COMPANY LAW REVIEW GROUP
an grúpa athbhreithnithe dlí cuideachtaí

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Ms. Mary Harney, T.D.
Tanaiste and Minister for Enterprise, Trade and Employment
Department of Enterprise, Trade and Employment
Kildare St.
Dublin 2

31 March 2004

Re: Report on Second Work Programme of Company Law Review Group 2002-2003

Dear Tánaiste,

I am very pleased to attach for your consideration the Second Report of the Company Law Review Group which covers its work programme for 2002-2003.

The First Report of the Review Group (February 2002) mapped out the broad framework for overall reform and consolidation of company law. The First Report also focussed on detailed reform in a number of sectoral areas, such as directors' duties, all dealt with in the context of the simplification and modernisation of company law and having regard to the well-established principles of creditor and shareholder protection.

The Second Report builds on the framework established by the First Report and makes recommendations within the context of the proposed consolidation and reform Bill. The Second Report is more technical in nature than the First Report and contains substantive recommendations in the following sectoral areas:

- Liquidations;
- Share capital;
- Debentures and the registration of charges;
- Corporate governance and company management regulations;
- Audit and accounting issues.

The Report also takes account, at Chapter 9, of company law developments in the EU having regard in particular to the elaboration of the Financial Services Action Programme. To the extent possible we are approaching the reform and consolidation of our domestic legislation such that it takes account of the suite of company law measures emerging at European level.

In addition, the Report outlines, at Chapter 3, the progress made to date in drafting the General Scheme of the Consolidated Companies Bill. The Review Group has been very pleased to work closely with your Department to formulate the draft Heads and develop the outline of the recommendations in the First Report as agreed by the Government in July 2002.

31 March 2004

We would propose similarly to factor the recommendations in the Second Report into the framework mapped out in the First Report such that you can bring an integrated set of proposals in the form of a General Scheme of the Companies Consolidation Bill to Government for agreement.

It has been a privilege as well as hard work to translate the recommendations in the First Report into draft Heads of the consolidated Bill and to see those Heads posted on our website as we complete our consideration of each Part of the Bill. As in the past, the pro bono work of the members of the Review Group should be acknowledged and members from both the public and private sectors have been regularly forsaking their Saturday mornings to progress the drafting of the Heads for the proposed Bill. At this stage, the Review Group has virtually completed the draft Heads of the private company statute, the key element of the consolidated Bill, and has set itself the objective of completing the draft Heads of the Bill by the end of this year.

As with the First Report, I am pleased to inform you of the Review Group's unanimous agreement on all of the recommendations in the current report.

Your own consistent support, and that of Minister Michael Ahern TD, for our work is gratefully acknowledged. I am also very appreciative of the encouragement of our task shown by the Minister for Justice, Equality and Law Reform, Mr Michael McDowell TD. The officials of your own Department and its related agencies have been key to moving the project forward. I would in particular like to acknowledge the excellence of the secretariat of the Review Group, led by Pat Nolan, in driving the consolidation and reform project forward, in ensuring that all members of the Review Group feel their contribution is valued, in developing the website of the Company Law Review Group, www.clrg.org, as a channel of communication with all interested parties and in contextualising the reform of company law within the wider regulatory reform and efficient markets goals of your Department.

It is my privilege to commend to you the Review Group's Second Report 2002-2003.

Yours sincerely

Thomas B. Courtney
Chairman

1908 Act
Companies (Consolidation) Act 1908

1963 Act or Principal Act
Companies Act 1963

1977 Act
Companies (Amendment) Act 1977

1982 Act
Companies (Amendment) Act 1982

1983 Act
Companies (Amendment) Act 1983

1984 Stock Exchange Regulations
EC (Stock Exchange) Regulations 1984

1986 Act
Companies (Amendment) Act 1986

1990 Act
Companies Act 1990

1990 Amendment Act
Companies (Amendment) Act 1990

1992 Prospectus Regulations
EC (Transferable Securities and Stock Exchange) Regulations 1992 (SI No 202 of 1992)

1999 (No.1) Act
Companies (Amendment) (No.1) Act 1999

1999 (No.2) Act
Companies (Amendment) (No.2) Act 1999

2001 Act
Company Law Enforcement Act 2001

2003 Act
Companies (Auditing & Accounting) Act 2003

CBFSAI
Central Bank and Financial Services Authority of Ireland

CESR
Committee of European Securities Regulators

CLS
Private company limited by shares, the proposed model company
further to the implementation of the restructuring of the Companies Acts
pursuant to the First Report of the Review Group.

CLRG
Company Law Review Group

CRO
Companies Registration Office

CSO
Central Statistics Office

DAC
Designated activity company

Department
Department of Enterprise, Trade and Employment

Director
Director of Corporate Enforcement

EC Act
EuropeanCommunities Act 1972 as amended**ECS**
European Company Statute

EMU Act
Economic and Monetary Union Act 1998

ESC
European Securities Committee

FSAP
Financial Services Action Plan

GAAP
Generally Accepted Accounting Principles

GNP
Gross National Product

IAASA
Irish Auditing and Accounting Supervisory Authority

IAIR
International Association of Insolvency Regulators

IAS
International Accounting Standards

IASB
International Accounting Standards Board

ICMSA
Irish Creamery Milk Suppliers Association

IFSRA
IrishFinancial Services Regulatory Authority

ISA
International Standards on Auditing

ISE
Irish Stock Exchange

Minister
Minister for Enterprise, Trade and Employment

ODCE
Office of the Director of Corporate Enforcement

OECD
Organisation for Economic Cooperation and Development

PLC
Public Limited Company

Registrar
Registrar of Companies

Review Group
Company Law Review Group

RGA
Review Group on Auditing, established by the Minister in February 2000 and which reported in July 2000

Table A
Table A of First Schedule to the 1963 Act (Company Management Regulations)

SI
Statutory Instrument

SIC
Standing Interpretations Committee

WG
Working Group on Company Law Compliance and Enforcement

1

CHAPTER 1

Introduction
& Summary of recommendations

one

1.1.1 The Company Law Review Group is a statutory advisory body to the Minister for Enterprise, Trade and Employment. Its task is to advise the Minister on the reform and modernisation of Irish company law. The Review Group is devised as the engine for delivering a world-class companies code in Ireland, i.e., the intention is to make company law a factor of competitive advantage in the Irish economy, while retaining the highest standards of shareholder and creditor protection.

1.1.2 The Review Group was set up in February 2000 on foot of Government decision. The Group operated on an administrative basis until it was accorded a statutory advisory status by the Company Law Enforcement Act 2001. Part 7 of that Act sets out the role and the advisory responsibilities of the Review Group and the basis on which its members are appointed[1].

1.1.3 The Review Group is a standing advisory body that operates on a two-yearly cycle. Every second year the Review Group is assigned by the Minister for Enterprise, Trade and Employment a work programme of issues for consideration. The First Report of the Review Group was the culmination of its work programme for 2000-2001 and was published on 28 February 2002.

1.1.4 Pursuant to section 71 of the 2001 Act, the Review Group makes an annual report to the Minister for Enterprise, Trade and Employment. The Minister, in turn, causes copies of the report to be laid before the Houses of the Oireachtas. The Review Group's annual report for 2002 was accordingly drawn up and laid before the Oireachtas in May 2003. As that report fell within the middle of the Review Group's two-year work programme it is in the nature of a summary rather than substantive report. This present Report, covering the Review Group's Second Work Programme, is the second substantive report of the Review Group and sets out a detailed analysis of issues and the resulting recommendations in each of the six topics assigned to the Review Group for its Second Work Programme, namely:

Windings up/liquidations	Shares and shareholders
Debentures and registration of charges	Corporate Governance and Company Management Regulations (Table A)
EU developments in	Audit and accounting

1.1.5 The review of company law issues in the Second Work Programme takes place against the background of the ongoing major reform and consolidation of company law initiated on foot of the Review Group's First Report (February 2002). That report mapped out a strategy for the restructuring, consolidation, simplification and modernisation of company law in Ireland. The key feature of this reform programme will be to establish the private company limited by shares as the standard type of company, reflecting the fact that 136,948, or 88.8%, of all companies registered in Ireland are of this type.[2]

1.1.6 The Government approved the concept of and framework for this approach on 26 July 2002, when it considered the Review Group's First Report, and approved implementation of the full set of the recommendations in that report. The General Scheme of the Bill to give effect to the proposals for this reform of company law is now being drafted in the Department of Enterprise, Trade and Employment and, alongside the work on the Second Work Programme of the Group which is detailed in this Report, was the major focus of the Review Group in 2002-2003. In particular, the Steering Committee of the Review Group has worked closely with the Company Law policy sections in the Commerce, Consumers and Competition Division of the Department to produce the legislative proposals which will constitute the General Scheme of the new Bill, and the Review Group as a whole has scrutinised and advised on these.

1.1.7 The new Companies Bill is at present planned to have the following structure:

Group A	**Private company limited by shares**
Part 1	Preliminary and Definitions
Part 2	Incorporation and Consequential Matters
Part 3	Share Capital
Part 4	Corporate Governance
Part 5	Duties of Directors and other Officers
Part 6	Accounts, Audit and Annual Return
Part 7	Debentures and Registration of Charges
Part 8	Receivers
Part 9	Reconstructions
Part 10	Examinerships
Part 11	Winding-up
Part 12	Dissolution and Reinstatement
Part 13	Compliance, Investigation and Enforcement
Part 14	Regulatory and Advisory Bodies[3]

Group B	**Companies and bodies corporate other than the private company limited by shares**
Part 1	Definitions
Part 2	Public Limited Companies
Part 3	European Companies (Societas Europeae or 'SE')
Part 4	Designated Activity Companies
Part 5	Guarantee Companies
Part 6	Unlimited Companies
Part 7	Overseas Companies
Part 8	Unregistered Companies
Part 9	Conversion and Re-registration
Part 10	Miscellaneous Bodies Corporate
Part 11	Collective Investment Schemes

This structure represents a fine tuning of the proposed structure contained in Chapter 17 of the First Report. In particular, developments under the EU's Financial Services Action Plan related to securities market activity:

- the Prospectus Directive (2003/71/EC)
- the Market Abuse Directive (2003/6/EC)
- the proposed Transparency Directive
- the proposed Takeover Directive, which was originally anticipated to form part of Group B of the Bill, are more likely to be enacted separately from the consolidation, at least initially.

1.1.8 As part of a commitment to accountability and transparency, the Tanaiste and Minister for Enterprise, Trade and Employment, Mary Harney TD, has approved the posting of the entire General Scheme of the new Bill on the website of the Review Group. This is a key part of a new Online Company Law Statute Book facility available to the general public and to interested parties. This facility includes access to all existing companies legislation. The Statute Book will help businesses considering incorporation, existing company directors, shareholders, creditors and the general public to navigate the complex area of company law.

1.1.9 Each section of the Statute Book features information specific to that section ranging from Oireachtas Debates, Explanatory Memoranda, Briefing Notes to the Minister of the day and cross references to amending legislation. In addition, as they are completed, the proposed Parts of the General Scheme of the new Bill to reform and consolidate company law will be posted on the Company Law Statute Book for view and consultation. As of March 2004, 9 Parts of the Bill, Parts A2, A3, A4, A5, A7, A8, A9, A12 and A13, dealing respectively with Incorporation and Consequential Matters, Share Capital, Corporate Governance, Duties of Directors and other Officers, Debentures and Charges, Receivers, Reconstructions, Dissolution and Reinstatement and Compliance Investigation and Enforcement had been posted. All of this information is available online at http://www.clrg.org/companiesbill/default.asp.

1.1.10 It is likely that the Heads of the Bill for the full Group of Parts A, i.e. in effect the private company statute, will be completed and in the public domain by 2004. Work will then begin on the application, disapplication and addition to the companies' statute as it applies to other types of company. The results of this analysis will serve as the basis for the legislative proposals to be set out for each of the Parts specified in Group of Parts B, see Table above. It is intended that observations received on all Parts of the General Scheme will inform the ultimate shape of the legislative proposals which the Ministerwill bring to Government for approval.

1.1.11 On approval of the detailed recommendations arising from the second Work Programme of the Review Group, these too will be factored into the legislative proposals in the General Scheme.

1.1.12 Such is the importance and priority of the proposed legislation that the sole focus and task of the Review Group over its two-year work programme 2004-5, as assigned to it by the Tanaiste and Minister for Enterprise, Trade and Employment, will be to work closely with the Department on the preparation of the General Scheme of the Bill and to assist with the ensuing dialogue between the Department and the Office of the Parliamentary Counsel as that Office works on the General Scheme to produce the Bill to be brought before the Oireachtas.

1.1.13 In addition to the work being undertaken by the Review Group, there has been a number of important developments in the area of company law in the two years since publication of the Review Group's First Report.

1.2 EU Developments in Company Law

1.2.1 In recent years EU activity in company law has greatly increased (See Chapter on EU Developments for full details). This has been driven by the Financial Services Action Programme[4] (FSAP) and the Lisbon process.[5] The type of legislation now being introduced at EU level is broad in scope and highly complex and involves a mixture of mainstream company law /accounting and financial services/securities law.

1.2.2 A feature of the EU legislation under consideration and planned over the short, medium and longer term, including legislation already adopted but yet to be implemented, is the substantial change it will bring about in the way things will be done in future. This will involve new roles for, inter alia, IFSRA[6] and the ISE[7]. Another feature is the speed with which EU legislation is being enacted. For example, over the past two years at least six Directives/Regulations covering a wide area of activity were adopted, with a further two expected to be adopted during the Irish EU Presidency in the first half of 2004. Each of these will require transposition over the next two to three years. An EU company law action plan was published in May 2003 which provides for a very wide range of additional measures over the short, medium and longer term. Twelve measures alone are earmarked for the short term i.e. 2003-2005, eight of which are legislative. Discussions have already commenced on some of these at Commission Working Group level (i.e., involving member state representatives).

1.2.3 Dealing with this very substantial work programme presents a major challenge. Given the complexity and scope of the subject matter this is most effectively done through a team approach, making use in particular of the Irish company law policy community as manifested in the Review Group.

1.2.4 The Review Group considered the issue of how to address the implementation and consolidation in Ireland of "company" law which has emerged and will continue to emerge from EU initiatives set in train under the FSAP. The context to this is the very considerable amount of EU legislation and its transposition into domestic law which the FSAP will give rise to. In the immediate future the Market Abuse and Prospectus Directives require transposition by 14 October 2004 and 1 July 2005 respectively. They are likely also to be joined as a minimum by the Transparency Directive as legal instruments which require transposition before enactment of the Consolidation Bill.

1.2.5 The Review Group then considered to what extent it might be appropriate to decouple FSAP initiatives from the main reform and consolidation already in train. The distinction on a thematic basis is not clearcut. While a number of the FSAP measures are clearly concerned with the marketing of products others are concerned with corporate governance. A decoupling approach would not mean a 'hands off' approach by the Review Group. The Group would continue to have the primary advisory role on FSAP measures and their appropriate transposition into Irish law to the extent that such measures had a significant company law element and, as such, fell within the policy and legislative responsibility of the Department of Enterprise Trade and Employment. It would also be the general intention to include in the consolidation those Directives which have already been transposed into Irish law.

1.2.6 Most FSAP initiatives are currently dynamic rather than static. They are complex to implement in domestic law because of their four level nature dealing with Principles, Regulations, Review and Enforcement. While ideally it might be appropriate to transpose the Principles level, i.e. the Council and European Parliament Directives, by statute it would probably be more appropriate to transpose the subsequent levels by Statutory Instrument.

1.2.7 In considering this issue overall, the Review Group recognised that a particular concern arises relating to the Prospectus Directive due to the fact that the law with regard to Prospectuses is governed by both domestic and EU-derived legislation thus giving rise to a "lack of cohesion between key aspects of these main bodies of legislation (leading) to confusion, uncertainty and inconsistency in the application of public offers legislation"[8]. The issues are comprehensively analysed in Chapter 9 of the Review Group's First Report. The implementation of the Prospectus Directive by Statutory Instrument, while achieving transposition, could not address the problem of confusion because the Statutory Instrument could not be used to repeal the disclosure provisions in the Companies code deriving from the 1963 Act. These provisions would need to be repealed by primary legislation, most likely by the Consolidation Bill. However this issue arises whether or not there is a decision to decouple the bulk of FSAP derived-legislation into its own suite of legal instruments associated with the companies code (The Review Group would retain its responsibility to advise on this legislation and ensure it was kept up to date).

1.2.8 On foot of its consideration of this issue the Review Group came to the following conclusions:

- The consolidation Bill should incorporate as much of stable company law as possible;
- That part of companies' legislation dealing with investment companies (Part XIII of the 1990 Act and the Euorpean Communities Undertaking for Collective Investment in Transferable Securities Regulation 2003) will be decoupled from company law proper and provided for in a separate contemporaneous enactment, ideally encompassing the law relating not only to investment companies but also other forms;
- Certain FSAP provisions should be decoupled from the company law Consolidation Bill.

Ideally they will be treated as a suite of legal instruments with titles along the lines of "Protection of Investors No. 1, 2, etc. Acts". This might be a decision to be considered in a future work programme of the Review Group.

The decision as to whether the FSAP provisions should be enacted as primary legislation or statutory instruments can also be taken at a later stage.

1.3 Companies (Auditing and Accounting) Act 2003

1.3.1 This Bill was initiated on 12 February 2003 and enacted on 23 December 2003. The Act establishes the Irish Auditing and Accounting Supervisory Authority (IASSA) on a statutory basis[9]. The role of the Authority is to: supervise the regulation and monitoring of their members by prescribed accountancy bodies; promote adherence to high standards across the accountancy profession, monitor compliance with the Companies Acts of certain classes of company and to provide specialist advice on accounting and auditing issues to the Minister for Enterprise, Trade and Employment. IAASA will work with the accountancy bodies to develop professional accounting and auditing standards and to take action in relation to compliance. IAASA will be funded by the Exchequer (40%) and by the accountancy professional bodies (60%).

1.3.2 In addition, the Act introduces a requirement for public limited companies (plcs) and large private companies to establish a committee of their Board of Directors to carry out defined tasks in relation to the audit and financial management of those companies. The requirement is mandatory for plcs, while for large private companies the obligation is to establish the committee or explain why they did not do so. There will also be a requirement for a statement by directors in the annual report setting out the company's compliance with company law, tax law and other legal obligations. This applies to all public companies and to private companies other than small and medium-sized private companies. The Act also raises the turnover level for qualifying for an audit exemption from €317,000 to €1.5m.

1.4 Commercial Court

1.4.1 In Chapter 12 of its First Report the Review Group analysed the need for a dedicated Court dealing with business-to-business and business-to-State litigation and concluded that there was a strong case for the establishment of a dedicated Commercial Court[10]. The Review Group accordingly welcomes the new regime for the conduct of commercial litigation in the High Court established with effect from the commencement of the Hilary Law Term on 12 January 2004. The regime, provision for which has been made by rules of court, envisages a new Commercial List in the High Court, charge of which will be assigned to a High Court judge experienced in commercial matters designated by the President of the High Court. The judge in charge of the Commercial List will have power, on the application of a party to commercial proceedings, to allocate the proceedings for disposal in the List. The categories of proceedings which may be so allocated include:

- claims or counterclaims in respect of a variety of specified commercial transactions where the value of the claim or counterclaim is not less than €1,000,000;
- claims or counterclaims irrespective of their value, which, having regard to the commercial and any other aspect, are considered appropriate for entry in the List;
- proceedings under the Arbitration Acts where the value of the claim or any counterclaim is not less than €1,000,000;
- proceedings for remedies in respect of intellectual property rights;
- appeals from or application for judicial review of decisions made or directions given under statutory regimes which having regard to the commercial or any other aspect, are considered appropriate for entry in the Commercial List.

1.4.2 The Commercial List will operate from premises at Bowe Street, Dublin 7, adjacent to the Four Courts, using courtrooms equipped with facilities for digital audio recording, document and evidence presentation and video conferencing. Case management by a judge will be available for litigation where the complexity of the case, the number of issues or parties, the volume of evidence, or other special reason, would warrant supervised preparation of the case for trial. The procedural regime will enable the court to provide an opportunity to the parties at an early stage to avail of alternative dispute resolution mechanisms, such as mediation or arbitration.

1.5 Decentralisation

1.5.1 The Minister for Finance, in his Budget speech of 3 December 2003, announced a decentralisation programme involving the relocation of 10,300 civil and public service jobs to 53 centres in 25 counties. The Companies Registration Office, currently located at Parnell Sq. Dublin 1, is among the agencies designated for decentralisation, with its services to be delivered from Carlow following its relocation. Ongoing developments with regard to the decentralisation programme are available on the Department of Finance website, www.finance.gov.ie.

1.6 Executive Summary of Recommendations

1.6.1 *Introduction*

The Review Group's substantive deliberations and recommendations are contained in Chapters 4 to 10. In the body of each chapter, particular issues are to a greater or lesser extent, contextualised and a recommendation formulated. At the end of each chapter the core recommendations are extracted and succinctly stated, with reference to the paragraph number in the body of the chapter where the issue is considered and the recommendation reached. In this chapter, each of those summaries of recommendations are clustered for readers' ease of reference and the 78 recommendations are listed.

