: 123(2)	Divisions: 160g(2)

[Disclosure in the public register i.e. the Companies Registration Office of (a) the draft terms of the cross-border transaction; and (b) a notice to members, creditors and (representatives of) the employees]

Member States may exempt a company from the disclosure requirement referred to in paragraph 1 of this Article where, for a continuous period beginning at least one month before the date fixed for the general meeting referred to in Article 86h and ending not earlier than the conclusion of that meeting, that company makes the documents referred to in paragraph 1 of this Article available on its website free of charge to the public.

Recommendation

This option should be taken, subject the prior filing by the company of a form in the CRO identifying the precise webpage/s where the documents are available for inspection.

Rationale

It is important that the public record shows that a transaction is contemplated and in progress.

Option 6	Conversions: 86g(5)	Mergers: 123(6)	Divisions: 160g(5)

[Disclosure of the draft terms of the cross-border transaction]

Member States may require, in addition to the disclosure referred to in paragraphs 1, 2 and 3 of this Article, that the draft terms of the cross-border conversion, or the information referred to in paragraph 3 of this Article, be published in their national gazette or through a central electronic platform in accordance with Article 16(3). In that instance, Member States shall ensure that the register transmits the relevant information to the national gazette or to a central electronic platform.

Recommendation

The fact of delivery of information to the CRO – whether it is the draft terms of conversion, merger or division and notices to members, creditors and (representatives of) employees or as we recommend at Option 5 above, a form notifying the precise webpages where those documents are available – should be included in the CRO Gazette.

Rationale

The Companies Act 2014 provides for publication of information in the online CRO Gazette, which are published by the Registrar of Companies each Wednesday. The CRO Gazette includes lists of the following in pdf: new companies; change of name; annual returns received and registered; liquidations; foreign companies; other registered documents; strike offs; restorations. It is appropriate that the public record shows that a transaction is contemplated and in progress and that information has been filed in the CRO.

Option 7	Conversions: 86h(4)	Mergers: n/a	Divisions: 160h(4)

Where a clause in the draft terms of the cross-border [transaction] or any amendment to the instrument of constitution of the converting company leads to an increase of the economic obligations of a member towards the company or third parties, Member States may require, in such specific circumstances, that such clause or the amendment to the instrument of constitution be approved by the member concerned, provided that such member is unable to exercise the rights laid down in Article [86i] [160i] [i.e. where shareholder cannot be given cash other securities.as compensation]

Recommendation

This option should be taken up.

Rationale

It is one thing for a member to be dispossessed of an asset and given consideration for that. It is quite different if it is proposed to impose a liability on a member.

The Companies Act 2104 section 32 (4) provides:

> Subject to subsection (5) [where a member agrees to be bound by the amendment] and notwithstanding anything in the constitution of a company, no member of the company shall be bound by an amendment made to the constitution after the date on which he or she became a member, if and so far as the amendment—
>
> (a) requires him or her to take or subscribe for more shares than the number held by him or her at the date on which the amendment is made, or
>
> (b) in any way increases his or her liability as at the date referred to in paragraph (a) to—
>
> (i) contribute to the share capital of the company, or
>
> (ii) otherwise pay money to the company.

IN a similar vein, where a limited company is to be re-registered as an unlimited company, such that the liability of members would become unlimited, section 1296 of the Companies Act requires the assent of all members to its re-registration. It follows therefore that the liability of a member of a limited company should not be increased without that member's consent.

Option 8	Conversions: 86i(1)	Mergers: 126a(1)	Divisions: 160i(1)

[Protection of members: cash consideration for dissenting members]

Member States may also provide for other members [i.e. members other than dissenting members] of the company to have the right referred to in the first subparagraph.

Recommendation

This option should not be taken up.

Rationale

A company planning any of these transactions will require certainty. It is not appropriate that assenting members should effectively be given a put option over their shares whereby they could compel the company to buy them out.

Option 9	Conversions: 86i(1)	Mergers: 126a(1)	Divisions: 160i(1)

Member States may require that express opposition to the draft terms of the cross-border [transaction], the intention of members to exercise their right to dispose of their shares, or both, be appropriately documented, at the latest at the general meeting referred to in Article [86h] [126] [160h].

Recommendation

This option should be taken up.

Rationale

A company planning any of these transactions will require certainty. It is appropriate that the level of dissent is known to the company before the meeting.

Option 10	Conversions: 86i(1)	Mergers: 126a(1)	Divisions: 160i(1)

Member States may allow the recording of opposition to the draft terms of the cross-border [transaction] to be considered proper documentation of a negative vote.

Recommendation

This option should be taken up.

Rationale

A company planning any of these transactions will require certainty. It is appropriate and convenient that express opposition be accepted as a negative vote.

Option 11	Conversions: 86i(4)	Mergers: 126a(4)	Divisions: 160i(4)

[Where a Court awards a higher cash consideration]

Member States may provide that the final decision to provide additional cash compensation is valid for all members who have declared their decision to exercise the right to dispose of their shares in accordance with paragraph 2.