1.6.2 *Liquidations (Chapter 4)*

In Chapter 4 the Review Group makes the following recommendations in relation to liquidations:

1. The establishment of a State-funded insolvency service in Ireland is not necessary as there is insufficient evidence to show that the absence of a State-funded service is creating major problems for company stakeholders. (4.11.1)

2. The existing power of the Director under s 12(2) of the 1990 Act to petition the Court for a winding up of a body corporate on the basis of any information obtained by the Director on foot of an investigation might be extended to allow the Director to petition the Court to have a company wound up on just and equitable grounds in the public interest. (4.13.6)

3. For the purpose of reducing costs for creditors in pursuing a judgment order, consideration should be given to the introduction in the Rules of the Superior Courts of a prescribed form, available online to help make this process simpler and cheaper to pursue. (4.15.21)

4. Section 214(a) of the 1963 Act should be amended to provide that a creditor, or two or more creditors acting collectively, should have standing to initiate insolvency proceedings. (4.15.21)

5. The current minimum debt level which can trigger an application to initiate insolvency proceedings, €1,269.74, is much too low and should be increased to €5,000. It is proposed to increase the minimum levels to €5,000 for an individual creditor and €10,000 for a group of creditors. (4.15.22)

6. A new provision should be inserted in the Companies Acts providing that when a company is notifying creditors of the creditors' meeting, creditors should also be circulated with a list of the other creditors and the name and address of the liquidator which the company proposes to appoint. (4.16.1)

7. A creditor who, with the liquidator's consent, in principle, provides funds to discharge fees, costs or expenses incurred by the liquidator should be entitled to reimbursement of those funds from the assets of the company in the same priority as currently attaches to the category of outlay for which the funds are provided. (4.17.8)

8. The limit on the amount of wages/salary due to any one claimant to which preference applies under section 285(3) of the 1963 Act should be increased from £2,500 (€3,174.35) to €10,000 and these figures should in future be reviewed periodically having regard to annualised average industrial earnings. (4.19.3)

9. The terminology used in s 285 of the 1963 Act should be updated by replacing the phrase "clerk, servant, workman, or labourer in the employment of a company" with the term the "employee". (4.19.4)

10. The preferential status for the Revenue Commissioners should be retained. (4.20.8)

11. There is no convincing reason for the reduction of the preference period for the Revenue Commissioners. (4.20.10)

12. There should be no change in the treatment of farmers as creditors in insolvencies. (4.21.5)

13. The information contained in the statement of affairs required to be filed by one or more of the directors and by the secretary of a company subject to a winding-up order should be expanded to include particulars of all disposals or other transactions by a company in relation to assets effected within two years prior to the commencement of the winding up. (4.22.1)

14. The period for furnishing of notice of the appointment of a liquidator in voluntary liquidations (currently 14 days) and court-ordered liquidations (currently 21 days) should be the same. (4.22.2)

15. Section 234 of the 1963 Act should be amended to provide expressly for the giving of directions by the court as to the position regarding retention or disposal of the seal, books, or records of a company where an application has been made to annul a

winding up order or stay proceedings in the winding up. (4.22.3)

16. Section 285 of the 1963 Act requires amending to reflect the recent amendment of the tax year to a calendar year. (4.22.4)

17. Sections 302 and 371A of the 1963 Act should be amended to allow applications to be brought in relation to an individual liquidator by the Director or the Registrar as to his defaults in relation to various companies. A similar provision should apply to examiners and receivers. (4.22.5) 18. In the case of court-ordered liquidations and creditors' voluntary liquidations a liquidator should be required to provide a more comprehensive report to the Registrar and, in the case of a court-controlled winding up, to the court, one year from commencement of the liquidation and annually thereafter, containing additional information more qualitative in nature, including the liquidator's estimated timescale for realisation of assets, and an explanation for delay in realising assets in line with the estimate. (4.22.6)

19. The practice whereby unclaimed dividends in windings up by the court have been lodged to the Companies Liquidation Account, which was envisaged as applying to unclaimed dividends in voluntary liquidations only, should be placed on a statutory footing and section 307 of the 1963 Act extended accordingly. (4.22.7)

1.6.3 *Share Capital (Chapter 7)*

In Chapter 7 the Review Group makes the following recommendations in relation to liquidations:

20. In the appropriate EU forums Ireland should express support for and work towards the possibility of introducing no par value shares. (7.5.7)

21. The par value of shares should be capable of being reduced, on the basis that the amount of the reduction is retained in the company capital account, and with identical limitations on distribution to shareholders as at present applies to share capital, share premium account, capital redemption reserve fund and capital conversion reserve fund. (7.6.4)

22. The par value of issued shares should be capable of being increased from other company capital (i.e. share premium account, capital redemption reserve fund and capital conversion reserve fund), from distributable reserves and from un-distributable reserves. (7.6.5)

23. While s 68(1)(c) of the 1963 Act is little used, and almost never used by a private company, there is little virtue in either repealing it or amending it and therefore no change is considered necessary. (7.6.8)

24. The need to cite authorised share capital in the CLS should be abolished. (7.7.2)

25. There is no need to vary section 23 of the 1983 Act whereby non-pre-emptive issues of shares and grants of options over shares under employee share schemes may be made by a board of directors without the requirement for a section 23 special resolution. (7.7.3)

26. Section 53(3) of the 1963 Act, which states that the amount payable on application on each share shall not be less than 5% of the nominal amount of the share, should be deleted. (7.7.6)

27. The law relating to capitalisation issues from revaluation reserve should be clarified so as to expressly permit capitalisation issues. (7.7.8)

28. Where shares are issued for a consideration other than cash, the requirement in section 58 of the 1963 Act to file a written contract documenting the agreement pursuant to which the company acquired the non-cash asset, or a Form 52 where there is no such written contract documenting the agreement, should be repealed. (7.7.10)

29. The Department of Finance and the Revenue Commissioners should consider changing the procedure for the stamping of documents in the interests of the efficient operation of business. (7.8.3)

30. The exact status of treasury shares should be clarified. (7.8.5)

31. Listed shares held as treasury shares (as defined by section 209 of the 1990 Act) should have their listing cancelled and any re-issue of such shares as ordinary shares shall be subject to the normal listing requirements for a new issue of shares. (7.8.6)

32. There should be no change in exemption for plcs from notifying, or in the continuing requirement for private companies to notify, share transfers from the previous return in its annual return under section 125 of the 1963 Act. (7.8.7)

33. The procedure for the reduction of capital under section 72 of the 1963 Act should be amended to remove, in most cases, the first court hearing – to approve the notification of/advertisement to the

shareholders of the passing of the resolution to reduce share capital and presentation of petition – by providing that any requirement to notify/advertise should be satisfied by (i) advertising in two daily national newspapers, as at present, along the lines of s 266(2) of the 1963 Act and (ii) notifying overseas creditors directly. (7.9.2)

34. Part IV of the 1983 Act should be disapplied to unlimited companies. (7.9.3)

35. Recommendation 11.10.8(i) of the First Report, which proposed the disapplication of the requirement on directors to make a notification under Part IV of the 1990 Act where the interest was less than 1% of the issued share capital, should be limited to private companies. (7.10.4)

36. A universal definition of "disclosable interest" should be added to the Companies Consolidation Bill so as to align the meaning for all disclosure purposes under the Companies Acts. (7.10.5)

37. The distinct provisions defining concert party behaviour contained in ss 73 et seq of the 1990 Act and in the Irish Takeover Panel Act and Rules be merged, preferably based on the more common and more often analysed and used provisions in the Irish Takeover Panel Act and Rules. (7.10.5) 38.
The law on notifiable interest should be consistent with the requirements under the Listing Rules of ISE. Accordingly the law should be amended to reduce the threshold for notification of individual and group acquisitions of shares in plcs from 5% to 3%. (7.10.6)

39. There is no change in the law proposed vis-à-vis bearer shares. (7.10.10)

40. A company ought to be empowered to enter into transactions whereby an undertaking or part of an undertaking or a subsidiary is transferred to a new company which issues shares as consideration to the shareholders rather than to the transferring company, notwithstanding the absence of adequate distributable reserves, where a validation procedure is implemented with respect to that transaction. (7.11.9)

41. Although the provisions concerning forfeiture, surrender and lien are little used, there is no amendment to them proposed. (7.12.1)

42. Section 38 of the 1983 Act appears to be the only provision in the Companies Acts where a quorum of members voting is specified. As such, it might be considered anomalous. However the Review Group was of the view that the balance of interest lay in favour of its retention. (7.12.6)

43. No change is proposed to shareholders' rights and duties, except to clarify the definitions of 'members' and 'shareholders'. (7.12.7)

1.6.4 *Debentures and Charges (Chapter 8)*

In Chapter 8, the Review Group makes the following recommendations in relation to debentures and charges:

44. Sections 93 to 97 of the 1963 Act have become less relevant. However they have not become redundant and should be retained so that the substantive law applicable to existing debentures is preserved. (8.1.2)

45. The sections (91 and 92) dealing with the register of debentures should be repealed. (8.1.3)

46. All charges created by companies should be registered in the CRO within 21 days of creation, save for any charge over categories exempted. (8.2.5)

47. The only exempted category should be charges over those assets specified in SI No.1 of 2004. (8.2.6)

48. Section 99(10)(a) of the 1963 Act should be amended to provide that "for the purposes of this Part the expression "charge" means a mortgage or a charge in an agreement (written or oral) created by a company over an interest in any property, assets or undertaking of that company, but shall not include a mortgage or charge in an agreement (written or oral) created by a company over an interest in cash, money credited to an account of a financial institution, or any other deposits, shares, bonds and debt instruments, units in collective investment undertakings, money market instruments and claims and rights (such as dividends or interest) in respect of any of the foregoing". (8.2.10)

49. The priority of charges, subject to the rules of other specialist registries, should run from the date of filing (or preliminary filing, if done), and not from the date of creation, of the charge. (8.3.5)

50. A preliminary filing of an anticipated charge should be permitted; such preliminary filing to be effective if particulars of the charge are registered within 21 days of the filing and 21 days of its creation. (8.3.6)

51. The form C1 should not require the presenter to categorise the charges to state the amount secured by the charge or to indicate, whether by ticking a box or filing another form, whether the charge

requires to be perfected in another jurisdiction. (8.4.3, 8.4.4 & 8.4.5)

52. The transfer of a charge should be notifiable to the CRO. Failure to notify should not however invalidate the charge or transfer. (8.4.6)

53. The prescribed particulars should be categorised in the form C1 with additional details of the property specifically listed in the security document. (8.4.10)

54. The form C1 should be accepted by the Registrar as valid if signed by a solicitor acting for one party. (8.4.11)

55. Details of any covenants, including any negative pledge, should not be inserted on any form C1, and if inserted, should be ignored by the Registrar (other than in respect of a floating charge created in favour of the CBFSAI). (8.5.2)

56. The 21 day registration period should not be extended to allow time for posting as currently permitted under section 99(3). of the 1963 Act. (8.6.1)

57. There should be no requirement to file a form (form 47C) that a charge, over property situate outside the State requiring registration outside the State to make the charge valid, has been presented for registration (outside the State) as currently required under section 99(5). (8.6.3).

58. Subsections (4), (6), (7) (8) and (9) of section 99 of the 1963 Act should be repealed. (8.6.2, 8.7.1 & 8.8.1)

59. A company and its officers should not be subject to a penalty for failing to register particulars of charges as currently required by section 100. Sections 100(3), 100(4), 101(2) and 106(2) should also be repealed. (8.9.1)

60. A judgment creditor rather than a debtor should be required to file details of the judgment mortgage. The 21 day registration period should not apply to judgment mortgages. (8.10.1)

61. The Registrar should continue to be required to maintain a Register of charges for each company and such register be open to the public – section 103(1) (b) (iv) shall be repealed. (8.11.1)

62. When filing the form C1, there should be no requirement or facility to file a copy of the charge. (8.11.5)

63. The Certificate of Registration of Charge should be conclusive evidence that the requirements as to registration have been complied with only in respect of the charges particulars of which have been filed. (8.11.6)

64. Satisfaction of a charge may be registerable by a statement signed by two directors of the chargor or by a director and the secretary of the chargor. Where the statement is false, the signatories could in certain circumstances, be personally liable for the debts of the company. (8.12.1)

65. Late registration may be effected only by court order – retention of section 106(1). (8.13.1)

66. Copies of charges may be inspected by a company's members or creditors, subject to a fee. The fee shall be fixed at the same rate as the fee payable for a physical inspection of the company's file at the CRO be payable to the company for each inspection (8.14.1)

67. Form 8E, which is similar to the form C1, should be amended in accordance with Review Group recommendations for amendment to the form C1. (8.15.2)

68. Particulars of charges created by companies incorporated outside Ireland which have not registered on the external register should not be capable of registration and only companies incorporated outside Ireland which have registered on the external register should be required to deliver particulars of charges created over Irish property. (8.15.4)

69. No change is recommended as to the filing of a form 8E where a charge is created by a branch of a company registered in the CRO pursuant to the European Communities (Branch Disclosure) Regulations 1993. (8.15.5)

70. Sections 108 and 112 of the 1963 Act, as well as section 99(10)(b), deal with the consequential provisions on the enactment of new legislation. Similar provisions as appropriate, should be incorporated in the Consolidation Bill. (8.17.1)

71. Security for an obligation under a financial contract within the meaning of the Netting of Financial Contracts Act, 1995 should be subject to the requirements for registration where such security falls within the definition of a charge. (8.18.2)

1.6.5 *E.U. Developments in Company Law (Chapter 9)*

In Chapter 9 the Review Group considered the optimum way to address the implementation and consolidation in Ireland of "company" law which has emerged and will continue to emerge from EU initiatives set in train under the FSAP and makes the following recommendations:

72. The Consolidation Bill should incorporate as much of stable company law as it can. (9.9.1)

72. The Consolidation Bill should incorporate as much of stable company law as it can. (9.9.1)

73. That part of companies legislation dealing with investment companies (Part XIII of the 1990 Act and the European Communities Undertakings for Collective Investment in Transferable Securities Regulation 2003) will be decoupled from company law proper and provided for in a separate contemporaneous enactment, ideally encompassing law relating not only to investment companies but also to other forms of collective investment funds. (9.9.2)

74. Certain FSAP provisions should be decoupled from the company law Consolidation Bill. (9.9.3)

1.6.6 *Accounting and Auditing Issues (Chapter 10)*

In Chapter 10 the Review Group makes the following recommendations in relation to accounts, audits and annual returns:

75. It is neither timely nor appropriate to develop a national accounting standard setting body at this juncture. (10.9.5)

76. The criteria for SMEs should be revised using the rate of inflation since 1993 as an approximate guideline for increasing limits. The result of this is a balance sheet total of €2.5m and a turnover of €5m for a small company and a balance sheet total of €5m and a turnover of €10m for a medium-size company. (10.12.3).

77. The ODCE should be accorded the power to require production upon request of a company's unabridged accounts as circulated to its shareholders. (10.12.8)

Endnotes

[1] The relevant provisions of Part 7 Company Law Enforcement Act 2001 are contained in Appendix 1 to this report.

[2] Companies Report 2002.

[3] Office of the Director of Corporate Enforcement, Companies Registration Office, Irish Accounting and Auditing Standards Authority, Company Law Review Group.

[4] A series of policy objectives and specific measures to improve the Single Market for financial services over the subsequent five years was outlined in a Financial Services Action Plan adopted by the European Commission on 11 May 1999. The Action Plan suggested indicative prioriies and time-scales for legislative and other measures to tackle three strategic objectives, namely a Single Market for wholesale financial services, open and secure retail markets and state-of-the-art prudential rules and supervision. Adoption of the FSAP took place against a background of the introduction of the euro, considerable restructuring in the financial services sector and greater recognition of the need to take account of consumer concerns.

[5] The Lisbon Strategy is a commitment to bring about economic, social and environmental renewal in the EU. In March 2000, the European Council in Lisbon set out a ten-year strategy to make the EU the world's most dynamic and competitive economy. The objective of the strategy is that a stronger economy will drive job creation alongside social and environmental policies that ensure sustainable development and social inclusion.

[6] Irish Financial Services Regulatory Authority.

[7] Irish Stock Exchange.

[8] Para. 9.1.3 of First CLRG Report.

[9] It was set up on an operational basis in 2002.

2

CHAPTER 2

Membership of the Company Law Review Group

two

2.1.1 The membership of the Company Law Review Group is as follows:

Chair:	Thomas B Courtney	Solicitor, Secretary, ICS Building Society
Members:	Paul Appleby	Director of Corporate Enforcement
	Marie Daly	IBEC
	David Devlin	Consultative Committee of Accountancy Bodies - Ireland
	Paul Egan	The Law Society of Ireland
	Paul Farrell	Registrar of Companies
	Michael Halpenny	ICTU
	Muriel Hinch	Revenue Commissioners
	William Johnston	Arthur Cox
	Martin Jacobs	Institute of Chartered Secretaries and Administrators
	Roger Kenny*	Office of the Attorney General
	Ralph MacDarby	Institute of Directors
	Vincent Madigan	Department of Enterprise, Trade and Employment
	Maire O'Connor	Ernst & Young
	John O'Donnell SC	The Bar Council
	Nora Rice	Companies Registration Office
	Deirdre Somers	Irish Stock Exchange
	Enda Twomey	Irish Bankers' Federation
	Alacoque Condon**	Courts Service
Secretary:	Pat Nolan	Principal Officer,
		Department of Enterprise, Trade and Employment
Secretariat:	Paul Shortt	Administrative Officer
	Michael O'Leary	Executive Officer
	Jason Rehill	Executive Officer
	Colin Delaney	Clerical Officer
	John Lonergan	Clerical Officer

*Replaced by Jonathan Buttimore in 2003.
**Replaced by Noel Rubotham in 2003.

The scheme of Review Group committees is as follows:

LIQUIDATORS AND LIQUIDATION SERVICE

Chair: Marie Daly
Deputy: Paul Appleby
Secretary: Paul Shortt
Members: Alacoque Condon, Michael Halpenny, Muriel Hinch, Roger Kenny, John O'Donnell, Nora Rice

EU DEVELOPMENTS

Chair: Vincent Madigan
Deputy: Enda Twomey
Secretary: Pat Nolan
Members: David Devlin, Paul Egan, Martin Jacob, Máire O'Connor

ACCOUNTING AND AUDIT

Chair: David Devlin
Deputy: Máire O'Connor
Secretary: Pat Nolan
Members: Paul Appleby, Muriel Hinch, Enda Twomey

STEERING

Chair: Thomas B. Courtney
Members: Paul Egan, Paul Farrell, William Johnston, Ralph McDarby, Vincent Madigan, Máire O'Connor
Secretariat: Pat Nolan, Paul Shortt, Michael O'Leary, Jason Rehill

DEBENTURES AND RGISTRATIONS OF CHARGES

Chair: William Johnston
Deputy: Muriel Hinch
Secretary: Paul Shortt
Members: Paul Farrell, Nora Rice, Enda Twomey

CONSOLIDATION

Chair: Thomas B. Courtney
Deputy: Paul Egan
Secretariat: Pat Nolan, Paul Shortt, Jason Rehill
Advisors: Tanya Holly, Declan Murphy, Kevin O'Connell, Aillil O'Reilly

COMPANY MANAGEMENT REGULATIONS

Chair: Paul Egan
Deputy: Nora Rice
Secretary: Paul Shortt
Members: Marie Daly, Martin Jacob, Ralph MacDarby

SHARES AND SHAREHOLDERS

Chair: Ralph MacDarby
Deputy: Martin Jacob
Secretary: Pat Nolan
Members: Paul Egan, Paul Farrell, Deirdre Somers

3

CHAPTER 3

Update on Company Law Reform and Consolidation Bill: Proposed Structure

three

3.1 First Report of the Company Law Review Group

3.1.1 The First Report of the Review Group, which was completed on target in December 2001, was published on 28 February 2002, and widely disseminated to interested parties.

3.1.2 In its First Report the Review Group came to the conclusion that it is necessary to create a new structure for Ireland's company laws that will facilitate innovation and capacity building. The recommendations in the First Report are intended to provide the cornerstone for the new companies code. The Review Group's aspiration is, through a series of reports, to establish a company law framework perceived as among the world's best; a framework with a degree of efficiency and effectiveness in legislation and indeed in the administration of justice such that Ireland becomes a forum of choice for dispute resolution by corporate litigants. In this respect, the Review Group is ever mindful of the injunction contained in s 68(2) of the 2001 Act, viz.:
In advising the Minister the Review Group shall seek to promote enterprise, facilitate commerce, simplify the operation of the Companies Acts, enhance corporate governance and encourage commercial probity.

3.1.3 The focus of the Review Group's report (31 December 2001) was on simplification and improving transparency. The general objectives of the report are that the reformed and streamlined companies code should be effective, intelligible to company directors and shareholders, and that the law should reflect how business is actually transacted. The big idea at the heart of the report is to replace the public company (plc), by the most common type of company, the private company limited by shares, as the standard type of company in Ireland. This will accord with the reality that 89% of all companies registered in Ireland are private companies limited by shares.

3.1.4 The reform will bring the totality of the content of the companies code, insofar as it applies to private companies, into a single Part of a new principal Companies Bill. A director or other stakeholder in a private company will only have to read that Part of the new Act instead of, as at present, having to plough through many provisions which relate only to plcs limited by shares or to specialised forms of company. This will bring the advantage, particularly to small and medium sized businesses, of clarity and relative simplicity in the regulatory and compliance regime. Those very substantial Parts of the new Act that only concern plcs limited by shares and the other more esoteric types of company will be physically distinct from the Part applying to private companies limited by shares.

3.1.5 The First Report maps out a framework for the consolidation of what is currently an extremely complex companies code into a single act. The code at present comprises: eleven Acts, all of which have to be read with reference to each other; in excess of 1,000 individual sections of law; and in excess of 300 separate offences.

3.1.6 The Review Group's proposals to reform and consolidate company law were submitted to the Government and received approval in their totality on 26 July 2002. The core principle on which the General Scheme of a Bill (legislative proposals or 'Heads' of a Bill) is being drafted is the simplification of company law. Consolidation in a single statute is itself a simplification measure, and the additional objectives of the initiative are that the reformed and streamlined companies code should be effective, intelligible to company directors and shareholders, and that the law should reflect how business is actually transacted.

3.1.7 For the past two years drafting of the General Scheme of a Bill to give effect to the recommendations of the Review Group has been underway under the aegis of the sponsoring Department for the legislation, the Department of Enterprise, Trade and Employment. The Steering Committee of the Review Group now has a dual role. It operates not only as the Review Group's bureau but also as a dedicated consultative committee on the emerging legislative proposals. As the legislative proposals are formulated, they are considered initially by the Steering Committee and then by the Review Group as a whole before being adopted as a draft and posted on the website of the CLRG, www.clrg.org, for the information of all interested parties.

3.1.8 The task of drawing up proposals ab initio for each Part of the new Bill draws significantly in the first instance on the expertise of the Steering Committee, and at a wider remove on the expertise of the Review Group as a whole.

3.1.9 As the Review Group has worked over the past two years it has modified the component Parts of the proposed new Bill on the basis of issues highlighted or developed in its debates but the overall framework is still very much the debates but the overall framework is still very much the same as proposed in the Group's First Report. As of March 2004 it is anticipated that the new Companies Bill will have the following structure:-

Group A	Private company limited by shares
Part 1	Preliminary and Definitions
Part 2	Incorporation and Consequential Matters
Part 3	Share Capital
Part 4	Corporate Governance
Part 5	Duties of Directors and other Officers
Part 6	Accounts, Audit and Annual Return
Part 7	Debentures and Registration of Charges
Part 8	Receivers
Part 9	Reconstructions
Part 10	Examinerships
Part 11	Winding-Up
Part 12	Dissolution and Reinstatement
Part 13	Compliance, Investigation and Enforcement
Part 14	Regulatory and Advisory Bodies[1]

Group B	Companies and bodies corporate other than the private company limited by shares
Part 1	Definitions
Part 2	Public Limited Companies
Part 3	European Companies (Societas Europeae or 'SE')
Part 4	Designated Activity Companies
Part 5	Guarantee Companies
Part 6	Unlimited Companies
Part 7	Overseas Companies
Part 8	Unregistered Companies
Part 9	Conversion and Re-registration
Part 10	Miscellaneous Bodies Corporate
Part 11	Collective Investment Schemes

3.1.10 To encourage an optimal degree of discussion on the legislative proposals in the new Bill the Tanaiste and Minister for Enterprise, Trade and Employment, Mary Harney T.D., has directed that as the proposed Heads of each Part of the new Bill are drafted they should be posted on the website of the Review Group for the purpose of informing all interested parties. Comments received on the proposals can in turn inform the final shape of these as they are presented to Government for approval.

3.1.11 Because one of main elements in the Review Group's strategy has been the establishment of the private company limited by shares as the standard company type the main focus of the Review Group's work on the new Bill over the past two years has been on the elaboration of the private company statute (Group of Parts A above). The draft General Scheme for Group of Parts A is near completion. All of the constituent Parts of Group of Parts A have now been considered and agreed by the Review Group (with the exception of Part A11, Winding Up where a first draft is almost complete). The other company types will be addressed in Group of Parts B and will be defined by reference to the private company statute, i.e. provisions may apply, not apply, apply in an amended form or be supplemented by additional provisions.

3.1.12 The main changes to existing law proposed in those Parts of the General Scheme of the Consolidation Bill which have been examined in detail to date are set out below. Full details for each Part are posted on the Review Group's website. The process of drafting the General Scheme of the Bill is a dynamic one and Parts will continue to be posted as they are agreed until the full draft General Scheme is complete.

3.2 Part A1 Preliminary and definitions

3.2.1 A number of important new definitions have been devised for this part. Among the most significant of these are:

- Constitution: elaboration of the single-document constitution governing the private company limited by shares (cls);
- Private company limited by shares *(cls)*: the new standard type of company
- Designated activity company *(dac)*: a dac will be similar to an existing private company limited by shares in that it will have limited objects and be governed by both a memorandum and articles of association;
- Management company
- De Facto directors
- Validation Procedure: an omnibus validation procedure for approval of otherwise restricted activities on the part of a company or its directors will be introduced covering 5 areas of activity and replacing the existing 3 stand-alone procedures
- Parent and subsidiary companies: a new definition of parent and subsidiary companies will amalgamate Section 155 of the 1963 Act and Regulation 4 of SI 201 of 1992.

3.3 Part A2 Incorporation and Registration

3.3.1 Part A2 restates existing provisions in the Companies Acts, but also gives effect to two main recommendations in the Review Group's First Report, i.e. abolition of the ultra vires concept through granting a private company limited by shares *(cls)* the legal capacity of a natural person and, also with regard to the cls, replacing the existing memorandum and articles by a single-document constitution.

3.3.2 Very importantly, a regime for the conversion of existing private companies to cls type companies is set out at Chapter 5 of this Part. This is substantially based on a model of regime reform that has already worked, i.e. that undertaken in New Zealand in the 1990s. During a specified period following commencement of the new Act re-registration as a cls can be effected by a decision of a company is directors or members. There are remedies for persons who believe themselves oppressed by such a decision. The transitional regime provides for an existing private company limited by shares to be converted to a cls at the end of the transition period unless it has re-registered as a designated activity company *(dac)* before a given date. Thus an existing private company limited by shares will know precisely what the law applicable to it is at any time.

3.3.3 This Part also proposes to increase the limit on the membership of a private company to 100 from 50 as is currently prescribed in subsection 33(1) of the 1963 Act.

3.4 Part A3 Share Capital

3.4.1 All the substantive changes proposed are set out in Chapter 6 of this Report.

3.5 Part A4 Corporate Governance

3.5.1 Significant proposals in this Part include an amended re-enactment of section 131 of the 1963 Act which requires a company to hold an AGM every year. The Part provides that a company may dispense with the requirement to hold an annual general meeting in any year where the members entitled to attend and vote at the general meeting sign, before the latest date for the holding of the annual general meeting in the next year, a written resolution. This reflects the operational reality of many closely held private companies limited by shares in Ireland. In addition, any resolution required to be passed by the company at general meeting may be achieved by unanimous written resolution of the company.

3.5.2 This Part further provides for a single validation procedure to approve that which would otherwise be prohibited by section 60 of the 1963 Act (provision of financial assistance by a company for the purchase of its own shares), section 31 of the 1990 Act (guarantees and the provision of security in connection with loans, quasi-loans and credit transactions for directors or persons connected) and section 256 of the 1963 Act (members' voluntary winding up). The gratuitous disposition of assets to members in company reconstructions has also been included.

3.6 Part A5 Duties of Directors and other Officers

3.6.1 This Part will give a statutory definition to *de facto* directors. It extends the High Court decision in *Re Lynnrowan Enterprises Ltd*. (High Court, 31 July 2002) in that de facto directors shall now, for all purposes, be treated as directors of the company, and not merely for the purposes of restriction orders. Thus, they will be under the same duties as ordinary directors even though not registered as directors. A saving provision for those giving professional advice has also been inserted. Many subsequent provisions in this Part are now expressly stated to apply to de facto directors.

3.6.2 The Part sets out the duties and responsibilities of the company secretary. A duty is imposed upon the directors to ensure that the secretary has the suitable skills to maintain records required by the Companies Acts.

3.6.3 The fiduciary duties of the directors are, for the first time, set out in the companies code. Since they are derived from principles established by the Courts, they are stated in general rather than specific terms and are not intended to be exhaustive.

3.7 Part A6 Accounts, Audit and Annual Return

3.7.1 The main aspect of reform in this Part, as detailed in Chapter 9 of this report is the consolidation of elements drawn from 13 Acts and Statutory Instruments into a single Part in the new Bill. The Part will also amalgamate the two sources of our law in this area, domestic statutes and EU Directives.

3.7.2 Significant specific reforms in this Part include:

- Increasing the monetary amounts in the definitions of small and medium companies for accounting and reporting purposes to the maxima permissible under Directive 2003/38/EC.

- Creating a common definition of parent and subsidiary undertaking for use throughout the act, encompassing the previous definitions in section 155 of the 1963 Act and Regulation 4 of SI 201 of 1992.

3.8 Part A7 Debentures and the Registration of Charges

3.8.1 The reforms in this Part are detailed in full in Chapter 7 of this Report.

3.9 Part A8 Receivers

3.9.1 The main innovation in this Part is a new provision setting out the powers of a receiver. The provision itself is modelled on section 420 of the Australian Corporations Act 2001. It gives certain specific powers to receivers, in addition to those conferred on them by the court order or by the instrument under which they were appointed.

3.9.2 Conferring statutory powers on receivers, in this manner, is intended to alleviate many of the problems that may arise from poorly drafted debentures.

3.10 Part A9 Reconstructions

3.10.1 The recommendations in Chapter 6 (sections 6.9 and 6.10) of the First Report regarding takeover offers and schemes of arrangement are implemented in this Part. In addition, the notice provisions now contained in the Companies (Forms) Order 1964 are brought into the statute.

3.10.2 It is likely that this Part may require further revision, when the pending EU Takeover Directive emerges.

3.11 Part A10 Examinerships

3.11.1 A new provision has been inserted which expressly applies EC Regulation 1346/2000 on insolvency proceedings (implemented and added to by S.I. No.333 of 2002 EC (Corporate Insolvency) Regulations 2002) to the Examinership process. These Regulations are concerned with cross-border insolvencies. Examinerships are included in the definition of "insolvency proceedings" for the purposes of the Regulation. The net effect of such provision is that once insolvency litigation is commenced in a Member State, that State's courts direct the proceedings notwithstanding that the company's assets may be located in another Member State.

3.12 Part A11 Windings up

3.12.1 A first draft of this Part will shortly be considered by the Review Group.

3.13 Part A12 Dissolutions and Re-Registrations

3.13.1 A number of additional requirements have been introduced for the Registrar to fulfil in notifying a company of the intention to strike off. Enhanced exchanges of information are provided for between the Registrar and the Director as regards the directors of a struck off company. The administrative practice of voluntary strike off is being put on a statutory footing.

3.14 Part A13 Compliance, Investigation and Enforcement

3.14.1 This Part consolidates in a systematic way the various provisions of the Companies Acts which deal with offences and related penalties.

Endnotes

[1] Office of the Director of Corporate Enforcement, Companies Registration Office, Irish Accounting and Auditing Standards Authority, Company Law Review Group.

4

CHAPTER 4

Liquidations

four

4.1 Introduction and Context

4.1.1 In the course of preparing the First Report of the Review Group it became clear that a number of problems for which complex solutions or responses had to be devised in Irish company law arise from the absence of an official liquidation service. Accordingly, the Review Group concluded that the case for and against a State-funded public interest liquidation service should be considered in the Review Group's second work programme and recommended accordingly (recommendation 178 of the First Report).

4.1.2 The Review Group also planned to consider issues with regard to winding up in its second programme. As originally conceived, it was intended that there would be distinct committees within the Review Group on (a) liquidations and the liquidation service and (b) winding up. However, on foot of initial discussions it became clear that because of the overlapping nature of the issues for consideration it made sense to combine the two committees and this was done.

4.2 Types of liquidation

4.2.1 The law on the winding up and liquidation of companies in Ireland is set out in comprehensive detail in the Companies Acts.

4.2.2 Currently, there are two categories of liquidation:

- Compulsory or court liquidation; and
- Voluntary liquidation, which can be either
  - a members' voluntary winding up, or
  - a creditors' voluntary winding up.

4.2.3 In a compulsory liquidation, a winding-up order is made by the High Court, usually on foot of application by a creditor of the company, on the grounds that the company is unable to pay its debts as they fall due[1]. The court appoints an 'Official Liquidator', who may be nominated by the petitioning creditor.

4.2.4 Voluntary liquidation is more common than compulsory liquidation. It is only possible to have a members' voluntary winding up where the company is solvent. A members' voluntary winding up is commenced by a special resolution of the members (adopted by not less than 75% of members present and voting at the meeting).

4.2.5 A creditors' voluntary winding up is used where the company is unable to pay its debts as they fall due and the members resolve that the company ought, on that basis, to be wound up. A creditors' voluntary winding up is generally commenced by way of ordinary resolution (adopted by a majority of members present at the meeting). Under this process, a company is obliged to call a meeting of its creditors for the day of the meeting at which the winding up resolution is to be proposed, or the following day – at least 10 days notice of the creditors' meeting is required to be given to the creditors. A creditors' voluntary winding up is generally less expensive than a court liquidation.

4.2.6 It can be seen from above that instances of insolvent companies or corporate insolvencies can largely be equated with compulsory liquidations and creditors' voluntary liquidations. The Companies Registration Office confirms that 412 insolvent companies commenced winding up during 2002. In addition, it is probable that the dissolved company figures for 2002 included some quantum of insolvent companies. However the extent of this is unquantifiable by its nature.

4.3 When is a company insolvent?

4.3.1 A company is insolvent when it is unable to pay its debts as they fall due. Section 214 of the Companies Act 1963 deems that a company will be unable to pay its debts, if any one of the following conditions is satisfied:

- where a creditor who is owed a debt of at least €1,905 has served a notice in writing of the debt upon the registered office of the company requiring payment within 21 days from the date of the notice and the company has failed to discharge the debt or make alternative arrangements for the payment of the debt within that period;
- where a judgement has been obtained by a creditor and the appropriate sheriff has been unable to seize sufficient funds or property of the company, in order to discharge the total value of the debt and the costs of seizure;
- where a court is of the opinion, on an examination of the facts before it, that the company is unable to pay its debts, including debts which may become due or will arise in the future.

4.3.2 It is not usually a sufficient test of insolvency that a company has an excess of liabilities over assets at a particular point in time, because the company may be able to meet its obligations as they fall due for some time. However, directors are expected to review on a regular basis the implications of a net assets/liabilities situation[2].

4.4 What kinds of companies become insolvent?

4.4.1 A survey by the Institute of Chartered Accountants in Ireland in 1996 indicated that small/owner-managed companies form the greater proportion of companies becoming insolvent. To a large extent this mirrors the structure of Irish business generally. The survey indicated that management related factors were a cause of insolvency in 65% of cases and market related factors a cause in 35% of cases.[3] Bad management typically manifested itself in a cavalier approach to the keeping of accounts. This overall pattern of factors leading to insolvency is unlikely to have changed significantly since that survey.

4.5 Incidence of corporate insolvencies

4.5.1 The baselines for comparison of business activity for 2002 show a total of 153,000[4] companies on the Companies Register, of which 14,000 were newly established that year.

4.5.2 Conventional wisdom is that higher GNP growth generally equates with an increased rate of company formation and proportionately fewer insolvencies. It is debatable if the converse of this is true. GNP growth in Ireland for 2001 is estimated at 3.8%[5], reasonable in international terms but significantly lower than growth in each of the previous four years.[6] The estimated GNP growth in Ireland in 2002 is 0.1%.[7] While there is a small year-on-year absolute increase in the number of company insolvencies – up from 949 to 1,176, there has been no corresponding decrease in the incidence of company formation.

4.5.3 It is difficult to get an exact figure for the incidence of corporate insolvencies in Ireland. The Table below gives figures, as reported to the CRO, for companies that went into liquidation in 2002[8] and 2003, respectively. Furthermore, a total of 7,104 companies were dissolved in 2002 . This global figure includes companies struck off the register for failure to comply with certain filing requirements (the majority), companies which had requested voluntary strike off on the basis that they had ceased business and had no assets or liabilities, and companies which completed the liquidation process during 2002 but which would most likely have commenced liquidation in previous years.

4.5.4 The figures below show the incidence of liquidations initiated in 2002 and in 2003 to end September and include both solvent and insolvent liquidations. It is also likely that a proportion of the companies that were dissolved in this period for failure to make returns were insolvent.

Year	2002	2003
Court order to wind up and appoint liquidator	35	25
Court order to wind up and appoint provisional liquidator	2	9
Special resolution to wind up and appoint a liquidator	763	589
Special resolution to wind up	104	69
Special resolution to wind up and appoint joint liquidators	0	0
Ordinary resolution to wind up and appoint liquidators	255	187
Ordinary resolution to wind up	17	15
TOTAL	**1,176**	**894**

Source: CRO

4.6 Effect of winding up

4.6.1 A company, from the commencement of the winding up, must cease to carry on its business except so far as may be required for the beneficial winding up of the company, but the corporate state and corporate powers of the company will continue until such time as the company is dissolved. Dissolution takes place when the winding up is complete. In the case of court liquidation, the liquidator, when the affairs of the company have been completely wound up, makes an application to court for an order that the company be dissolved with effect from the date of the court order. In a voluntary winding up, the liquidator files the return of the final meeting of members (and a meeting of the creditors, if applicable) with his final account, and the Registrar registers the result. Three months after the date of registration of these documents, the company is deemed to be dissolved.

4.6.2 The following table describes the effect of the commencement of winding-up on each stakeholder in the process.

Stakeholder	Action
Directors' Role	Ceases
Creditors	Claims crystallise - Liquidator proofs and distributes available assets to various classes of creditors
Shareholders	Shareholding unaffected in a limited company; shareholders' liability is limited to the amount if any, unpaid for their shares.. Any surplus available after payment of Creditors to be distributed to Shareholders
The Business	Usually ceases. Liquidator may continue to trade to maximise asset values or to complete work in progress.

4.7 Position of creditors

4.7.1 The Review Group noted the difficulty of obtaining current data on companies that are insolvent but unliquidated. Such companies, which cease to trade without liquidating, only show up eventually on a CRO strike off list. As CRO allows a lengthy period to elapse before moving to strike off companies for the non-filing of annual returns, it could be quite some time before such a company is listed for strike off. CRO data show a number of companies passed a winding up resolution putting the company into a creditors' voluntary winding up, in relation to which no liquidator had been appointed either by the company or the creditors. While the number of such companies is not large, the figures indicate a rising trend. It is believed that this may reflect an effort to circumvent the provisions of the 2001 Act which require all liquidators to report to the ODCE.

4.7.2 The situation of a creditor in an insolvent dissolution is undoubtedly difficult. Given the existence of preferential creditors, there is scant comfort for other unsecured creditors. Where smaller debts are owed, it is unlikely that creditors will seek costly compulsory liquidation of the company and even if they do, the value of their debt is likely to be substantially eroded, if not entirely, by liquidation costs. It is even more difficult to recover debts from a company which has been struck off the register and dissolved for failure to file annual returns, as there must be an application to court by a creditor to have the company restored in order that the company can be made subject to a court order for winding up.that creditors will seek costly compulsory liquidation of the company and even if they do, the value of their debt is likely to be substantially eroded, if not entirely, by liquidation costs. It is even more difficult to recover debts from a company which has been struck off the register and dissolved for failure to file annual returns, as there must be an application to court by a creditor to have the company restored in order that the company can be made subject to a court order for winding up.

4.7.3 Using a sample of 30 recent liquidations[9] it is possible to show some average liquidation costs which indicate the potential difficulties which individual creditors may face in pursuing unliquidated companies which have ceased to trade, whether struck off or not, for debts due them.

4.7.4 Of the 30 liquidations, the average amount recovered was IR£52,409 (€66,545.70) of which liquidation costs (excluding Court fees but including legal fees) was IR£17,664 (€22,428.65). This represented an average of 33.7% of the available funds, thus indicating that the process was unlikely to be used by small creditors. This would mean it would be worthwhile for a creditor to pursue an unliquidated company, whether struck off or not only where substantial monies remain outstanding and where the debtor company has sufficient assets to satisfy any judgment obtained by the creditor. Where smaller debts are owed, it is unlikely that creditors will seek the liquidation of the company and if they do the value of their debt is likely to be substantially eroded by liquidation costs.

4.8 Compliance and Enforcement Issues

4.8.1 The immediate background to the recommendation to consider a State-funded liquidation service arose from the intensive strike-off process, initiated by the CRO in 1998, to enforce compliance with the requirement by companies to file annual returns. The computer system of the CRO automatically identifies companies that fail to deliver their annual returns and accounts on time. Where a company fails to file an annual return for any one year, then the company is eligible to be struck off the register. This initiative has resulted in a dramatic improvement in the proportion of companies filing a current annual return – up from 44% (of those due to file) in 1998 to 98% in 2000.[10] The possibility of strike off from the companies' register for non-compliance with filing requirements serves as a powerful incentive to companies to comply with the law.

4.8.2 Despite the efficacy of this policy, concerns have been expressed to the Review Group about the consequences for the creditors of a company struck off the register for non-compliance with filing requirements. Furthermore, strike off enables companies to avoid the obligation to wind up in accordance with the Companies Acts, as a number of the companies included on the CRO strike off list are companies that have ceased to trade but have not initiated winding-up proceedings.

4.8.3 Following strike off, restoration may be achieved by a company making application to the Registrar to have itself restored to the register, subject to that company providing the necessary outstanding returns. If more than 12 months have elapsed since the dissolution date of the company, the application by or on behalf of the company for restoration must be made to the High Court. A creditor may apply to either the Circuit Court or the High Court at any time from the date of dissolution of the company until 20 years have elapsed to have the company restored.

4.8.4 The concerns expressed to the Review Group were to the effect that it might suit unscrupulous company directors not to restore the company following strike off, as this makes it both more costly and more difficult for a creditor to proceed to recover monies due from the company. The general issue on compliance can be cogently summed up in the words of Eric Orts, Professor of Legal Studies and Management at the Wharton School of the University of Pennsylvania[11]:

> *"Business enterprises are socially constructed entities that bring together interests under a common legal and economic structure for the advancement of the business as a whole. Inevitably, some people will care much more about themselves than the collective aims of the enterprise. In extreme cases, some people will have only their own interests in mind, despite the fact that they occupy high-ranking positions that demand fiduciary obligations to others…In unscrupulous hands, rules and procedures that are designed to channel self-interest towards collective ends become merely obstacles to be overcome rather than norms to be followed"*

4.8.5 In its consideration of the issues involved with regard to strike off, the Review Group had regard to existing relevant provisions of company law which might be utilised by creditors, to the powers conferred on the Director in the 2001 Act and also to changes in CRO procedures introduced by the 2001 Act. The Review

Group concluded that frequent use of strike off could give rise to circumstances which make it more difficult for creditors to proceed with court action against a debtor. It was further noted by the committee that following the implementation of the increased late filing penalty in October 2001, the CRO had scaled back the use of strike off as an enforcement weapon to secure the filing of outstanding annual returns.[12] Nevertheless it remains a powerful compliance mechanism. The nub of the problem for creditors however is not the struck off status of the debtor company. Rather, it is the fact that the debtor company is unliquidated and may well be insolvent. The less solvent a company is, the less likely it is to be restored and put into compulsory liquidation by an aggrieved creditor.

4.8.6 For insolvent companies, the winding-up process is similar to the bankruptcy procedure in the case of an individual. However the law, the processes and the Stateofficers involved in corporate insolvency and individual bankruptcies are entirely distinct from each other. A bankruptcy is administered by an officer of the Courts Service known as an Official Assignee. The liquidation of a company is carried out by a person appointed either by the company, the creditors of the company, or the High Court. The liquidator will sell all the company's assets and pay the company's debts in order of priority.