Recommendation

This option should be taken up.

Rationale

Where a Court awards higher consideration, as opposed to where a separate amount might be agreed by contract, it is appropriate that the price so determined should apply to all members affected.

Option 12	Conversions: n/a	Mergers: 126a(6)	Divisions: n/a

[Where Court adjusts consideration in the case of a merger]

Recommendation

This option should be taken up.

Rationale

Where a Court adjusts the consideration, including the share ratio, it is appropriate that the ratio so adjusted should apply to all members affected.

Option 13	Conversions: n/a	Mergers: 126a(7)	Divisions: 160i(7)

Member States may also provide that the company resulting from the cross-border merger or division can provide shares or other compensation instead of a cash payment.

Member States may also provide that the recipient company concerned and, in the event of a partial division, also the company being divided, can provide shares or other compensation instead of a cash payment.

Recommendation

This option should be taken up.

Rationale

The law should provide for flexibility as to consideration that may be offered by the relevant company in either case, subject to the right of dissenting members to a cash payment, as elsewhere in the Directive.

Option 14	Conversions: 86j(2)	Mergers: n/a	Divisions: 160j(3)

Member States may require that the administrative or management body [i.e. the directors] of [the company] [the company being divided] provide a declaration that accurately reflects its current financial status at a date no earlier than one month before the disclosure of that declaration.

Recommendation

This option should not be taken up.

Rationale

This is not required in the case of a merger. Companies are obliged to keep up-to-date accounting records and those will inform the design of the cross-border transaction. Such a report does not add any protection that is not otherwise available in the process.

Option 15	Conversions: 86k(i)	Mergers: 126c(1)	Divisions: 160k(1)

Member States may decide that employees' rights to information and consultation apply with respect to the employees of companies other than those referred to in Article 3(1) of Directive 2002/14/EC. [i.e. (a) undertakings employing at least 50 employees in any one Member State, or (b) establishments employing at least 20 employees in any one Member State.]

Recommendation

The Review Group makes no recommendation.

Rationale

The Company Law Review Group has since its establishment confined itself to matters of company law, including securities law regulated by the Companies Act. This issue is primarily a point of employment law and labour relations.

Option 16	Conversions: 86l(4)(b)	Mergers: n/a	Divisions: 160l(4)(b)

When regulating the principles and procedures referred to in paragraph 3 [those laid down in Article 12(2) and (4) of Regulation (EC) No 2157/2001 certain provisions of Directive 2001/86/EC] Member states may, in the case where, following prior negotiations, standard rules for participation apply and notwithstanding such rules, decide to limit the proportion of employee representatives in the administrative body of the [converted company] [recipient companies]. However, if, in the company, employee representatives constituted at least one third of the administrative or supervisory body, the limitation may never result in a lower proportion of employee representatives in the administrative body than one third.

Recommendation

The Review Group makes no recommendation.

Rationale

The Company Law Review Group has since its establishment confined itself to matters of company law, including securities law regulated by the Companies Act. This issue is primarily a point of employment law and labour relations.

Option 17	Conversions: 86m(1)	Mergers: 127(1)	Divisions: 160m(1)

[Procedures before pre-transaction certificate]

Such completion of procedures and formalities may comprise the satisfaction or securing of pecuniary or non-pecuniary obligations due to public bodies or compliance with specific sectoral requirements, including securing obligations arising from ongoing proceedings.

Recommendation

This option is an unnecessary additional step and should not be taken up.

Rationale

There was lengthy and detailed discussion at Committee as to whether this should be taken up. When the Committee examined this first, it approached it on n the basis that it was reasonable that, at a minimum, when a company is exiting the jurisdiction that it satisfies all taxation liabilities.

That is fine in principle but when one attempts to apply this in practice, difficulties arise. A company, if a trading company, will be accruing taxation liabilities with each passing day, be it VAT on supply of goods or services or PAYE and levies on employees' remuneration. Accordingly, the Committee concluded that it was impractical for there to be what would effectively be a mandatory pre-payment of taxation obligations before an order be given. The liability to pay taxes applies to the continuing company or companies.

As to obligations to satisfy any other undefined liabilities to "public bodies" the breadth of that definition might render it impossible for a company to determine whether it was in compliance and for the Court to give its approval.

The Committee considered the inherent jurisdiction of the High Court to address potential abuses of process. Article 34.3.1 of the Constitution vests the High Court "with full and original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal." Whilst the court will exercise inherent jurisdiction, there are limitations. In the case of *McG v D.W. (No.2)*[3] Murray C.J. noted:

> "The interaction between the express jurisdiction of the courts and their inherent jurisdiction will depend in each case according to the scope of the express jurisdiction, whether its source is common law, legislative or constitutional, and the ambit of the inherent jurisdiction which is being invoked. Inherent jurisdiction by its nature only arises in the absence of the express."

This issue has been discussed and decided judicially very recently, the Court of Appeal judgment in the case of *Wee Care Limited v Companies Registration Office*[4], where the Court acknowledged its inherent jurisdiction but, on the facts, declined to exercise it.