4.8.7 In considering how to deal with unliquidated insolvent companies a primary issue for consideration is if a State-funded liquidation service might be somehow utilised to liquidate such companies. Consideration of the case for a State-funded Insolvency Service for Ireland is not new. Recently, the issue of a State Insolvency Service was considered by the Working Group on Company Law Compliance and Enforcement (WG). Its November 1998 Report noted the role of the Insolvency Service in the UK which

> *"appoints Official Receivers in cases where insufficient assets exist to pay private insolvency practitioners to liquidate the assets of bankrupts and insolvent companies."*

4.8.8 The report went on to note that:

> *"While the service is profit-making, the Group was reluctant to recommend the establishment of an equivalent State infrastructure in Ireland. Rather the Review Group propose a series of more modest measures which the Review Group believe will nevertheless make an impact in dealing with the problem of companies which cease to trade without being wound up."*

4.8.9 Finally, the report notes that:

> *"The Group recognises…that the success or otherwise of these recommendations may require to be reviewed in due course by the Company Law Review Group."*[13]

4.8.10 Although that report did not set out the analysis on which its conclusion was based, the Review Group understands that the profitability of the Insolvency Service in England and Wales was founded in part on a treasury management function for the proceeds of all liquidated assets (including those generated by private sector insolvency practitioners). The introduction of such arrangements in Ireland would require substantial legal and operational changes, and it was very unclear if these changes could be justified solely in the context of addressing the discrete problem of unliquidated insolvent companies. The WG accordingly decided to recommend that sufficient powers should be conferred on the proposed Director to address the problem where warranted on a case-by-case basis. It is relevant also to note that the Insolvency Service is well resourced financially. The bulk of its operating costs in the year 2001-2002 came from two sources – fees charged to insolvent estates administered by Official Receivers and by insolvency practitioners; and investment income from the Insolvency Service Account and Insolvency Services Investment Account.

4.9 Position in other Jurisdictions

4.9.1 The general issue of devising a satisfactory legal liquidation and winding up framework for insolvency is one which has challenged not only Irish law-makers but others around the world. For historical and cultural reasons insolvency law in Ireland has most similarities with other common law jurisdictions. In our review of insolvency regimes elsewhere for preparation of this Report it was noted that many options exist in other jurisdictions. The website of the International Association of Insolvency Regulators (IAIR), www.insolvencyreg.org, can be used to access reports on the regulation of insolvency in a range of countries, mostly common law jurisdictions. Approaches towards insolvent companies have developed over time in response to domestic circumstances, but no single solution appears to be ideal to adopt in Irish circumstances. What is clear is that in every country in question the authorities are trying to square the circle of:

- Orderly winding up;
- Facilitation of aggrieved creditors
  - o to initiate compulsory liquidation
  - o to recover a reasonable proportion of debts owed to them; and
- Investigation and prosecution of negligent or fraudulent behaviour on the part of company officers.

4.9.2 For Ireland now, the issue is whether a State-funded insolvency service is required to deal with unliquidated insolvent companies, whether struck off or not. This is not an easy question to answer. Unlike the UK, most other common law jurisdictions with which Ireland shares a common legal heritage and many common processes and forms of organisation do not have State Insolvency services.

4.9.3 The objective of the UK Insolvency Service as set out on its website www.insolvency.gov.uk is to provide the essential mechanisms and efficient means for dealing with individual and corporate insolvency, and to investigate fraud and misconduct in insolvencies to ensure that genuine enterprise is advanced and consumers and the general public are protected.

4.9.4 The key functions of the Insolvency Service include the following;

- o To administer and investigate the affairs of bankrupts and companies and partnerships wound up by the court (compulsory liquidation), and establish why they became insolvent;
- o To act as trustee/liquidator where no private sector insolvency practitioner is appointed;
- o To take forward reports of bankrupts' and directors' misconduct;
- o To deal with the disqualification of directors in all corporate failures ;
- o To provide banking and investment services for bankruptcy and liquidation estate funds.

4.9.5 It can be seen from the above paragraph that the remit of the Insolvency Service is very broad. The fact that it deals with both personal and corporate insolvencies makes it very different from any Irish model that might be considered. Moreover, a number of the competences it has vis a vis corporate insolvency are assigned in Ireland to the Director or may at a future date be assigned to the Irish Accounting and Audit Supervisory Authority.

4.10 The State and Corporate Insolvency

Considerations for and against a State Liquidation Service

4.10.1 A State-funded insolvency service does not necessarily mean a cheaper means of redress for aggrieved creditors. Nor is its function to remove the element of risk from investing in business and from trading. The existence of a State-funded insolvency service might deter but would not, for example, prevent unscrupulous company directors taking advantage of the strike off process by allowing the name of an insolvent company to be removed from the register, and so avoiding a creditors' voluntary winding up.[14] There is also the fundamental point that while there is a public interest dimension to ensuring the orderly winding up and liquidation of an insolvent company, if no assets remain in the liquidator's account there will be nothing with which to pay company creditors and shareholders, and the company employees will be covered only to the extent provided for in law.

4.10.2 It would be a large and complex undertaking to set up a State insolvency service in Ireland funded on the same treasury management style basis as in Britain, and initially, certainly, would give rise to substantial costs. The Review Group was also conscious that it was only in June 2002 that the ODCE formally assumed its statutory functions in the insolvency area and that much of its focus and effort since then has been devoted to companies in liquidation. Having dealt with the initial surge of liquidator reports under section 56 of the 2001 Act, the ODCE has only begun in recent months turning its attention to individual cases of other forms of insolvent company.

4.11 Conclusion on State-funded Insolvency

4.11.1 The Review Group reflected on the case for an Insolvency Service at length and in detail, with the focus of its consideration being the improvement of the protections for creditors, particularly small creditors. Given the factors set out above, but in particular the powers accorded to the ODCE, the Review Group concluded after intensive discussion that it would not recommend the establishment of a State-funded insolvency service in Ireland. Critical to this decision was the fact that there was not sufficient evidence to show that the absence of a State-funded service was creating major problems for company stakeholders. The Review Group was also mindful of the powers assigned to the Director *vís a vís* liquidations. The Review Group felt that after three years of operating these powers it would be appropriate to review their efficacy and in that context of review fresh consideration should be given to any lacunae which might be best addressed through such a service.

4.12 Official Assignee in Insolvency?

4.12.1 Ireland does not have an official receiver or insolvency trustee, an official of the Courts Service whose duties vis a vis liquidations would be analogous to the duties of the Official Assignee in bankruptcy. The history to this is that the Committee which presented its final report on "the winding up of companies and societies" to the Minister for Industry and Commerce in February 1930 recommended against the appointment of such an official (largely on the grounds that there would not be sufficient work for him). When the issue was revisited in the 1958 Report of the Company Law Reform Committee there was no consensus on the issue and hence no agreement on a recommendation.

4.12.2 In many common law countries –e.g. New Zealand, Canada, the Official Trustee or Assignee deals with both personal (i.e. bankruptcy) and corporate insolvency. In

Ireland, the functions of the Official Assignee in bankruptcy, as set out in the Courts Service website, www.courts.ie are:

- o to realise the assets of bankrupts or arranging debtors whose assets have vested in the Official Assignee;
- o to ascertain the liabilities of such persons; and
- o to distribute the proceeds of realisation of assets by way of dividend among the creditors.

4.12.3 The Official Assignee becomes involved in a bankruptcy or arrangement only after an order has been made by the courts adjudging a debtor bankrupt (in case of a bankruptcy matter) or granting a debtor protection to enable him to make a proposal to his creditors (in the case of an arrangement matter).

4.12.4 Bankruptcy itself is a process by which the property of an individual who is unable or unwilling to pay his/her debts (a "debtor") is transferred to a trustee to be sold and, after payment of costs, expenses, fees and certain debts given priority, distributed among those to whom he/she owes money (the "creditors"). Bankruptcy proceedings may be brought only in the High Court, and the proceedings are filed in the Examiner's Office, High Court. In the vast majority of cases, the trustee to whom the debtor's property is transferred is the Official Assignee in Bankruptcy.

4.12.5 Having regard to these powers the issue arising is if there is a necessary or useful role for an official assignee in corporate insolvencies in Ireland. Or more accurately the issue arising is if there is a "safety net" which provides a focus to identify problems and act on them without the appointment of a further dedicated official.[15]

4.12.6 On consideration of this matter, the Review Group came to the conclusion that an "unliquidated but insolvent companies - detective" of some kind was not, however, a companies - detective" of some kind was not, a necessary addition to the supports now in existence. The "safety net" objective of the CLRG might be attained through systematic interaction of existing agencies. It seems self-evident that the ODCE will not be able to devote an identical amount of resources to each complaint made to it but, on initial investigation, will have to focus on those cases where the public interest is greatest. Inevitably the ODCE will have to be selective in its prosecution policy.

4.12.7 The Review Group noted the procedures in place for the exchange of information between the Revenue Commissioners and the ODCE. Such exchanges will facilitate the ODCE in targeting its investigations and provide useful corroborative evidence for such investigations. The Review Group also noted that the Revenue Commissioners are active in pursuing liquidations in which they have an interest. Such liquidations will inevitably bring to light breaches of company law and the calling to task of those responsible through the liquidation procedure. Co-operation of this sort will facilitate the ODCE in carrying out to a limited extent some of the functions performed in other jurisdictions by a dedicated official.

4.13 Insolvent Unliquidated Companies

4.13.1 Whilst the Review Group has concluded that an additional office is not warranted, a number of issues concerning compliance and enforcement remain to be examined. In the main, these pertain to the ODCE but also impact on other regulatory bodies.

4.13.2 With regard to the overall role and functions of the Director of the Review Group is of the view that because the legislation to establish the Office was so recent (2001), and because the Oireachtas expressed its opinion so recently on the matter, that the Review Group should be circumspect about recommending that any further powers should be assigned to the Office, at least until it had been operational for a while and its powers reviewed systematically.

4.13.3 With this in mind, the Review Group reflected on how the issue of insolvent unliquidated companies should be addressed. It is currently difficult for the ODCE to prove the insolvency of any company. In particular, the Director is not a creditor of the company and cannot therefore take the actions set out in s 251(1)(a). Furthermore, there is no appropriate method for the Director to consider whether the company is unable to pay its debts save through complaints from individual creditors. It may be possible to prove that there is an insufficiency of assets. However, as invariably there are no recent audited accounts of the company, this is also likely to be very difficult.

4.13.4 The Review Group posited a view that one approach towards addressing the circumstances set out above would be that the Director of should be accorded the power to require a statement of solvency from a company where he had reasonable cause to believe that company to be insolvent. The wording of this provision could be based on section 311 of the 1963 Act which sets out the power of the Registrar to strike off a company, subject to safeguards. Such a change would be a significant qualitative change in the powers of the Director. The Review Group will consider this issue during its imminent examination of the winding up provisions to be included in the consolidation bill.

4.13.5 The Review Group further considered if, in order to tackle the problem of insolvent companies which have ceased to trade but have not appointed a liquidator, the Director might be accorded a discretionary power to petition the Court to place a company into compulsory liquidation. This would allow him to pursue these types of cases. Elaborating on this proposal, the Review Group also considered the case for expanding the grounds on which it is possible to petition the Court for liquidation such that in particular defined circumstances this power would be available to any interested party, i.e. ODCE, CRO, IFSRA, creditors, members and officers of the company. The conclusion was that if such an extension of powers were to be made, this change would need to be effected on the basis of quantitative evidence of the scale of the problem of insolvent-but-unliquidated companies.

4.13.6 The Review Group noted the existing power of the Director under s 12(2) of the 1990 Act to petition the Court for a winding up of a body corporate on the basis of any information obtained by the Director on foot of an investigation. This is one possible mechanism that the Director might use on a selective basis to tackle the problem of insolvent but unliquidated companies. The Review Group will consider whether this power should be extended by allowing the Director to petition the Court to have a company wound up on just and equitable grounds in the public interest.

4.14 Reports to the ODCE

4.14.1 Any person carrying out a liquidation of an insolvent company is required to make a report to the Director within six months of appointment on the conduct of the directors of the insolvent company.

4.14.2 The obligation for a report on each insolvent liquidation is likely to serve not only as a deterrent to unduly prolonging the duration of individual liquidations. It is seen as one of the strongest powers accorded to the ODCE. So much so that anecdotal reports suggest that a number of companies who should go into liquidation do not do so because of their desire to avoid activating the liquidator's report to ODCE as required by s 56 of the 2001 Act. In effect, these become unliquidated but insolvent companies. The costs involved pose difficulties for creditors seeking to put a company into liquidation. It is estimated that it could cost in the region of €70,000 to achieve a creditors' liquidation in the High Court. Given this early stage in the operation of the ODCE and the resultant caution needed in drawing conclusions about the need for intervention, the Review Group believes it would be unwise at this time to recommend further additional powers for the Director in this area. Given this early stage in the operation of the ODCE and the resultant caution needed in drawing conclusions about the need for intervention, the Review Group believes it would be unwise at this time to recommend further additional powers for the Director in this area.

4.15 Voluntary winding-up

4.15.1 *Section 277 of the 1963 Act – Power of Court to appoint and remove liquidator in a voluntary winding up*

The Review Group reflected on whether it was appropriate that this provision should be amended by the addition of a specific subsection which provides for a power for the Director, the members, the officers and any creditors of the company to apply to the Court to have a liquidator appointed where there is no liquidator acting or to have a liquidator removed. However, the conclusion was the Court had sufficient latitude under section 277(1) which provides that "if from any cause whatever there is no liquidator acting, the court may appoint a liquidator".

4.15.2 *Appointment of Liquidator (Section 253 of the 1963 Act)*
The issue arising here concerns companies which have passed a resolution to wind up but have failed to appoint a liquidator. The Review Group considered if a company should be entitled to be designated as being in voluntary liquidation without the appointment of a liquidator.

4.15.3 To that end the Review Group considered if the Companies Acts might be amended so as to discourage companies from passing a resolution to wind up but failing to appoint any liquidator, which practice has arisen in recent years, with the advent of the ODCE and the duty of liquidators to report to that Office.

4.15.4 Accordingly, the Review Group reflected on whether Section 253 of the 1963 Act - *Commencement of voluntary winding up* might be amended along the following lines:
A voluntary winding up shall be deemed to commence at the date of the appointment of a liquidator to the company following the passing of the resolution for voluntary winding up.

4.15.5 The proposed amendment above would mean that in a voluntary winding up, a company would not be designated as being in liquidation until such time as the company (or its creditors) appointed a liquidator.

4.15.6 While this seemed to have the advantage of encouraging the practice of virtue in a relatively straightforward way the Review Group was cognisant that the commencement of a winding up is a benchmark date, and in consequence is relevant to a number of important provisions of the 1963 Act. The Review Group was conscious that it would need to consider the impact of the proposed change on the relevant provisions before reaching a definitive conclusion.

4.15.7 The provisions in question are:

S 254, 1963 Act, Effect of voluntary winding up on business and status of company;
S 256, 1963 Act, Statutory declaration of solvency in case of proposal to wind up voluntarily;
S 275, 1963 Act, Distribution of property of a company;
S 286, 1963 Act, Fraudulent preference;

S 288, 1963 Act, Circumstances in which floating charge is invalid.

4.15.8 Analysis of the proposed change suggested the following consequences:

4.15.9 Section 254 – *A company shall, from the commencement of the voluntary winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof*.
If the proposed amendment was proceeded with, a company which has passed a resolution to wind up but where no liquidator has been appointed may continue to carry on its business as normal, as it falls outside section 254.

4.15.10 Section 256 – *where it is proposed to wind up a company voluntarily, the directors of the company are required to make a declaration that the company will be able to pay its debts "within such period not exceeding 12 months from the commencement of the winding up" as may be specified in the declaration*.
Given that the declaration is required to be made within the 28 days immediately preceding the date of the passing of the resolution for winding up the company, and the fact that the date on which the liquidator will be appointed may not be known at the time of swearing of the declaration, it would be difficult for the section 256 declaration to be made with certainty under the proposed change in law. There is no time limit specified by section 258 of the 1963 Act by which a company has to appoint a liquidator after the passing of a winding up resolution. Unless a declaration is made which complies with the requirements of section 256, however, the winding up cannot be a members' voluntary (i.e. solvent) winding up, and will be a creditors' voluntary winding up.

4.15.11 Section 275 – *the property of a company "on its winding up" shall be applied in satisfaction of its liabilities pari passu*.
If the proposed amendment was proceeded with, a company which has passed a resolution to wind up but where no liquidator has been appointed may deal with its property without reference to the obligation pursuant to section 275, as it falls outside that section.

4.15.12 Section 286 – *fraudulent preference (contains two references to commencement of the winding up): Any transaction by an insolvent company with a view to giving a creditor a preference over the other creditors "shall if a winding up commences within six months of the making or doing the same and the company is at the time of the commencement of the winding up unable to pay its debts be deemed a fraudulent preference of its creditors and be invalid accordingly*."
If the proposed amendment was proceeded with, the relevant dates would be within 6 months of the date of appointment of a liquidator, where the company is at the time of the appointment of the liquidator unable to pay its debts. If a company passes a resolution to wind up, but no liquidator was appointed, section 286 would not have any effect on any transaction entered into by the company as no winding up has commenced for the purposes of the section.

4.15.13 Section 288 – *invalidity of certain floating charges – "where a company is being wound up, a floating charge on the undertaking or property of the company created within 12 months before the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid…"*
If the proposed amendment was proceeded with, the relevant date for the creation of the charge will be within 12 months of the date of appointment of a liquidator. This means that if a company passes a resolution to wind up, but no liquidator is appointed, section 288 would not affect any floating charges as no winding up would have commenced for the purposes of the section.

4.15.14 It can be seen from the above commentary that the proposed remedy for the problem of companies winding up but not going into liquidation would create greater opportunities for abuse of the companies' code by unscrupulous companies and company officers than it would close off. The Review Group was also conscious that there were provisions in other legislation which were founded on the existing winding up provisions in the Companies Acts and that any fundamental change could have consequential and unforeseen effects in other areas. Accordingly, the Review Group decided against recommending that a voluntary winding up should commence only on appointment of the liquidator.

4.15.15 The Review Group nonetheless would very much wish to see the potential exploitation of the status of being wound up but not in liquidation addressed. One possibility which might help address the exploitation of this window is the possibility of enhanced systematic control which arises from the fact that the ODCE now has full access to the complete CRO register and can run such reports as it needs for any purpose whatsoever. Such a control might, for example, take the form of checking which companies had not appointed a liquidator 6 months after passing the resolution to wind up.

4.15.16 The Review Group then considered the ability of the Director (as well as creditors and members) to take effective action in relation to any notified cases. The Group has already noted that creditors and members have an entitlement to seek the appointment of a liquidator pursuant to section 277 of the 1963 Act. However, as indicated earlier, the average cost of a Court appointed liquidator is approximately €70,000.

4.15.17 Of course, there will also be situations where the value of the recoverable assets may be too small to justify the creditors, members or the Director petitioning for the appointment of a liquidator. In such circumstances, the Review Group considered the potential for alternative options for remedies. While the Director has adequate powers of investigation and entitlements to prosecute substantive actions, neither he nor the High Court has sufficient power to distribute the proceeds of these actions to the creditors of the company. The Review Group noted in particular that there is an arguable case that section 251 of the 1990 Act does not apply to companies in respect of which a winding-up resolution has been passed but are not in liquidation, as the precondition for the application of that section is that it applies to "a company which is not being wound up".

4.15.18 As the potential abuses wrought by unliquidated insolvent companies and companies in respect of which a winding up resolution has been passed but are not in liquidation are the same, the Review Group considered if all of the powers which are already available to the Director (as well as to other parties such as creditors and members) under section 251 should be extended to cover companies in respect of which a winding up resolution has been passed but are not in liquidation. These powers include petitioning to have the directors examined by the High Court, seeking an order for payment or delivery of property against any such persons, seeking their restriction, etc.

4.15.19 However, the conclusion of the Review Group was that sufficient evidence did not as yet exist which would warrant this particularly in the context where there is an existing remedy for aggrieved creditors, i.e. they can petition the Court to convert the winding up into an official liquidation. Moreover, the ODCE can apply for a disqualification order in such circumstances.

4.15.20 The committee discussed s 214 of the 1963 Act Circumstances in which company deemed to be unable to pay its debts. It was agreed that with regard to reducing costs for creditors in pursuing a judgment order consideration should be given to the introduction in the Rules of the Superior Courts of a prescribed form, available online, to help make this process simpler and cheaper to pursue.

4.15.21 It was drawn to the attention of the Review Group that although this section provides for a creditor to initiate insolvency proceedings, given the costs involved it would enhance the efficacy of the provision for groups of small creditors similarly to be enabled to initiate the same process.

4.15.22 Accordingly, the Review Group recommends the amendment of S 214(a) to provide that a creditor, or two or more creditors acting collectively, should have this standing. In addition the Review Group was of the view that the current minimum debt level which can trigger an application, €1,269.74, was much too low and should be increased to €5,000. It is proposed to increase the minimum levels to €5,000 for an individual creditor and €10,000 for a group of creditors.

4.16 Notice of Creditors' Meeting:

4.16.1 In order to give more information to creditors in the case of a creditors' voluntary liquidation, the Review Group considered and agreed with a proposal that a new provision be inserted in the Companies Acts providing that when a company is notifying creditors of the creditors' meeting, creditors should be circulated with a list of the other creditors and the name and address of the liquidator which the company proposes to appoint. The Review Group will consider this issue further during its imminent examination of the winding up provisions to be included in the consolidation bill.

4.17 Funding of Liquidations

4.17.1 The Review Group considered how or if liquidations might be funded in cases where it is clear there are insufficient assets to cover the costs of liquidation. One suggestion to emerge was that all companies on incorporation would make a small payment (flat fee) into a fund which could be used to cover the costs of liquidations where there are insufficient assets. This could reasonably be regarded as a small fee to pay for the privilege of obtaining limited liability, and an approach not unlike bonding. However, it is not possible under EU law to impose such a levy on companies on incorporation.

4.17.2 This is because of Council Directive 69/335/EEC which prohibits indirect tax on the raising of capital (Article 10 of that Directive refers). This was confirmed in the *Ponente Carni* and *Fantask* decisions of the European Court of Justice which ruled that the filing fees charged by the national registries must correspond to the cost of providing registry services, otherwise the fees would constitute an indirect tax on the raising of capital.

4.17.3 It is clearly desirable that creditors of a company in liquidation should, where funds are not otherwise readily available, be encouraged to provide funds to the liquidator to enable the latter to proceed with the task of realising assets and pursuing remedies for the benefit of the creditors. One possible approach would be to improve the position of a creditor who was willing to assume the risk of funding the liquidator's work in advance. This is based on a concept recommended by the New Zealand Law Commission in 1999[16], which in turn is derived from a consideration of section 564 of the Australian Corporations Act 2001, see below. The aim of s 564 is to encourage creditors to support a liquidator in taking legal proceedings against persons for the recovery of property or the defence of the estate. Under this provision the court has an unfettered discretion and may award the indemnifying creditors a larger proportion of the property indemnifying creditors a larger proportion of the property than the creditor would otherwise have received in the bankruptcy. In exercising its discretion, the court has regard to the fact that the indemnifying creditor or creditors took a risk in funding the action.

4.17.4 The Australian provision *Power of Court to make orders in favour of certain creditors* provides that:

Where in any winding up:
(a) property has been recovered under an indemnity for costs of litigation given by certain creditors, or has been protected or preserved by the payment of money or the giving of indemnity by creditors; or
(b) expenses in relation to which a creditor has indemnified a liquidator have been recovered;
the Court may make such orders, as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them.

4.17.5 The New Zealand Law Commission recommended adoption of a similar approach in New Zealand but without a court discretion being exercised over the proportions in which the proceeds should be shared. This recommendation is based on the idea that with the creation of a new priority category there would be an incentive for creditors to fund actions. The Law Commission noted that creditors are loath to fund actions where priority creditors will get most of the money realised, and further noted that preferential creditors rarely finance these types of actions. The New Zealand Law Commission's proposal has the advantage of greater transparency in that the extent to which an indemnifying creditor's position is improved over that of other creditors in the same class is more readily calculable.

4.17.6 However, both of the approaches aforementioned would afford a potentially significant preference to creditors who happen to be well resourced over others in the same class – most likely small trade creditors – who are already disadvantaged under the existing regime as to priorities and preferences. In view of the likely inequity which could thus result, the Review Group favours an approach which would focus on recoupment by the indemnifying creditor of the amount actually provided to the liquidator by way of funding. Where there is a prospect, with financing of the liquidator's steps, of significant assets being recovered, a creditor for a substantial amount may already have sufficient incentive to assist the liquidator, provided that reimbursement is assured.

4.17.7 In compulsory liquidations, the current order of distribution of assets affords priority, consecutively, to: the fees and expenses of preserving and recovering the assets; petitioner's costs; the costs of providing the statement of affairs; necessary disbursements of the Official Liquidator's; costs payable to the Official Liquidator's solicitor; the Official Liquidator's remuneration; and expenses of any Committee of Inspection appointed.[17] In voluntary liquidations, all costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the assets of the company in priority to all other claims, no order of priority being set as between the various categories of outlay.[18]

4.17.8 The Review Group recommends that in priniciple a creditor who, with the liquidator's consent, provides funds to discharge fees, costs or expenses incurred by the liquidator should be entitled to reimbursement of those funds from the assets of the company in the same priority as currently attaches to the category of outlay for which the funds are provided. The Review Group will seek to develop this proposal in the context of fleshing out draft Heads for Part A11, Winding Up.

4.18 Consideration of preferential creditors

4.18.1 Section 285(2) of the 1963 Act sets out the categories of preferential creditors, i.e. those classes of unsecured creditors who must be paid in full before any amount is paid to other unsecured creditors. Preference does not affect creditors who are secured by a specific mortgage or charge; preference applies only in respect of poceeds of assets subject to a floating charge or who are not secured at all. Preference is only relevant if the company is insolvent and there are insufficient funds to pay all unsecured creditors in full. The identified preferential categories rank equally among themselves.

4.18.2 Preference – Section 285 of the Companies Act, 1963

Type of Debt	Period of Preference
All local taxes	Due in the **12 months** prior to liquidation
Assessed taxes	Not exceeding the whole of **one year's assessment**-assessed on the company up to April 5th before the relevant date.
PAYE	Amounts employer was liable to deduct from amounts paid during the **12 months** next before the relevant date
Wages or salary of employees	In respect of services rendered in the **4 months** next before the relevant date.
All accrued holiday pay Contributions payable under Insurance (intermittent Unemployment) Act or Social Welfare Acts	all amounts due Contributions payable during the next **12 months,** before the relevant date.
Compensation or liability in respect of Workmen's compensation Act (under the company is indemnified by insurers)	**All amounts** accrued before the relevant date
Amount due by the company to a person employed by it, in connection with an accident	**All amounts** due
Sums due to an employee under any scheme or arrangement for sick pay	**All amounts** due
Superannuation contributions	**All amounts** due

4.19 Preferential status of employees' wages/salary

4.19.1 The Review Group considered the position of the current limitation on pay qualifying for preference.

4.19.2 Subsection 285(3) of the 1963 Act limits the amount of wages/salary due to any one claimant on which preference applies to £2,500 (€3,174.35). This limit was set in 1982 and clearly needs updating. An obvious basis on which such an increase might be based is to link the limit proportionately to current average earnings.

4.19.3 CSO sourced figures for 1982 show average industrial earnings (manufacturing) of €163.27 pw, annualised at €8,490.04. A figure for the category "All Industries" was not available from CSO until 1985, so updating on a "like for like" basis suggests use of the manufacturing figure as the basis for comparison. The existing limit under subsection (3) represents 37.39% of an employee's annualised pay at 1982 levels. The comparable figure, based on 37.39% of current annualised average industrial earnings of €25,509.02 (€490.56 pw) comes to €9,537.65. The Review Group accordingly proposes to increase the limit at Subsection (3) to €10,000. The Review Group also notes that these figures should in future be reviewed periodically having regard to annualised average industrial earnings.

4.19.4 It is also proposed to update the terminology used in s 285 by replacing the phrase "clerk, servant, workman, or labourer in the employment of a company" by the term "employee".

4.20 Revenue Preference

4.20.1 Section 285 of the 1963 Act continued the provisions of Section 209(1)(a) of the 1908 Act. It should be noted that, apart from the preference given by that section to State taxes, section 38(2) of the Finance Act, 1924, provides that moneys due to the Central Fund should have attached to them all the rights, privileges and priorities previously attaching to debts due to the Crown. The effect of this was to give a further priority to other debts due to the State, in addition to the preferential payment of 12 months taxes provided for by section 209 of the 1908 Act.

4.20.2 The Company Law Reform Committee which preceded enactment of the 1963 Act and on whose recommendations much of that Act is based pointed out that the priority given to sums due to the State inflicts hardship and injustice on many small creditors; it cannot, they said, be seriously contended that small traders are in a better financial position to bear the loss than is the Central Fund. They could not see any reason why debts due to the State should be given priority, generally speaking, and they recommended that the law should be amended accordingly. The Revenue Commissioners were, however, opposed to any change in the existing arrangements and when the matter was considered by the government it was decided that the 12 months' tax preference given by the 1908 Act should be maintained. However, it was agreed that section 38(2) of the Finance Act, 1924 should be repealed in so far as it relates to the winding up of companies. This repeal was effected by the Finance Act, 1963.

4.20.3 In considering Revenue preference anew, the Review Group was cognisant of the recent UK decision to abolish crown preference with a view to improving the position of the unsecured creditors. The Review Group noted that the UK decision was taken against a backdrop of long standing mechanisms for enforcement of company law. In particular, the mechanisms in place for the orderly winding up of companies make it less attractive for directors to let their companies drift into insolvency. In Ireland such enforcement is in its infancy. However, as the powers of the Director of Corporate Enforcement begin to impact, there should be a change in the culture of non-payment of debts that is currently prevalent in Irish business. These changes will benefit all creditors.

4.20.4 The principle underlying preferential status for Revenue debts was designed to compensate for both the nature of the debts and the special position of Revenue as a creditor. Monies due for PAYE, PRSI and VAT do not belong to the company but have been deducted from third parties and held in trust for transmission to Revenue. The employees' share of social welfare contributions is afforded super preferential status because it is part of the social insurance fund from which employees' social insurance benefits are paid.

4.20.5 Preferential status is also designed to compensate for the special circumstances of Revenue as a creditor. Revenue is an involuntary creditor. It cannot choose its customers on a risk assessment basis. In many instances Revenue has to seek out companies that commence to trade without registering for tax. The establishment of a company's tax debts is not always easy, requiring the gathering of evidence and pursuit of cases through the various appeal mechanisms. Even applying best practice in terms of collection, Revenue is at a disadvantage compared with a creditor who knows his customer and operates in an environment with limited opportunity for disputes as to the amount of the debt.

4.20.6 The Review Group considered if the elimination of Revenue preference might serve as a means of improving the position of the small unsecured creditor but concluded that it would not be possible to target such an aggregate gain at this most disadvantaged group of creditors.

4.20.7 The Review Group also recognised that preferential status for Revenue enables them to make an important contribution to the liquidation process. This contribution has had indirect benefits on corporate compliance and has contributed to strengthening the position of all creditors. Even with the establishment of the ODCE there will be a need for strong creditor involvement in this area. Preferential status facilitates Revenue in undertaking such action by ensuring that there is a benefit to outweigh the cost.

4.20.8 Finally, the Review Group noted that it had not received a single submission arguing for the ending of Revenue preference. However, there was a view among some interests in membership of the Group that Revenue preference did impact adversely on unsecured creditors and that it would be appropriate to reconsider the issue at a future stage having regard inter alia to the abolition of crown preference in the UK.

4.20.9 In the course of the deliberations of the Review Group the Revenue Commissioners were asked to consider if there is a case for reducing the duration of '12 months' as the period for which preference applies to a duration more akin to that applying to other preferential creditors.

4.20.10 The preferential debts and period of preference are set out in Section 285 of the Companies Act 1963, see para. 4.18.2 above. Some debts are not restricted as to the period of preference applied. The only debts with a shorter period of preference than Revenue's are wages or salaries payable to employees. In these cases the period is 4 months. The shorter period makes sense in this context as it is highly unlikely that employees' salaries would be outstanding for more than 4 months. Of the remainder, the Revenue preference period cannot be said to be out of line with the general practice. The Review Group noted that the existence of the 12-month period does not mean that all Revenue liquidation claims cover that full period. The normal collection process works effectively in the majority of cases to minimise the period of default at the time of liquidation. The Review Group saw no convincing reason for reduction of the preference period for Revenue.

4.20.11 The Review Group noted the provision of section 1001 of the Taxes Consolidation Act 1997. These provisions were originally introduced by section 115 of the Finance Act 1986 and modified somewhat by section 174 of the Finance Act, 1995. Although affecting company law, in priority of payment by companies, the provisions have been the subject of legislative provisions introduced by the Minister for Finance. The Review Group would wish to return to this at a later stage bearing in mind that any consideration of this issue would have to encompass a wider forum.

4.21 Farmers as Preferential Creditors in a Liquidation

4.21.1 The first Company Law Review Group[19], established in March 1994, was asked to examine the position of farmer creditors in the event of company liquidation. The Group reported in December 1994.

4.21.2 The Review Group recognises that in a number of cases, commodity supplier farmers have suffered badly in insolvencies, with their supplies being unpaid-for, and without the protection of reservation of title. While recognising that farmers and suppliers of agricultural produce have had particular problems, the Review Group found it difficult to conclude that farmers were in a unique position, in that non-farmer suppliers have similar problems in the case of insolvencies in non-farming businesses. The Review Group did not favour the expansion of the list of preferential creditors to secure such status for farmer creditors.

4.21.3 On foot of representations made by the farming sector, the Department has asked the current Review Group to consider the position of farmers as preferential creditors in the context of the Group's examination of the law relating to liquidations and the winding-up of companies. The Review Group agreed to do this.

4.21.4 In order that the position of the farming sector could be fully taken into account in the review, the Review Group invited the ICMSA, who had made the case on farmer preference to the first Company Law Review Group and had again raised it with the Tánaiste and Minister for Enterprise, Trade and Employment, to advise the Review Group of any factors which arose since publication of the report of the precursor CLRG in 1994 which it believed would reinforce the argument to extend preference to farmers. The Review Group wrote to the ICMSA extending this invitation but did not receive any new evidence or argument.

4.21.5 The only change that the Review Group was aware of in the arguments discussed at some length by the precursor CLRG was related to retention of title where, in view of the increasing focus on traceability of produce, the position is likely to have improved for farmers. Apart from a reiteration of the request from the ICMSA that preferential status be accorded to farmers in the event of liquidation, the current Review Group received no submissions on this issue. Neither did the ICMSA take up the invitation from the Review Group referred to above. On this basis the Review Group concluded that the analysis of farmer preference as an issue undertaken by the precursor CLRG still stood and the Review Group was not convinced of special arguments such as to lead it to recommend a change in this area.

4.22 Other suggestions for reform of existing legislation/practice

4.22.1 *Section 224 of the 1963 Act: filing of Statement of Affairs in respect of company subject to a winding up order*
The Review Group recommends that the information contained in the statement of affairs required to be filed by one or more of the directors and by the secretary of a

company subject to a winding-up order (Form No.13 of Appendix M to the Rules of the Superior Courts) should be expanded to include particulars of all disposals of or other transactions by a company in relation to assets effected within two years prior to the commencement of the winding up, whether by way of conveyance, transfer, encumberance or otherwise, in favour of a person falling within the definition of "connected person" within the meaning of section 286(5) of the 1963 Act, as amended. This would assist the liquidator in determining whether the transaction is capable of being set aside under section 286(3) of the 1963 Act.

4.22.2 *Sections 227 and 278 of the 1963 Act: Period for furnishing of notice of liquidator's appointment*
The Review Group has expressed a preference that the period for furnishing of notice of the appointment of a liquidator in voluntary liquidations (currently 14 days) and court-ordered liquidations (currently 21 days) should be the same. The Review Group will consider this issue further during its imminent examination of the winding-up provisions to be included in the Consolidation Bill.

4.22.3 *Section 234 of the 1963 Act: Annulment of or stay in respect of winding up*.
Section 234 of the 1963 Act allows the court, on the application of the liquidator or any creditor or contributory, at any time after an order has been made for winding up, to annul a winding-up order or stay proceedings in the winding up. While the provision is silent as to the position regarding retention or disposal of the seal, books, or records of the company, it is understood that it has been the practice of the court to give directions as to these. The Review Group recommends that the provision concerned should be amended to provide expressly for the giving of such directions.

4.22.4 *Section 285 of the 1963 Act: Preferential payments in a winding up*
The Review Group agreed that this provision needed to be amended to reflect the recent amendment of the tax year to a calendar year.

4.22.5 *Sections 302 and 371A of the 1963 Act: Enforcement of duty of liquidator to make returns*
The Review Group recognised that because this enforcement mechanism has a per company rather than per liquidator focus there can be difficulties in enforcing compliance. Specifically, the issue can be the cumulative defaults of a particular liquidator in regard to various companies rather than his defaults with regard to a single company. The Review Group recommends that any procedural changes necessary be implemented which would allow applications to be brought in relation to an individual liquidator by the Director or the Registrar as to his defaults in relation to various companies. A similar provision should apply to examiners and receivers. The Review Group will consider this issue further during its imminent examination of the winding up provisions to be included in the consolidation bill.

4.22.6 *Section 306(1) of the 1963 Act: Liquidator's statement regarding liquidation*
Section 306(1) of the 1963 Act provides, where a winding up is not concluded within two years after its commencement, for the sending by a liquidator to the Registrar of a prescribed statement containing particulars about the proceedings in and position of the liquidation. The present form of this report (see Form 44, Appendix M, Rules of the Superior Courts) is essentially an account of receipts and disbursements. The Review Group considers that, in the case of Court-ordered liquidations and creditors' voluntary liquidations a liquidator should be required to provide a more comprehensive report to the Registrar and, in the case of a court-controlled winding up, to the court, one year from commencement of the liquidation and annually thereafter, containing additional information more qualitative in nature, including the liquidator's estimated timescale for realisation of assets, and an explanation for delay in realising assets in line with the estimate.

4.22.7 *Section 307 of the 1963 Act: Unclaimed dividends in windings up by the court*
It is understood that, in the absence of provision by statute or rule of court for an account to which they might be deposited, unclaimed dividends in windings up by the court have, in practice, been lodged to the Companies Liquidation Account, which was envisaged as applying to unclaimed dividends in voluntary liquidations only. The Review Group recommends that this arrangement be placed on a statutory basis and the scope of section 307 extended accordingly.

4.22.8 *Court review of liquidations supervision*
The Review Group notes that the Courts Service is at present evaluating the procedure for supervision of compulsory liquidations by the court as part of an overall review of the functions of the Examiner of the High Court, and will consider in due course the implications of any recommendations emanating from that exercise.

4.22.9 *Table A*
The Review Group has previously recommended that the relevant provisions now contained in Table A of the First Schedule of the 1963 Act ought to be contained in the main body of statute law, rather than being left remote from the statutory provisions which deal with liquidation. The following regulation concerning the winding-up of a company *in specie* is to be migrated from Table A to the consolidated Companies Bill:

Provision		*Comment*
137.	If the company is wound up, the liquidator may, with the sanction of the special resolution of the company and any other sanction required by the Act, divide among the members in specie or kind the whole or any part of the assets of the company (whether they shall consist of property of the same kind or not) and may, for such purpose, set such value as he deems fair upon any property to be divided as aforesaid and may determine how such division shall be carried out as between the members or different classes of members. The liquidator may, with the like sanction, vest the whole or any part of such assets in trustees and upon such trust for the benefit of the contributories as the liquidator, with the like sanction, shall think fit, but that so that no member shall be compelled to accept any shares or other securities whereon there is any liability.	Incorporate into statute. This is reflected in Part A11 of the Consolidation Bill Heads.

4.23 Summary of Recommendations

- The establishment of a State-funded insolvency service in Ireland is not necessary as there is insufficient evidence to show that the absence of a State-funded service is creating major problems for company stakeholders. (4.11.1)

- The existing power of the Director under s 12(2) of the 1990 Act to petition the Court for a winding up of a body corporate on the basis of any information obtained by the Director on foot of an investigation should be extended by allowing the Director to petition the Court to have a company wound up on just and equitable grounds in the public interest. (4.13.6)

- For the purpose of reducing costs for creditors in pursuing a judgment order, consideration should be given to the introduction in the Rules of the Superior Courts of a prescribed form, available online, to help make this process simpler and cheaper to pursue. (4.15.21)

- Section 214(a) of the 1963 Act should be amended to provide that a creditor, or two or more creditors acting collectively, should have standing to initiate insolvency proceedings. (4.15.21)

- The current minimum debt level which can trigger an application to initiate insolvency proceedings, €1,269.74, is much too low and should be increased to €5,000. It is proposed to increase the minimum levels to €5,000 for an individual creditor and €10,000 for a group of creditors. (4.15.22)

- A new provision should be inserted in the Companies Acts providing that when a company is notifying creditors of the creditors' meeting, creditors should also be circulated with a list of the other creditors and the name and address of the liquidator which the company proposes to appoint. (4.16.1)

- In principle a creditor who, with the liquidator's consent, provides funds to discharge fees, costs or expenses incurred by the liquidator should be entitled to reimbursement of those funds from the assets of the company in the same priority as currently attaches to the category of outlay for which the funds are provided. (4.17.8)

- The limit on the amount of wages/salary due to any one claimant on which preference applies to under section 285(3) of the 1963 Act should be increased from £2,500 (€3,174.35) to €10,000 and these figures should in future be reviewed periodically having regard to annualised average industrial earnings. (4.19.3)

- The terminology used in s 285 of the 1963 Act should be updated by replacing the phrase "clerk, servant, workman, or labourer in the employment of a company" with the term "employee". (4.19.4)

- The preferential status for Revenue Commissioners should be retained. (4.20.8)

- There is no convincing reason for the reduction of the preference period for the Revenue Commissioners. (4.20.10)

- There should be no change in the treatment of farmers as creditors in insolvencies. (4.21.5)

- The information contained in the statement of affairs required to be filed by one or more of the directors and by the secretary of a company subject to a winding up order should be expanded to include particulars of all disposals of or other transactions by a company in relation to assets effected within two years prior to the commencement of the winding up. (4.22.1)

- The period for furnishing of notice of the appointment of a liquidator in voluntary liquidations (currently 14 days) and court-ordered liquidations (currently 21 days) should be the same. (4.22.2)

- Section 234 of the 1963 Act should be amended to provide expressly for the giving of directions by the court as to the position regarding retention or disposal of the seal, books, or records of a company where an application has been made to annul a winding up order or stay proceedings in the winding up. (4.22.3)

- Section 285 of the 1963 Act requires amending to reflect the recent amendment of the tax year to a calendar year. (4.22.4)

- Sections 302 and 371A of the 1963 Act should be amended to allow applications to be brought in relation to an individual liquidator by the Director or the Registrar as to his defaults in relation to various companies. A similar provision should apply to examiners and receivers. (4.22.5)

- In the case of Court-ordered liquidations and creditors' voluntary liquidations a liquidator should be required to provide a more comprehensive report to the Registrar and, in the case of a court-controlled winding up, to the court, one year from commencement of the liquidation and annually thereafter, containing additional information more qualitative in nature, including the liquidator's estimated timescale for realisation of assets, and an explanation for delay in realising assets in line with the estimate. (4.22.6)
- The practice whereby unclaimed dividends in windings up by the court have been lodged to the Companies Liquidation Account, which was envisaged as applying to unclaimed dividends in voluntary liquidations only, should be placed on a statutory footing and section 307 of the 1963 Act extended accordingly. (4.22.7)

Endnotes

[1] See sections 213 and 214 of the Companies Act 1963 as amended by section 132 of the Companies Act 1990.
[2] ODCE Annual Report 2002, ODCE ISBN 0-7557-1440-7, Page 11.
[3] It is coincidence that these figures add up to 100%. They are simply the highest ranked among a number of factors which lead to company dissolution. In most cases more than one factor applied.
[4] This figure excludes companies in the process of liquidation.
[5] Department of Finance Monthly Economic Bulletin, January 2004.
[6] Figures for GDP growth are significantly higher, see. www.finance.gov.ie
[7] op. cit.
[8] This is a significantly lower figure than usual. In previous years, due to a compliance campaign by the Companies Registration Office, very large numbers of companies were struck off the register for failure to file annual returns. During 2002, companies were struck off for failure to deliver information to the Revenue Commissioners but there was no strike off campaign in respect of annual returns.
[9] Source: CRO
[10] Position at the Companies Registration Office (15 March 2001).
[11] Financial Times, 23 August 2002
[12] The CRO acted to strike off in excess of 10,000 companies in December 2003, where those companies owed a 2001 annual return or earlier and had failed to file same, despite several requests
[13] Para. 4.52, Report of the Working Group on Company Law Enforcement and Compliance. The Company Law Review Group was itself established on foot of a recommendation by the Working Group.
[14] In this regard the Review Group noted that it is now a ground for disqualification pursuant to section 150 of the Companies Act 1990 to have been a director of an company at the date of sending to that company of a strike off notice pursuant to section 12 of the Companies (Amendment) Act 1982, where the company had liabilities at the time of its name was struck off the register, which liabilities are not discharged prior to the making of the application for the disqualificxation order.
[15] One recent innovation which may be of benefit to creditors is the European Communities (Late Payment in Commercial Transactions) Regulations (Statutory Instrument 388 of 2002). These give effect to Directive No. 2000/35/EC. The Regulations establish a 30 day payment period, where none other is specified by contract between the two parties. As late payments are one of the principal causes of company failure, this legislation ought in principle to alleviate the pressure on small creditors. (The ICAI surveys of 1994 and 1996 indicate that a quarter of companies surveyed were liquidated because of late payments.) However, as the 30 day period is optional, it may be the case that many smaller creditors will be forced to accept a longer credit period than is provided for under the Directive. Where the supplier (creditor) believes that grossly unfair terms are being set by the purchaser there is provision under the Regulations to apply for arbitration or to the Circuit Court but obviously this would be in the nature of a 'nuclear option'
[16] *Priority Debts in the Distribution of Insolvent Estates*, an advisory report by the NZ Law Commission to the Ministry of Commerce, October 1999 (www.lawcom.govt.nz).
[17] Precursor to the current statutory Company Law Review Group.