In this context, the Committee finally took comfort from the express provisions of the Directive aimed at ensuring that a pre-[transaction] certificate should not issue in the case of apparent abuse or fraud. Articles 86m(8) (conversions), 127(8) (mergers) and 160m(8) (divisions) provide:

> "Member States shall ensure that the competent authority does not issue the pre-[transaction] certificate where it is determined in compliance with national law that a cross-border [transaction] is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes."

Option 18	Conversions: 86m(3)	Mergers: 127(3)	Divisions: 160m(3)

[Information before pre-transaction certificate]

Member States may require that the application to obtain a pre-[transaction] certificate by the company is accompanied by additional information, such as, in particular:

[3] [2000] 4 I.R. 1.
[4] [2020] IECA 266.

(a) the number of employees at the time of the drawing up of the draft terms of the cross-border [transaction];

(b) the existence of subsidiaries and their respective geographical location;

(c) information regarding the satisfaction of obligations due to public bodies by the company.

Recommendation

This option should be taken up, in the case of paragraph (c), but limited to moneys that may become due and owing to the Revenue Commissioners in respect of any taxes or levies. The application should not require that the taxes be paid (if not already due) but the arrangements for settling taxes to be come due should be specified.

Rationale

As in the case of option 17, there was considerable debate as to whether to recommend exercise of this option. The considerations discussed under option 17 were relevant in this case. It was argued that the provision of other information is unnecessary as information regarding employees, assets and liabilities will have already been included in the draft terms of the cross-border transaction; the court may, if it wishes, seek additional information regarding employees, assets and liabilities at the court hearing to approve the cross-border transaction. There is therefore adequate protection for employees and creditors in the court procedure. The inclusion of this option would place an additional burden on companies wishing to complete a cross-border transaction.

Following much debate it was concluded that it is not unreasonable for a company proposing to exit the jurisdiction by conversion, merger or division to make clear its intentions as to settlement of taxation liabilities. Such an obligation would not be a particularly onerous burden

Option 19	Conversions: 86m(10)	Mergers: 127(10)	Divisions: 160m(10)

[Delay in Court approval in order to determine whether the transaction is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of Union or national law, or for criminal purposes.]

Where it is necessary for the purposes of the assessment under paragraphs 8 and 9 to take into account additional information or to perform additional investigative activities, the period of three months provided for in paragraph 7 may be extended by a maximum of three months.

Recommendation

This option should be taken up.

Rationale

A Court should be given the necessary time to be satisfied of there being no abuse or fraud.

Summary of Recommendations

	Option	Conversions	Mergers	Divisions	Exercise option?
1	Disapply to companies in insolvency procedures?	86a(4)	120(4)	160a(5)	No
2	Disapply requirement for admin/mgt report for single member companies?	86e(4)	124(4)	160e(4)	Allow waiver
3	Disapply requirement for expert report for single member companies?	86f(3)	125(4)	160f(3)	Allow waiver
4	Require disclosure of expert report in register (at CRO)?	86g(1)	123(1)	160g(1)	No
5	Exempt companies from filing requirements where documents on company's website for a month?	86g(2)	123(2)	160g(2)	Condition-ally
6	Require filing of documents in national gazette (i.e. Iris Oifigiúil)?	86g(5)	123(6)	160g(5)	Yes: CRO Gazette
7	Require consent of shareholder who suffers extra economic obligations as a result of transaction where shareholder cannot take cash-out payment under 86i/160i?	86h(4)		160h(4)	Yes
8	Extend right to be cashed out to voters in favour (as well as voters against)?	86i(1)	126a(1)	160i(1)	No
9	Require indication of dissent at or before meeting?	86i(1)	126a(1)	160i(1)	Yes
10	Accept opposition as negative vote?	86i(1)	126a(1)	160i(1)	Yes
11	Apply court-imposed cash-out consideration awarded in one case to all shareholders of that class?	86i(4)	126a(4)	160i(4)	Yes
12	Apply court-imposed share exchange ratio awarded in one case to all shareholders of that class?		126a(6)		Yes
13	Allow companies to issue shares instead of cash payment compensation?		126a(7)	160i(7)	Yes
14	Require admin/mgt financial report no earlier than one month before procedure?	86j(2)		160j(3)	No
15	Extend consultation with employees beyond companies in scope of Directive 2002/14/EC, Article 3(1)?	86k(1)	126c(1)	160k(1)	-

	Option	Conversions	Mergers	Divisions	Exercise option?
16	Adjust worker director numbers in circumstances stated?	86*l*(4)(b)		160l4(b)	-
17	Include satisfaction of liabilities with public bodies before pre-transaction certificate?	86m(1)	127(1)	160m(1)	No
18	Require info on subsidiaries, employees, satisfaction of obligations to pubic bodies before application for pre-transaction certificate?	86m(3)	127(3)	160m(3)	Yes: Revenue only
19	Allow authorities extra 3 months to assess transaction for abuse?	86m(10)	127(10)	160m(10)	Yes