5

CHAPTER 5

Table A

five

5.1 Introduction

5.1.1 In the First Report, the Review Group made several recommendations touching on the management and administration of companies. These are contained in Chapter 4 (Internal Administration) and Chapter 11 (Directors and other Officers.). In the recommendations in those chapters, the Review Group expressed the view that the relevant provisions now contained in Table A of the First Schedule to the 1963 Act ought to be contained in the main body of statute law, rather than being left remote from statutory provisions to which the Table A provisions were related.

5.1.2 For the purpose of this Report, the Review Group considered each provision of Table A, Part I and Part II (and by extension Table C, which applies to companies limited by guarantee without a share capital) on the basis of integrating the provisions logically and sequentially in the Bill. For this purpose, the Report builds on the work done in and for the First Report of the Review Group, notably in relation to resolutions and directors. It also draws from the review of the relevant areas of law e.g. shares, winding up, etc. undertaken in the Second Work Programme of the Review Group (2002-2003) and addressed in other chapters of this Report.

5.1.3 Table A sets out a model set of internal management regulations for a company limited by shares. Its present form is contained in the First Schedule to the 1963 Act, and it embodies amendments made by the 1977 and 1983 Acts. The previous versions of internal management regulations are those contained in, or made by instrument under the 1856, 1862, 1906 and 1908 Companies Acts. It is because of this provenance that many parts of Table A continue to use the language of another era.

5.1.4 Companies limited by shares (public or private) and companies limited by guarantee not having a share capital are not obliged to file Articles – if they do not, Table A Part I, Table A Part II and Table C will be deemed to constitute the articles of association. All other types of companies must adopt articles of association, even if those articles import, by reference, e.g. the provisions of Table A.

5.1.5 The 1963 and 1983 Acts contain the following model constitutions or parts of constitutions

Type of Company	Memorandum of Association	Articles of Association
Private, limited by shares	Table B	Table A, Part II. This incorporates, with exclusions and amendments, Part I of Table A
Public, limited by shares	1983 Act, Schedule	Table A, Part I
Private, limited by guarantee, having a share capital	Table D Part I	Table D, Part III, This one has one distinct Regulation as to number of members and then incorporates Part II of Table A (which in turn incorporates, with exclusions and amendments, Part I of Table A).
Limited by guarantee without a share capital	Table C, first part	Table C, second part
Private, unlimited (with a share capital	Table E, Part I	Table E, Part III. This has three Regulations and then incorporates Part II of Table A.
Public, unlimited with a share capital	Table E, Part I	Table E, Part II. This has five distinct Regulations and then incorporates Part I of Table A (with certain exclusions).
Unlimited, without a share capital	None specified	None specified

5.2 Draft Heads of the Consolidation Bill

5.2.1 Since November 2003, a considerable number of draft Heads of the proposed Consolidation Bill have been published on the Review Group's website, www.clrg.org. The constituent Parts of the Consolidation Bill are being posted on this website as they are drafted for the purpose of transparency and consultation. In the drafting of the Parts of the Bill, the Review Group has incorporated the Table A provisions, subject to amendment in certain cases. In this Report, Chapter 6, Corporate Governance, and Chapter 7, Share Capital, deal with the parts of Table A which are relevant to those subjects and the issues are addressed in some detail. This is because in its Second Work Programme the Review Group was asked specifically to consider the law relating to shares and shareholders and to the internal management of companies.

5.2.2 In the Table that follows on the next page, the Review Group signposts where the commentary on analysis of the provisions of Table A are in this Report. The commentary on issues relating to corporate governance, share capital, accounts and audit, and liquidations is dealt with as appropriate in the relevant chapters of this Report.

5.3 Analysis and Commentary on Table A

Table A

Interpretion	*Comment/Recommendation*
1. In these regulations: "the Act" means the Companies Act, 1963 (No. 33 of 1963); "the directors" means the directors for the time being of the company or the directors present at a meeting of the board of directors and includes any person occupying the position of director by whatever name called; "the register" means the register of members to be kept as required by section 116 of the Act; "secretary" means any person appointed to perform the duties of the secretary of the company; "the office" means the registered office for the time being of the company; "the seal" means the common seal of the company. Expressions referring to writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, photography, and any other modes of representing or reproducing words in a visible form. Unless the contrary intention appears, words or expressions contained in these regulations shall bear the same meaning as in the Act or in any statutory modification thereof in force at the date at which these regulations become binding on the company.	Most of these defined terms are redundant in view of the importing of the Table A provisions into the main statute. This definition is replaced by "registered office"
Share Capital and Variation of Rights. 2 – 10	Chapter 7
Lien 11 – 14	Chapter 7
Calls on Shares 15 – 21	Chapter 7
Transfer of Shares 22 – 28	Chapter 7
Transmission of Shares 29 – 32	Chapter 7
Forfeiture of Shares 33 – 39	Chapter 7
Conversion of Shares into Stock 40 – 43	Chapter 7
Alteration of Capital 44 – 46	Chapter 7
General Meetings 47 – 50	Chapter 6
Notice of General Meetings. 51 – 52	Chapter 6
Proceedings at General Meetings. 53 – 62	Chapter 6
Votes of Members 63 – 73	Chapter 6
Bodies Corporate acting by Representatives at Meetings. 74	Chapter 6
Directors 75 – 78	Chapter 6
Borrowing Powers 79.	Chapter 6
Powers and Duties of Directors 80 – 90	Chapter 6
Disqualification of Directors 91.	Chapter 6
Rotation of Directors 92 – 100	Chapter 6
Proceedings of Directors 101 – 109	Chapter 6
Managing Director 110 – 112	Chapter 6
Secretary 113 – 114	Chapter 6
The Seal. 115.	Chapter 6
Dividends and Reserve 116 - 124.	Chapter 7

Table A

Interpretion		**Comment/Recommendation**
Accounts		
125.	The directors shall cause proper books of account to be kept relating to - (a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure take place; and (b) all sales and purchases of goods by the company; and (c) the assets and liabilities of the company. Proper books shall not be deemed to be kept if there are not kept such books of account as are necessary to give a true and fair view of the state of the company's affairs and to explain its transactions.	Chapter 10
126.	The books of account shall be kept at the office or, subject to section 147 of the Act, at such other place as the directors think fit, and shall at all reasonable times be open to the inspection of the directors.	Chapter 10
127.	The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members, not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by statute or authorised by the directors or by the company in general meeting.	Chapter 10
128.	The directors shall from time to time, in accordance with sections 148, 150, 157 and 158 of the Act, cause to be prepared and to be laid before the annual general meeting of the company such profit and loss accounts, balance sheets, group accounts and reports as are required by those sections to be prepared and laid before the annual general meeting of the company.	Chapter 10
129.	A copy of every balance sheet (including every document required by law to be annexed thereto) which is to be laid before the annual general meeting of the company together with a copy of the directors' report and auditors' report shall, not less than 21 days before the date of the annual general meeting be sent to every person entitled and under the provisions of the Act to receive them.	Chapter 10
Capitalisation of Profits		
130 - 131		Chapter 5
Auditors		
132.	Auditors shall be appointed and their duties regulated in accordance with sections 160 to 163 of the Act.	Chapter 10
Notices		
133 - 136		Chapter 4
Indemnity		
138.		Chapter 6
Part III		
3.		Chapter 7
4.		Chapter 6
5.		Chapter 6
6.		Chapter 6
7.		Chapter 6
8.		Chapter 6
9.		Chapter 6
10.		Chapter 7

6

CHAPTER 6

Corporate Governance

six

6.1 Introduction

6.1.1 Corporate governance can be summarised as defining:

- o Who runs the company;
- o How they run the company; and
- o How they are accountable to the owners of the company, the shareholders.

6.1.2 Company law is not the only regulator and standard setter of ethical, reasonable and effective norms of corporate governance. It is complemented by:

1. The company's own constitution as set out in its memorandum and articles of association;
2. The standards of self-regulating professions (principally accountants as regards company accounts and audit);
3. Codes of best practice such as those applied by the Irish Stock Exchange; and
4. The fiduciary duties of company directors to members, which are often common law principles rather than being set out in company law statutes.

6.1.3 However, company law is by far the most important element of the corporate governance framework. An important concern in drafting this Chapter was to ensure complementarities with the other kinds of corporate governance. To that end there is a focus on removing duplication and overlaps, and even conflicts or perceived conflicts, where these exist.

6.1.4 In this chapter, which is the narrative to accompany the proposed changes to corporate governance in the companies code, the Review Group in effect undertook a stock-taking of existing legal provisions and their interaction with the other facets of corporate governance outlined above. The objective of the analysis and recommendations set out in this Chapter is, first, to ensure that the legal and regulatory framework is robust, transparent, and enforceable. Secondly, the framework should ensure that the corporate governance system supports the exercise of entrepreneurship and limits the risks of damaging conflicts of interest arising in the management of a company's affairs.

6.1.5 Table A (First Schedule) of the 1963 Act relates to internal company management and sets out what is in effect the standard articles of association adopted by companies. In its First Report the Review Group concluded that for the purpose of overall simplification the provisions of Table A should be set out in the new main statute. To that end, Chapter 3 outlines the Review Group's approach to each of the provisions of Table A. This Chapter in turn analyses those provisions that are relevant to Corporate Governance.

6.1.6 Parts IV and V of the General Scheme of Companies Bill deal with Corporate Governance and Duties of Directors, embodying recommendations from the First Report of the Review Group, the Group's analysis of Table A, as well as a general review of the applicable law.

6.2 Analysis and Commentary on Table A

6.2.1 The format of this section is the setting out of Table A Parts I and II, with commentary, and, where applicable, recommendations; it should be noted that were possible, the Review Group endeavours to facilitate rather than presciptive in many places import regulations into statute, but providing that such apply unless a company's own constitution otherwise provides.

Table A			***Comment/Recommendation***
47.	All general meetings of the company shall be held in the State.		Import into statute, amended to provide that a company may by its constitution provide for meetings to be held elsewhere. This is reflected in Part IV Head 35 of the General Scheme of the Companies Bill.
48.	(1)	Subject to paragraph (2) of this regulation, the company shall in each year hold a general meeting as its annual general meeting in addition to any other meeting in that year, and shall specify the meeting as such in the notices calling it; and not more than 15 months shall elapse between the date of one annual general meeting of the company and that of the next.	Import into statute and integrate with section 131 of the 1963 Act. This is reflected in Part IV Head 34 of the General Scheme of the Companies Bill.
	(2)	So long as the company holds its first annual general meeting within 18 months of its incorporation, it need not hold it in the year of its incorporation or in the year following. Subject to regulation 47, the annual general meeting shall be held at such time and place as the directors shall appoint.	Import into statute and integrate with section 131(2) of the 1963 Act. This is reflected in Part IV Head 34 of the General Scheme of the Companies Bill.
49.	All general meetings other than annual general meetings shall be called extraordinary general meetings.		Import into statute, unamended. This is reflected in Part IV Head 36 of the General Scheme of the Companies Bill.

Table A		Comment/Recommendation
50.	The directors may, whenever they think fit, convene an extraordinary general meeting, and extraordinary general meetings shall also be convened on such requisition, or in default, may be convened by such requisitionists, as provided by section 132 of the Act. If at any time there are not within the State sufficient directors capable of acting to form a quorum, any director or any 2 members of the company may convene an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors.	Import into statute, unamended. This is reflected in Part IV Head 36 of the General Scheme of the Companies Bill.
51	Subject to sections 133 and 141 of the Act, an annual general meeting and a meeting called for the passing of a special resolution shall be called by 21 days' notice in writing at the least, and a meeting of the company (other than an annual general meeting or a meeting for the passing of a special resolution) shall be called by 14 days' notice in writing at the least. The notice shall be exclusive of the day on which it is served or deemed to be served and of the day for which it is given, and shall specify the place, the day and the hour of the meeting, and in the case of special business, the general nature of that business, and shall be given, in manner hereinafter mentioned, to such persons as are, under the regulations of the company, entitled to receive such notices from the company.	Import into statute and integrate with s 133 of the 1963 Act. This is reflected in Part IV Head 40 of the General Scheme of the Companies Bill.
52.	The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any person entitled to receive notice shall not invalidate the proceedings at the meeting.	Import into statute, unamended. This is reflected in Part IV Head 40 of the General Scheme of the Companies Bill.
53.	All business shall be deemed special that is transacted at an extraordinary general meeting, and also all that is transacted at an annual general meeting, with the exception of declaring a dividend, the consideration of the accounts, balance sheets and the reports of the directors and auditors, the election of directors in the place of those retiring, the re-appointment of the retiring auditors and the fixing of the remuneration of the auditors.	Import into statute, unamended. This is reflected in Part IV Head 45 of the General Scheme of the Companies Bill.
54.	No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, three members present in person shall be a quorum.	Amend to make the standard quorum one in a single-member company, two in all companies other than PLCs and 3 in a PLC. This is reflected in Part IV Head 41 of the General Scheme of the Companies Bill.
55.	If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case it shall stand adjourned to the same day in the next week, at the same time and place or to such other day and at such other time and place as the directors may determine, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum.	Import into statute, unamended. This is reflected in Part IV Head 41 of the General Scheme of the Companies Bill.
56.	The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company, or if there is no such chairman, or if he is not present within 15 minutes after the time appointed for the holding of the meeting or is unwilling to act, the directors present shall elect one of their number to be chairman of the meeting.	Import into statute, unamended. This is reflected in Part IV Head 46 of the General Scheme of the Companies Bill.
57.	If at any meeting no director is willing to act as chairman or if no director is present within 15 minutes after the time appointed for holding the meeting, the members present shall choose one of their number to be chairman of the meeting.	Import into statute, unamended. This is reflected in Part IV Head 46 of the General Scheme of the Companies Bill.
58.	The chairman may, with the consent of any meeting at which a quorum is present, and shall if so directed by the meeting, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for 30 days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.	Import into statute, unamended. This is reflected in Part IV Head 46 of the General Scheme of the Companies Bill.

Table A		Comment/Recommendation
59.	At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands unless a poll is (before or on the declaration of the result of the show of hands) demanded— (a) by the chairman; or (b) by at least three members present in person or by proxy; or (c) by any member or members present in person or by proxy and representing not less than one-tenth of the total voting rights of all the members having the right to vote at the meeting; or (d) by a member or members holding shares in the company conferring the right to vote at the meeting being shares on which an aggregate sum has been paid up equal to not less than one-tenth of the total sum paid up on all the shares conferring that right. Unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book containing the minutes of the proceedings of the company shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution. The demand for a poll may be withdrawn.	Import into statute, unamended. This is reflected in Part IV Heads 46 and 48 of the General Scheme of the Companies Bill.
60.	Except as provided in [regulation 62], if a poll is duly demanded it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.	Import into statute, unamended. This is reflected in Part IV Head 48 of the General Scheme of the Companies Bill.
61.	Where there is an equality of votes, whether on a show of hand or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, shall be entitled to a second or casting vote.	Import into statute, unamended. This is reflected in Part IV Head 46 of the General Scheme of the Companies Bill.
62.	A poll demanded on the election of a chairman or on a question of adjournment shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs, and any business other than that on which a poll is demanded may be proceeded with pending the taking of the poll.	Import into statute, unamended. This is reflected in Part IV Head 48 of the General Scheme of the Companies Bill.
Part II: 6.	Subject to section 141 of the Act, a resolution in writing signed by all the members for the time being entitled to attend and vote on such resolution at a general meeting (or being bodies corporate by their duly authorised representatives) shall be as valid and effective for all purposes as if the resolution had been passed at a general meeting of the company duly convened and held, and if described as a special resolution shall be deemed to be a special resolution within the meaning of the Act.	Import into statute, integrated with section 141(8) of the 1963 Act, and, as recommended by the First Report at 4.5.6(i), provide that this applies to all companies unless they provide otherwise in their constitutions. This is reflected in Part IV Head 52 of the General Scheme of the Companies Bill.
Votes of Members		
63.	Subject to any rights or restrictions for the time being attached to any class or classes of shares, on a show of hands every member present in person and every proxy shall have one vote, so, however, that no individual shall have more than one vote, and on a poll every member shall have one vote for each share of which he is the holder.	Import into statute, unamended. This is reflected in Part IV Head 47 of the General Scheme of the Companies Bill.
64.	Where there are joint holders, the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose, seniority shall be determined by the order in which the names stand in the register.	Import into statute, unamended. This is reflected in Part IV Head 47 of the General Scheme of the Companies Bill.
65.	A member of unsound mind, or in respect of whom an order has been made by any court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee, receiver, guardian or other person appointed by that court and any such committee, receiver, guardian or other person may vote by proxy on a show of hands or on a poll.	Import into statute, amended to take account of more up-to-date concepts of "unsound mind" etc. This is reflected in Part IV Head 47 of the General Scheme of the Companies Bill.
66.	No member shall be entitled to vote at any general meeting unless all calls or other sums immediately payable by him in respect of shares in the company have been paid.	Import into statute, unamended. This is reflected in Part IV Head 47 of the General Scheme of the Companies Bill.

Table A		Comment/Recommendation
67.	No objection shall be raised to the qualification of any voter except at the meeting or adjourned meeting at which the vote objected to is given or tendered, and every vote not disallowed at such meeting shall be valid for all purposes. Any such objection made in due time shall be referred to the chairman of the meeting, whose decision shall be final and conclusive.	Import into statute, unamended. This is reflected in Part IV Head 47 of the General Scheme of the Companies Bill.
68.	Votes may be given either personally or by proxy.	Import into statute, integrated with section 136 of the 1963 Act. This is reflected in Part IV Head 47 of the General Scheme of the Companies Bill.
69.	The instrument appointing a proxy shall be in writing under the hand of the appointer or of his attorney duly authorised in writing, or, if the appointer is a body corporate, either under seal or under the hand of an officer or attorney duly authorised. A proxy need not be a member of the company	Import into statute integrated with section 136 of the 1963 Act. This is reflected in Part IV Head 42 of the General Scheme of the Companies Bill.
70.	The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed, or a notarially certified copy of that power or authority shall be deposited at the office or at such other place within the State as is specified for that purpose in the notice convening the meeting, not less than 48 hours before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote, or, in the case of a poll, not less than 48 hours before the time appointed for the taking of the poll, and, in default, the instrument of proxy shall not be treated as valid.	Import into statute, integrated with section 136 of the 1963 Act. This is reflected in Part IV Head 42 of the General Scheme of the Companies Bill.
71.	An instrument appointing a proxy shall be in the following form or a form as near thereto as circumstances permit— [Form of Proxy]	Import into statute, integrated with section 136. Provide for the following options as to instruction: (1) For (2) Against (3) Abstain (4) Proxy's discretion This is reflected in Part IV Head 43 of the General Scheme of the Companies Bill.
72.	The instrument appointing a proxy shall be deemed to confer authority to demand or join in demanding a poll	Repeal - identical to section 137(2) of the 1963 Act.
73.	A vote given in accordance with the terms of an instrument of proxy shall be valid notwithstanding the previous death or insanity of the principal or revocation of the proxy or of the authority under which the proxy was executed or the transfer of the share in respect of which the proxy is given, if no intimation in writing of such death, insanity, revocation or transfer as aforesaid is received by the company at the office before the commencement of the meeting or adjourned meeting at which the proxy is used.	Import into statute, integrated with section 137 of the 1963 Act. This is reflected in Part IV Head 42 of the General Scheme of the Companies Bill.
Bodies Corporate acting by Representatives at Meetings.		
74.	Any body corporate which is a member of the company may, by resolution of its directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of the company or of any class of members of the company, and the person so authorised shall be entitled to exercise the same powers on behalf of the body corporate which he represents as that body corporate could exercise if it were an individual member of the company.	Import into statute, integrated with section 139 of the 1963 Act. This is reflected in Part IV Head 44 of the General Scheme of the Companies Bill.

Directors

75.	The number of the directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum of association or a majority of them.	The 1982 Act, s 3 provides that "there shall be delivered to the registrar together with every memorandum of a company delivered to him pursuant to section 17 of the 1963 Act a statement in the prescribed form containing the ….. the particulars specified …… in relation to—(a) the persons who are to be the first directors of the company." Regulation 75 / 32 should be merged with section 3 in the 1982 Act to provide that the first directors and their number are as specified on the Form A1, and that the number of directors from time to time is variable by ordinary resolution. This is reflected in Part IV Head 13 of the General Scheme of the Companies Bill.
76.	The remuneration of the directors shall from time to time be determined by the company in general meeting. Such remuneration shall be deemed to accrue from day to day. The directors may also be paid all travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or at general meetings of the company or in connection with the business of the company.	Import into statute, unamended, subject to companies' ability to prescribe otherwise in their constitution. This is reflected in Part IV Head 20 of the General Scheme of the Companies Bill.
77.	The shareholding qualifications for directors may be fixed by the company in general meeting and unless and until so fixed, no qualification shall be required.	Repeal, See First Report, para 4.8.3
78.	A director of the company may be or become a director or other officer of, or otherwise interested in, any company promoted by the company or in which the company may be interested as shareholder or otherwise, and no such director shall be accountable to the company for any remuneration or other benefits received by him as a director or officer of, or from his interest in, such other company unless the company otherwise directs.	This is an exception to the duty of directors to be accountable to their companies for profits earned from those companies. Import into statute, as an exception to the fiduciary duties to be stated in the Act. This will be reflected in the General Scheme of the Companies Bill.

Borrowing Powers

79.	The directors may exercise all the powers of the company to borrow money, and to mortgage or charge its undertaking, property and uncalled capital or any part thereof, and [subject to section 20 of the Companies (Amendment) Act, 1983][1], to issue debentures, debenture stock and other securities, whether outright or as security for any debt, liability or obligation of the company or of any third party,….. …..so, however, that the amount for the time being remaining undischarged of moneys borrowed or secured by the directors as aforesaid (apart from temporary loans obtained from the company's bankers in the ordinary course of business) shall not at any time, without the previous sanction of the company in general meeting, exceed the nominal amount of the share capital of the company for the time being issued, but nevertheless no lender or other person dealing with the company shall be concerned to see or inquire whether this limit is observed. No debt incurred or security given in excess of such limit shall be invalid or ineffectual except in the case of express notice to the lender or the recipient of the security at the time when the debt was incurred or security given that the limit hereby imposed had been or was thereby exceeded.	Repeal. See First Report, para 4.8.5.

Table A *Powers and Duties of Directors*		***Comment/Recommendation***
80.	The business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company and may exercise all such powers of the company as are not, by [the Companies Acts, 1963 to 1983] or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations and to the provisions of the Companies Acts, 1963 to 1983, and to such directions, being not inconsistent with the aforesaid regulations or provisions, as may be given by the company in general meeting; but no direction given by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that direction had not been given. [Inserted by 1983 Act, s3 (1), Schedule I, Paragraph 24 (d)].	Import into statute, amended as per recommendations in paras 4.8.6 et seq of First Report. This will be reflected in Part IV Head 23 of the General Scheme of the Companies Bill.
81.	The directors may from time to time and at any time by power of attorney appoint any company, firm or person or body of persons, whether nominated directly or indirectly by the directors, to be the attorney or attorneys of the company for such purposes and with such powers, authorities and discretions (not exceeding those vested in or exercisable by the directors under these Regulations) and for such period and subject to such conditions as they may think fit, and any such power of attorney may contain such provisions for the protection of persons dealing with any such attorney as the directors may think fit, and may also authorise any such attorney to delegate all or any of the powers, authorities and discretions vested in him.	Repeal. See First Report paras 4.8.11 et seq. This will be reflected in the General Scheme of the Companies Bill.
82.	The company may exercise the powers conferred by section 41 of the Act with regard to having an official seal for use abroad, and such powers shall be vested in the directors.	Amend s 41 of the 1963 Act to provide that all companies can have an official seal for use abroad unless precluded in their Articles, and repeal Regulation 82. This will be reflected in the General Scheme of the Companies Bill.
83.	A director who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall declare the nature of his interest at a meeting of the directors in accordance with section 194 of the Act.	Repeal, as it merely repeats s 194(1) of the 1963 Act: *"It shall be the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of the directors of the company."*
84.	A director shall not vote in respect of any contract or arrangement in which he is so interested, and if he shall so vote, his vote shall not be counted, nor shall he be counted in the quorum present at the meeting but neither of these prohibitions shall apply to - (a) any arrangement for giving any director any security or indemnity in respect of money lent by him to or obligations undertaken by him for the benefit of the company; or (b) any arrangement for the giving by the company of any security to a third party in respect of a debt or obligation of the company for which the director himself has assumed responsibility in whole or in part under a guarantee or indemnity or by the deposit of a security; or (c) any contract by a director to subscribe for or underwrite shares or debentures of the company; or (d) any contract or arrangement with any other company in which he is interested only as an officer of such other company or as a holder of shares or of securities in such other companies; and these prohibitions may at any time be suspended or relaxed to any extent and either generally or in respect of any particular contract, arrangement or transaction by the company in general meeting.	This Regulation at present is meant to apply to public companies only – Regulation 7 of Table A Part II applies to private companies, reading as follows: *"A director may vote in respect of any contract, appointment or arrangement in which he is interested, and he shall be counted in the quorum present at the meeting."* Plcs listed on the Stock Exchange tend to have articles which are updated versions of Regulation 84. The Review Group recommends: a) Regulation 84 should be updated to present listed company practice, which should be imposed as an obligation on Plcs unless their Articles provide otherwise. b) The matters in Regulation 7 of Part II of Table A should be stated exceptions to the fiduciary duties to be stated in the Act, for private companies. This will be reflected in the General Scheme of the Companies Bill.

Table A		Comment/Recommendation
85.	A director may hold any other office or place of profit under the company (other than the office of auditor) in conjunction with his office of director for such period and on such terms as to remuneration and otherwise as the directors may determine, and no director or intending director shall be disqualified by his office from contracting with the company either with regard to his tenure of any such other office or place of profit or as vendor, purchaser or otherwise, nor shall any such contract or any contract or arrangement entered into by or on behalf of the company in which any director is in any way interested, be liable to be avoided, nor shall any director so contracting or being so interested be liable to account to the company for any profit realised by any such contract or arrangement by reason of such director holding that office or of the fiduciary relation thereby established.	Import in statute as an exception to the fiduciary duties to be stated in the Act.
86.	A director notwithstanding his interest, may be counted in the quorum present at any meeting whereat he or any director is appointed to hold any such office or place of profit under the company or whereat the terms of any such appointment are arranged, and he may vote on any such appointment or arrangement other than his own appointment or the arrangement of the terms thereof.	This Regulation at present is meant to apply to public companies only – Regulation 8 of Table A Part II applies to private companies, reading as follows: *"The directors may exercise the voting powers conferred by the shares of any other company held or owned by the company in such manner in all respects as they think fit and in particular, they may exercise the voting powers in favour of any resolution appointing the directors or any of them as directors or officers of such other company or providing for the payment of remuneration or pensions to the directors or officers of such other company. Any director of the company may vote in favour of the exercise of such voting rights, notwithstanding that he may be or may be about to become a director or officer of such other company, and as such or in any manner is or may be interested in the exercise of such voting rights in manner aforesaid."* Plcs listed on the Stock Exchange tend to have articles which are the same as or similar to Regulation 86 The Review Group recommends a) That Regulation 84 should be updated to present listed company practice, and imposed as an obligation on plcs unless their Articles provide otherwise. b) The matters in Regulation 8 of Part II of Table A should be stated exceptions to the fiduciary duties to be stated in the Act, for private companies. This is reflected in Part IV Head 25 of the General Scheme of the Companies Bill.
87.	Any director may act by himself or his firm in a professional capacity for the company, and he or his firm shall be entitled to remuneration for professional services as if he were not a director; but nothing herein contained shall authorise a director or his firm to act as auditor to the company.	Import into statute as exceptions to the fiduciary duties to be stated in the Act. This will be reflected in the General Scheme of the Companies Bill. Repeal. See First Report, paras 4.8.14 et seq.
88.	All cheques, promissory notes, drafts, bills of exchange and other negotiable instruments and all receipts for moneys paid to the company shall be signed, drawn, accepted, endorsed or otherwise executed, as the case may be by such person or persons and in such manner as the directors shall from time to time by resolution determine.	

Table A		Comment/Recommendation
89.	The directors shall cause minutes to be made in books provided for the purpose - (a) of all appointments of officers made by the directors; (b) of the names of the directors present at each meeting of the directors and of any committee of the directors (c) of all resolutions and proceedings at all meetings of the company and of the directors and of committees of directors.	Import into statute, integrated with ss 145 et seq of the 1963 Act. This will be reflected in the General Scheme of the Companies Bill.
90.	The directors on behalf of the company may pay a gratuity or pension or allowance on retirement to any director who has held any other salaried office or place of profit with the company or to his widow or dependants, and may make contributions to any fund and pay premiums for the purchase or provision of any such gratuity, pension or allowance.	Import into the statute integrated with the imported Regulation 80. This will be reflected in the General Scheme of the Companies Bill.
Disqualification of Directors		
91.	The office of director shall be vacated if the director - (a) ceases to be a director by virtue of section 180 of the Act; or	This relates to share qualifications, and can be provided for in the statute to any companies which have a shareholding requirement or any other requirement. Recommendation: Insert a provision in the Act equivalent to Regulation 91(a) for companies with share qualifications (or other pre-requisites to appointment and retention of the office) only, also providing that it can be disapplied by companies if they wish. This is reflected in Part IV Head 9 of the General Scheme of the Companies Bill.
	(b) is adjudged bankrupt in the State or in Northern Ireland or Great Britain or makes any arrangement or composition with his creditors generally; or	Repeal: a director is automatically disqualified if bankrupt.
	(c) becomes prohibited from being a director by reason of any order made under section 184 of the Act; or	Repeal: this law is spent and is replaced by the disqualification provisions of Part VII of the 1990 Act.
	(d) becomes of unsound mind; or	This is generally applied to all companies, but uses expressions as to mental health which have progressed for other legal purposes. Rather than examine the substance of this issue at this state, the Group is of the view that its being imported into the statute, but subject to the ability of a company to disapply it, was the preferable way to deal with the point. This is reflected in Part IV Head 16 of the General Scheme of the Companies Bill
	(e) resigns his office by notice in writing to the company; or	Import into statute, subject to the provisions of the 2001 Act [reference] regarding the number of directors falling below the minimum. The difficulties regarding this latter issue are likely to be remedied for the most part by the proposal to reduce the required number of directors to 1. This is reflected in Part IV Head 16 of the General Scheme of Companies Bill.
	(f) is convicted of an indictable offence unless the directors otherwise determine; or	Under the 1990 Act Part VII, convictions for indictable offences in relation to fraud provide for automatic disqualification. Paragraph (f) deals with indictable offences, with, in the past, some companies removing motoring offences from the class of offences that would trigger a vacation of office. Recommendation: Provide that conviction on indictment will cause a director to vacate office, unless the Articles provide otherwise. This is reflected in Part IV Head 16 of the General Scheme of the Companies Bill. An exclusion under the Road Traffic Acts has been inserted.

Table A		Comment/Recommendation
	(g) is for more than six months absent without permission of the directors from meetings of the directors held during that period.	This is generally applied to all companies. Recommendation Repeal. Not necessary to provide for such a default position.
Rotation of Directors		
92.	At the first annual general meeting of the company all the directors shall retire from office, and at the annual general meeting in every subsequent year, one-third of the directors for the time being, or, if a number is not three or a multiple of three, then the number nearest one-third shall retire from office.	Generally, most private companies do not adopt Regulations 92-95 to do with retirement by rotation. Many of those companies choosing retirement by rotation adopt more up to date provisions, most notably providing for directors to retire at least once every three years, which is not what the Regulations provide. The provisions to do with retirement by rotation should be updated for plcs, but should not be the norm for a private company. A private company can adopt them like any other provision it may wish to add to its constitution. This will be reflected in the General Scheme of the Companies Bill.
93.	The directors to retire in every year shall be those who have been longest in office since their last election but as between persons who became directors on the same day, those to retire shall (unless they otherwise agree among themselves) be determined by lot.	See above
94.	A retiring director shall be eligible for re-election.	See above
95.	The company, at the meeting at which a director retires in manner aforesaid, may fill the vacated office by electing a person thereto, and in default the retiring director shall, if offering himself for re-election, be deemed to have been re-elected, unless at such meeting it is expressly resolved not to fill such vacated office, or unless a resolution for the re-election of such director has been put to the meeting and lost.	See above
96.	No person other than a director retiring at the meeting shall, unless recommended by the directors be eligible for election to the office of director at any general meeting unless not less than 3 nor more than 21 days before the day appointed for the meeting shall have been left at the office notice in writing signed by a member duly qualified to attend and vote at the meeting for which such notice is given, of his intention to propose such person for election and also notice in writing signed by that person of his willingness to be elected.	This provision is not solely concerned with retirement by rotation and would be usefully stated alongside other provisions dealing with appointment of directors (Regulation 98/47[23]). Recommendation Insert Regulation 96/45, without reference to retirement by rotation along with Regulations 98/47 and 100/49 in the Act. This is reflected in Part IV Head 13 of the General Scheme of the Companies Bill.
97.	The company may from time to time by ordinary resolution increase or reduce the number of directors and may also determine in what rotation the increased or reduced number is to go out of office.	This is connected with Regulation 75/32. See recommendation above. This is reflected in Part IV Head 13 of the General Scheme of the Companies Bill.
98.	The directors shall have power at any time and from time to time to appoint any person to be a director, either to fill a casual vacancy or as an addition to the existing directors, but so that the total number of directors shall not at any time exceed the number fixed in accordance with these regulations. Any director so appointed shall hold office only until the next following annual general meeting, and shall then be eligible for re-election but shall not be taken into account in determining the directors who are to retire by rotation at such meeting.	This should be stated alongside other provisions dealing with appointment of directors (Regulation 96/45 and 100/49). Recommendation Insert Regulation 96/45, without reference to retirement by rotation along with Regulations 98/47 and 100/49 in the main Act This is reflected in Part IV Head 13 of the General Scheme of the Companies Bill.

Table A		Comment/Recommendation
99.	The company may, by ordinary resolution, of which extended notice has been given in accordance with section 142 of the Act, remove any director before the expiration of his period of office notwithstanding anything in these regulations or in any agreement between the company and such director. Such removal shall be without prejudice to any claim such director may have for damages for breach of any contract of service between him and the company.	Repeal, as the issue is regulated already by s 182 of the 1963 Act.
100.	The company may, by ordinary resolution, appoint another person in place of a director removed from office under regulation 99 and without prejudice to the powers of the directors under regulation 98 the company in general meeting may appoint any person to be a director either to fill a casual vacancy or as an additional director. A person appointed in place of a director so removed or to fill such a vacancy shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.	This should be stated alongside other provisions dealing with appointment of directors (Regulations 96/45 and 98/49). Regulation 96/45, should be inserted without reference to retirement by rotation along with Regulations 98/47 and 100/49 in the Act. This is reflected in Part IV Head 13 of the General Scheme of the Companies Bill.
Proceedings of Directors		
101.	The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit.	Import into statute, amended to provide that meetings of directors may be held by telephone or by other suitable electronic means whereby all directors can hear and be heard, unless the company's constitution provides that such meetings cannot be so held. (First Report, recommendation 4.8.19) This is reflected in Part IV Head 25 of the General Scheme of the Companies Bill.
	Questions arising at any meeting shall be decided by a majority of votes. Where there is an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the directors. If the directors so resolve, it shall not be necessary to give notice of a meeting of directors to any director who, being resident in the State, is for the time being absent from the State.	This is reflected in Part IV Head 25 of the General Scheme of the Companies Bill.
102.	The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall be two.	Import into statute, unamended This is reflected in Part IV Head 25 of the General Scheme of the Companies Bill.
103.	The continuing directors may act notwithstanding any vacancy in their number but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors or director may act for the purpose of increasing the number of directors to that number or of summoning a general meeting of the company but for no other purpose.	Import into statute, unamended This is reflected in Part IV Head 25 of the General Scheme of the Companies Bill.
104.	The directors may elect a chairman of their meeting and determine the period for which he is to hold office, but if no such chairman is elected, or, if at any meeting the chairman is not present within 5 minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.	Import into statute, unamended This is reflected in Part IV Head 25 of the General Scheme of the Companies Bill.
105.	The directors may delegate any of their powers to committees consisting of such member or members of the board as they think fit; any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on it by the directors	Import into statute, unamended This is reflected in Part IV Head 23 of the General Scheme of the Companies Bill.
106.	A committee may elect a chairman of its meeting; if no such chairman is elected, or if at any meeting the chairman is not present within 5 minutes after the time appointed for holding the same, the members present may chose one of their number to be chairman of the meeting.	Import into statute, unamended This is reflected in Part IV Head 25 of the General Scheme of the Companies Bill.

Table A		Comment/Recommendation
107.	A committee may meet and adjourn as it thinks proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and where there is an equality of votes, the chairman shall have a second or casting vote.	Import into statute, unamended This is reflected in Part IV Head 25 of the General Scheme of the Companies Bill.
108.	All acts done by any meeting of the directors or of a committee of directors or by any person acting as a director shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.	Import into statute, unamended This is reflected in Part IV Head 23 of the General Scheme of the Companies Bill.
109.	A resolution in writing signed by all the directors for the time being entitled to receive notice of a meeting of the directors shall be as valid as if it had been passed at a meeting of the directors duly convened and held	Provide for this to be possible by several pieces of paper. This is reflected in Part IV Head 25 of the General Scheme of the Companies Bill.
Managing Director		
110.	The directors may from time to time appoint one or more of themselves to the office of managing director for such period and on such terms as to remuneration and otherwise as they think fit, and, subject to the terms of any agreement entered into in any particular case, may revoke such appointment	Import into statute, amended to provide for any other executive office also. This is reflected in Part IV Head 24 of the General Scheme of the Companies Bill.
	A director so appointed shall not, whilst holding that office, be subject to retirement by rotation or be taken into account in determining the rotation of retirement of directors	Repeal. Where there is retirement by rotation, the fact that a director has an executive office should not exempt him from removal by the shareholders at the AGM
	but (without prejudice to any claim he may have for damages for breach of any contract of service between him and the company), his appointment shall be automatically determined if he ceases for any cause to be a director.	Import into statute. This is reflected in Part IV Head 24 of the General Scheme of the Companies Bill.
111.	A managing director shall receive such remuneration whether by way of salary, commission or participation in the profits, or partly in one way or partly in another, as the directors may determine	Import into statute, unamended This is reflected in Part IV Head 24 of the General Scheme of the Companies Bill.
112.	The directors may entrust to and confer upon a managing director any of the powers exercisable by them upon such terms and conditions and with such restrictions as they may think fit, and either collaterally with or to the exclusion of their own powers, and may from time to time revoke, withdraw, alter or vary all or any of such powers.	Import into statute, unamended This will be reflected in the General Scheme of the Companies Bill.
Secretary		
113.	[Subject to Section 3 of the Companies (Amendment) Act, 1982] the secretary shall be appointed by the directors for such term, at such remuneration and upon such condition as they may think fit; and any secretary so appointed may be removed by them. [Inserted by 1982 Act, s21 (a)].	Import into statute, amended to incorporate Recommendation 11.7.11 from the First Report: (i) the duties of the secretary will, without derogating from his own responsibility, be such duties as are delegated by the board of directors acting as a whole; (ii) the directors shall in their appointment of a secretary have a duty to ensure that the person appointed has the suitable skills to maintain or to procure the maintenance of records (other than books of account) to be kept under the Companies Acts; (iii) upon notification of appointment as secretary, the secretary's signature should appear below a statement "I acknowledge that as a secretary, I have legal duties and obligations under the Companies Acts and other enactments". This is reflected in Part IV Head 2 of the General Scheme of the Companies Bill.

Table A		Comment/Recommendation
114.	A provision of the Act or these Regulations requiring or authorising a thing to be done by or to a director and the secretary shall not be satisfied by or to the same person acting both as director and as, or in place of, the secretary.	Repeal - 1963 Act s 177 states: "A provision requiring or authorising a thing to be done by or to a director and the secretary shall not be satisfied by its being done by or to the same person acting both as director and as, or in place of the secretary." This is reflected in Part IV Head 7 of the General Scheme of the Companies Bill.
The Seal.		
115.	The seal shall be used only by the authority of the directors or of a committee of directors authorised by the directors in that behalf, and every instrument to which the seal shall be affixed shall be signed by a director and shall be countersigned by the secretary or by a second director or by some other person appointed by the directors for the purpose.	Import into statute, integrated with law relating to official seals (1963 Act s 41), securities seals (1977 Act) and registered persons (1973 Regulations, Regulation 6). This will be reflected in the General Scheme of the Companies Bill.
Notices		
133.	A notice may be given by the company to any member either personally or by sending it by post to him to his registered address. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice, and to have been effected in the case of the notice of a meeting at the expiration of 24 hours after the letter containing the same is posted, and in any other case at the time at which the letter would be delivered in the ordinary course of post.	Incorporate into the statute, amended to incorporate (i) Recommendation 4.5.11 from the First Report that that notices can be served by delivery to the registered address of any shareholder (ii) Recommendation 4.5.10 (ii) providing for deemed delivery of all documents after 24 hours Amend also the 1964 Forms Order to remove the requirement for registered post in the case of notices under section 204, subject to the fact of posting being recorded and the sender being identified on the outside of the letter, so as to facilitate returns. This is reflected in Part IV Head 40 of the General Scheme of the Companies Bill.
134.	A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder first named in the register in respect of the share.	Incorporate into statute, unamended. This is reflected in Part IV Head 39 of the General Scheme of the Companies Bill.
135.	A notice may be given by the company to the persons entitled to a share in consequence of the death or bankruptcy of a member by sending it through the post in a prepaid letter addressed to them by name or by the title of representatives of the deceased or Official Assignee in bankruptcy or by any like description at the address supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or bankruptcy had not occurred.	Incorporate into statute, unamended. This is reflected in Part IV Head 39 of the General Scheme of the Companies Bill.
136.	Notice of every general meeting shall be given in any manner hereinbefore authorised to— (a) every member; and (b) every person upon whom the ownership of a share devolves by reason of his being a personal representative or the Official Assignee in bankruptcy of a member, where the member but for his death or bankruptcy would be entitled to receive notice of the meeting; and. (c) the auditor for, the time being of the company. No other person shall be entitled to receive notices of general meetings.	Incorporate into statute, unamended. This is reflected in Part IV Head 39 of the General Scheme of the Companies Bill.
Indemnity		
138.	Every director, managing director, agent, auditor, secretary and other officer for the time being of the company shall be indemnified out of the assets of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in relation to his acts while acting in such office, in which judgment is given in his favour or in which he is acquitted or in connection with any obligation under section 391 of the Act in which relief is granted to him by the Court.	Repeal – tautology of s 391 This will be reflected in the General Scheme of the Companies Bill.

Table A *Part II*		Comment/Recommendation
4.	Subject to sections 133 and 141 of the Act, an annual general meeting and a meeting called for the passing of a special resolution shall be called by 21 days' notice in writing at the least and a meeting of the company (other than an annual general meeting or a meeting for the passing of a special resolution) shall be called by 7 days' notice in writing at the least. The notice shall be exclusive of the day on which it is served or deemed to be served and of the day for which it is given and shall specify the day, the place and the hour of the meeting and, in the case of special business, the general nature of that business and shall be given in manner authorised by these regulations to such persons as are under the regulations of the company entitled to receive such notices from the company. [Regulation 4 of this Part is alternative to Regulations 51 of Part I.]	Incorporate in statute, implementing Recommendations 4.5.7 of the First Report as to length of notice for meetings. This is reflected in Part IV Head 40 of the General Scheme of the Companies Bill.
5.	No business shall be transacted at any general meeting unless a quorum of members is present at the time that the meeting proceeds to business; save as herein otherwise provided, two members present in person or by proxy shall be a quorum. [Regulation 5 of this Part is alternative to Regulation 54 of Part I.	Incorporate into statute, unamended. This is reflected in Part IV Head 41of the General Scheme of the Companies Bill.
6.	Subject to section 141 of the Act, a resolution in writing signed by all the members for the time being entitled to attend and vote on such resolution at a general meeting (or being bodies corporate by their duly authorised representatives) shall be as valid and effective for all purposes as if the resolution had been passed at a general meeting of the company duly convened and held, and if described as a special resolution shall be deemed to be a special resolution within the meaning of the act.	Incorporate into statute, implementing Recommendation 4.5.6 (ii) of the First Report, whereby regardless of what is in the constitution of a company, the written resolution procedure is effective. This is reflected in Part IV Head 50 of the General Scheme of the Companies Bill.
7.	A director may vote in respect of any contract, appointment or arrangement in which he is interested, and he shall be counted in the quorum present at the meeting. [Regulation 7 of this Part is alternative to Regulation 84 of Part I.]	Incorporate into statute as an exception to directors' fiduciary duties. This is reflected in Part IV Head 25 of the General Scheme of the Companies Bill.
8.	The directors may exercise the voting powers conferred by the shares of any other company held or owned by the company in such manner in all respects as they think fit and in particular, they may exercise the voting powers in favour of any resolution appointing the directors or any of them as directors or officers of such other company or providing for the payment of remuneration or pensions to the directors or officers of such other company. Any director of the company may vote in favour of the exercise of such voting rights, notwithstanding that he may be or may be about to become a director or officer of such other company, and as such or in any manner is or may be interested in the exercise of such voting rights in manner aforesaid. [Regulation 8 of this Part is alternative to Regulation 86 of Part I.]	Incorporate into statute as an exception to directors' fiduciary duties. This is reflected in Part IV Head 25 of the General Scheme of the Companies Bill.
9.	Any director may from time to time appoint any person who is approved by the majority of the directors to be an alternate or substitute director. The appointee while he holds office as an alternate director, shall be entitled to notice of meeting of the directors and to attend and vote thereat as a director and shall not be entitled to be remunerated otherwise than out of the remuneration of the director appointing him. Any appointment under this Regulation shall be effected by notice in writing giving by the appointor to the secretary. Any appointment so made may be revoked at any time by the appointor or by a majority of the other directors or by the company in general meeting. Revocation by an appointor shall be effected by notice in writing given by the appointer to the secretary.	Incorporate into statute, unamended. This is reflected in Part IV Head 48 of the General Scheme of the Companies Bill.

Endnotes

[1] Inserted by 1983 Act, s3 (1), Schedule I, Paragraph 24 (c)]

[2] Regulation 47 of Table C of the First Schedule to the Companies Act 1963, Form of Memorandum and Articles of Association of a Company Limited by Guarantee and not having a Share Capital.

7

CHAPTER 7

Share Capital

seven

7.1 Introduction

7.1.1 In the First Report, the Review Group examined the issue of shareholder protection in the context of simplification of the Companies Acts. For the purpose of this Report, the Review Group looked at the matter of shares and share capital, the concept which gives effect to a member's proportional participation in a company's assets and profits and, through voting, its governance.

7.1.2 For the purpose of this Report, the Review Group examined a number of fundamental concepts regarding share capital, and as in the case of corporate governance, the Group examined the relevant provisions of Table A of the First Schedule to the Companies Act 1963.

7.2 "Share Capital"

7.2.1 Section 2(1) of the 1963 Act defines "share" as meaning a "share in the share capital of a company, and includes stock except where a distinction between stock and shares is expressed or implied".

7.2.2 Section 6(4) of the 1963 Act provides, in the case of a company having a share capital –
"the memorandum must also, unless the company is an unlimited company, state the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount;".
This capital is the "authorised" or "nominal" share capital of the company.

7.2.3 Section 2(2) of the 1983 Act provides –
"In relation to an allotment of shares in a company, the shares shall be taken for the purposes of the Companies Acts to be allotted when a person acquires the unconditional right to be included in the company's register of members in respect of those shares."
This is allotted share capital, and includes shares taken by subscribers.

7.2.4 Section 2(3) of the 1983 Act provides, for the purposes of the Companies Acts—
"(a) *a share in a company shall be taken to have been paid up (as to its nominal value or any premium on it) in cash or allotted for cash if the consideration for the allotment or the payment up is cash received by the company or is a cheque received by the company in good faith which the directors have no reason for suspecting will not be paid or is the release of a liability of the company for a liquidated sum or is an undertaking to pay cash to the company at a future date; and*
(b) *in relation to the allotment or payment up of any shares in a company, references in the Companies Acts, except in section 23, to consideration other than cash and to the payment up of shares and premiums on shares*
otherwise than in cash include references to the payment of, or an undertaking to pay, cash to any person other than the company;
and for the purposes of determining whether a share is or is to be allotted for cash or paid up in cash, "cash" includes foreign currency."
Allotted share capital which has been paid up is "paid-up" share capital.

7.2.5 Where shares have been allotted and the allottee is entered in the register of members in respect of those shares, the shares are "issued". In practice, the expression "issued" share capital is used interchangeably with "allotted" share capital, denoting shares comprised in the authorised share capital which have been taken up or agreed to be taken up. In this Report, the Review Group use the expression 'issued' to mean allotted shares which are registered in the name of the allottee and, unless otherwise stated, fully paid-up.

7.2.6 Share capital, both issued and unissued can be divided into different classes of shares, usually defined by provisions in a company's articles of association. It is also possible to attach particular rights to shares without specifying this in the articles of association.

7.3 Quasi capital

7.3.1 Where an amount exceeding the nominal value of a share is paid on allotment, that excess becomes part of the share premium account. Subject to exceptions, discussed below[1], the share premium account is subject to the same rules of capital maintenance as the actual issued share capital of the company.

7.3.2 Where redeemable shares are redeemed or purchased, and are then cancelled out of profits available for distribution, an amount equivalent to the par value of the shares redeemed must be transferred to a capital redemption reserve fund.[2] This reserve is subject to the same rules of capital maintenance as the actual issued share capital of the company

7.3.3 Where the nominal value of a share has been reduced using the procedures in the EMU Act 1998, the amount of the reduction must be transferred to a capital conversion reserve fund which again is subject to the same rules of capital maintenance as the actual issued share capital of the company.

7.3.4 Finally, it is in some companies a relatively common practice for money to be committed by members to companies without the allotment of shares, commonly called a *capital contribution*. This is typically done by the sole member of a company which wishes to fortify the balance sheet of the company, but sees no need for the issue of shares[3]. It is an open point in any particular case as to whether a capital contribution, once made, is subject to the same rules of capital maintenance as the actual issued share capital of the company and the above other reserves.

7.4 Issues considered by the Review Group

7.4.1 The Review Group analysed the issues concerning share capital under the following headings:

- the concept of nominal or par value of shares
- variation of par value of issued shares
- issue of new shares
- transfer of existing shares
- reduction of share capital
- disclosure of ownership of share and loan capital and other matters
- maintenance of capital in corporate reorganisations
- miscellaneous

7.5 Par Value

7.5.1 All shares in Irish-incorporated companies, limited or unlimited, private or public, must have a par value, that is, a value expressed as a monetary amount. The monetary amount can be large or small (e.g. €1,000 or €0.0000001), euro or foreign currency and can be either a whole number or a fraction. There is no requirement that all shares in a company have the same par value.

7.5.2 The Review Group considered whether it would make sense to allow for no par value shares as an option for the new model company (private company limited by shares - cls). In the context of the current review of simpler legislation for the internal market, the Review Group noted the UK position paper proposing amendment of the EU Second Company Law Directive to allow for this. In the UK both the 1954 Board of Trade Review Group (the Gedge Committee) and the 1962 Jenkins Review Group supported the principle of introducing no-par value shares, although this was not acted upon in UK national legislation. Outside the EU, the principle is well established and has been given effect in Australia, New Zealand, South Africa, etc.

7.5.3 In Australia, for example, the Company Law Review Act 1998 abolished par value shares. The objective of this is set out cogently in Understanding Company Law[4], as follows:

> The Company Law Review Act 1998 abolished par value shares: s 254C. The abolition of the concept of par value recognised that it no longer served a useful commercial purpose and its continued existence added unnecessary complexity to the law dealing with share capital.
>
> The meaningful value of a share is based on its proportion of the company's share capital and the net value of the company's business. Its par value was an arbitrary amount which did not usually bear any resemblance to the real value of its shares. In some cases, the par value of a share could be misleading to unsophisticated investors. Section 254C provides that shares no longer have a par value and this also applies to shares issued before 1 July 1998: s 1444.
>
> A company may issue shares at any value that it chooses without being restricted to a predetermined nominal value as specified in its constitution. Contracts and provisions contained in a company's constitution which refer to par value and which operated before 1 July 1998 still apply.
>
> The removal of the concept of par value has resulted in significant simplification of various aspects of the share capital provisions. It is not possible for companies to issue shares at a premium or discount because this presupposes that the shares have a par value.

7.5.4 The most interesting recent development in this context is the final report of the EU High Level Group of Company Law Experts[5], which analyses the issue and recommends as follows:

> Wide demand for no par value shares is being expressed by the financial industry and the legal professions. Not only the SLIM group[6] favoured the introduction of no par value shares, but also the Giovannini Group in its report on The Impact of the Introduction of the Euro on Capital Markets.
>
> Offering the possibility to have no par value shares does not necessarily require major changes in the system. The Second Company Law Directive already allows for shares to have a fractional value (also referred to as "accountable par") rather than a nominal value (see for example Article 8 providing that shares cannot be issued below their nominal or fractional value). Shares would have to express numerically the fraction of the capital of the company that they represent or, alternatively, the total number of shares outstanding. In a system in which shares are dematerialised, the updating of the percentage or of the total number of shares should be relatively easy: there should be continuous disclosure of all shares outstanding, and, at the very least, companies should be required to update the fraction any time that there are relevant changes to it. As for "paper" shares, they would have to include the appropriate fraction or the total number of shares, together with the date in which the fraction or the total number of shares was correct, and a reminder that the correct fraction can be obtained

at any time from the company itself, or from the companies Register.

It is debatable that introducing shares without any reference to either nominal or fractional value would constitute a significant change in the system of the Second Company Law Directive. Many argue that Article 8 of the Directive - which prohibits issues with a discount to nominal value - is the only objection, and that a system of real no par value shares is consistent with the General approach of the Directive to capital formation and maintenance rules. Others take the view that real no par value shares would require a more fundamental change to the system of the Directive.

The Review Group recommend that, as part of SLIM-Plus[7], it is reviewed how no par value shares can be accommodated within the Second Company Law Directive.

7.5.5 It does not seem as if action on this proposal will take place with any degree of urgency. The EU Action Plan on Company Law[8] proposes that before any such reform should take place there should first be a study into the feasibility of an alternative to the existing capital maintenance regime.

7.5.6 The Review Group is of the opinion that the introduction of no par value shares could have a number of advantages, as follows:

- new shares would be issued at the current market price and there would be no confusion between current market value and historic par value;
- the focus would be solely on the actual capital employed and not the paid-up share capital when assessing the true capital of an undertaking; and
- the process of capitalisation, bonus issues, subdivisions etc. would be simplified.

7.5.7 Any proposal to introduce no par value shares would need to take account of creditor protection concerns by setting in place measures to ensure that the current protections afforded to creditors are not reduced in any way. Such reform would be a simplification in the interests of shareholders through simplifying filing requirements with the CRO and would also simplify accounting procedures within a company. To that end the Review Group concludes that Ireland, should express support for and work towards this reform in the appropriate EU forums. In its 5 September 2003 national response to the EU Action Plan, Ireland strongly supported the proposal for a feasibility study on an alternative to the capital maintenance regime and urged that it should get a higher priority than currently proposed in the Action Plan.

7.5.8 The Review Group stops short of a recommendation to abolish the concept of par value of shares for a number of reasons:

- there are likely to be developments on the issue at EU level in the short- to medium-term
- all Irish companies have par value at present
- par value has its relevance in relation to the redemption or liquidation value of shares in a significant number of companies – e.g. redeemable preference shares
- par value provides a shorthand to assist the actual identification of classes of shares
- the Group's proposal on "company capital" set out at 7.6.4 below, which provides a useful half-way house towards no-par value shares in due course, whilst enabling all existing companies to vary the par value of shares to suit their circumstances.

7.6 Variation of the par value of issued shares

7.6.1 Whereas it is possible to vary the par value of unissued shares[9], it is not possible to vary the par value of existing shares other than by consolidation or subdivision (or by reduction of share capital through the Court under s 72 of the 1963 Act). Such a consolidation or division will not change the relative proportions of share capital held by shareholders. More importantly, it is not possible to reduce the par value of issued shares (save under s 72) rendering it difficult or awkward to issue new shares to rank pari passu with existing shares at a price less than the par value of the existing pari passu shares.[10]

7.6.2 The EMU Act 1998 introduced a temporary measure, to operate from the Act's enactment until 30 June 2003 whereby the par value of issued shares could be reduced by up to 10% of the post reduction par value,[11] in the context of the redenomination of share capital, either voluntarily pre-1 January 2002, or automatically as at 1 January 2002 into euro from Irish pounds or other Euroland currencies. This reduction is called "renominalisation". An amount equivalent to the aggregate of the reduction of the par value of issued shares must be transferred to a capital conversion reserve account

7.6.3 The Review Group noted that very many companies have not availed of the provisions for renominalisation of shares in euro, as set out in s 26 of the EMU Act. Failure to do so within the designated period has led to many companies having their unit share prices expressed in very inconvenient amounts. The Review Group accordingly considered if it should recommend indefinite extension of the facility to renominalise.

7.6.4 Consistent with its views on no par value shares set out above, the Review Group is of the opinion that the various ways in which undistributable company capital is designated, i.e. share capital, share premium account, capital redemption reserve fund, and now capital conversion reserve fund are unnecessarily complex and that in the case of the CLS it makes sense to consolidate these into a single account, which in this Report the

Review Group call the company capital account. At present it is possible to create share capital out of the share premium account, capital redemption reserve fund and capital conversion reserve fund, by capitalisation or bonus issues. The Review Group recommends that the par value of shares be capable of being reduced, on the basis that the amount of the reduction is retained in the company capital account, and with identical limitations on distribution to shareholders as at present applies to share capital, share premium account, capital redemption reserve fund, and capital conversion reserve fund.

7.6.5 The Review Group also recommends that it be possible for the par value of issued shares to be increased:

- from other company capital (i.e. share premium account, capital redemption reserve fund, and capital conversion reserve fund);
- distributable reserves; and
- un-distributable reserves.

7.6.6 The Review Group is of the view that this could usefully constitute a stepping-stone to no-par value shares. Moreover, this reform would obviate the need to extend the expiry deadline for the right to renominalise shares.

7.6.7 The one exception to the rule as to non-distributability of company capital for which provision would have to be made is the existing transitional provision at s 220 of the 1990 Act. Section 220 provides that any redeemable preference shares issued by a company before 1 July 1991 which could but for the repeal of section 64[12] have been redeemed under that section shall be subject to redemption in accordance with the provisions of this Part XI of the 1990 Act save that any premium payable on redemption may be paid out of the share premium account instead of out of profits or may be paid partly out of that account and partly out of profits available for distribution.

Transfer between stock and shares

7.6.8 The Review Group considered whether any change to s 68(1)(c) of the 1963 Act was necessary. This provision sets out the powers of a company to convert all or any of its paid-up shares into stock and to re-convert that stock into paid up shares of any denominations. Only paid-up shares can be converted into stock, the historic reason for this being that there was no record of the holders of stock, the certificates of which could, in fact, be transmitted from one person to another without any notification to the company; if conversion of partly paid shares into stock were permitted, this might be resorted to as a device by persons who wish to escape the calls likely to be made on the balance outstanding on their shares. Such abuses have long been addressed by legislation, including the Stock Transfer Act 1963. The Review Group took the view that while this section is little used, and almost never used by a private company, there is little virtue in either repealing it or amending it and therefore recommends no change in this law.

7.7 The issue of new shares

7.7.1 The Review Group considered a number of issues under this heading:

- Whether it is desirable to keep the concept of authorised share capital
- Whether there ought to be any change in the capacity of the board of a company to make non-pre-emptive allotments and grants of options under employees share schemes
- Whether the 5% minimum subscription should be retained in the cls
- Clarification of law as to allotment from undistributable reserves.

As the law now stands, in order for shares to be capable of allotment:

- They should exist as part of the authorised capital, both as to par value and number
- The directors must be authorised by ordinary resolution or by the articles to allot the shares under s 20 of the 1983 Act[13]
- If the shares are being issued for cash other than to existing members, either the pre-emption timetable in ss 23 et seq of the 1983 Act must be complied with or a disapplication of those pre-emption provisions must be effected by special resolution or a provision in the company's articles. This does not apply to shares issued or options over shares granted under employees' share schemes.

Authorised share capital

7.7.2 The Review Group came to the conclusion that the need to cite authorised share capital in the CLS should be abolished. Currently shareholders have three protections from management forcing through an issue of shares – (i) the existence of authorised share capital and (ii) the requirement for a s 20 authorisation at least every 5 years and (iii) the requirement for a section 23 authorisation where shares are to be issued other than pre-emptively. The key protections here are the requirements for s 20 and s 23 authorities rather than the existence of authorised share capital. In view of the requirement for a s 20 authorisation for the allotment of shares,[14] which describes the amount, and nature of share capital which can be allotted, there is no benefit in having a separate pool of capital beyond the s 20 authorisation which cannot be issued. The Review Group recommends that the concept of authorised capital be reoriented to mean the capital capable of being allotted. If a section 20 authorisation does not exist, then it cannot be issued, and the capital may as well not exist.

Exemption of employee shares and options from s 23 of the 1983 Act

7.7.3 The Review Group considered whether there ought to be any change to the law whereby non-pre-emptive issues of shares and grants of options over shares under employee share schemes may be made by a board of directors without the requirement for a section 23 special resolution.[15] Provided they have authority under s 20 of the 1983 Act the directors of a company can grant options to issue shares. The Review Group noted the view from stock market participants that the capacity of directors to grant options to issue shares on this basis should be maintained; any amendment pursuant to which such a grant of options over shares to employees would utilise s 23 (disapplication of pre-emption rights) of the 1983 Act could potentially compromise the equity fundraising capacity of the company; many listed companies use options as an important incentive tool and the ability to grant options should not be restricted. The Review Group concludes there is no need to recommend variation of this law. The Review Group notes also the regulation of these issues in plcs by a combination of Listing Rules and guidelines of the Irish Association of Investment Managers.

Minimum capital and minimum subscriptions

7.7.4 The Review Group is unconvinced that minimum capital levels operate effectively as a creditor protection mechanism. This view is corroborated in the Report of the EU High Level Group of Company Law Experts, as follows:[16]

The Group has reached the conclusion that the only function of the minimum capital requirement is to deter individuals from lightheartedly starting a public limited company. The Review Group are not convinced that minimum capital, at its present levels, performs any other useful functions, but there is no evidence that accordingly it constitutes a hurdle to business activity either. The minimum capital requirement should not be removed, nor increased.

7.7.5 Section 53(3) of the 1963 Act requires that on allotment of shares in a company other than a plc, at least 5% of the par value must be paid up. This is in the context of at least 25% of the par value and all of the premium on shares in a plc being payable on allotment. However, there is an anomaly in that shares allotted under an employee share scheme in a plc are exempt from the requirement for any minimum payment,[17] whereas in a private company they are subject to the 5% minimum payment requirement.

7.7.6 Consistent with the Review Group's recommendations to consolidate the various kinds of company capital into a single company capital account and with its longer term objective of introducing no par value shares the Review Group also recommends deletion of the provision at s 53(3) of the 1963 Act that the amount payable on application on each share shall not be less than 5% of the nominal amount of the share. In a context where it will be possible to have shares of very low nominal value this provision is meaningless. It will be necessary to review the remainder of s 53 when no par value shares become an option.

7.7.7 ***Capitalisation issues from revaluation reserve***

Before the coming into force of the 1983 Act, s 149(6) of the 1963 Act expressly allowed a company to utilise unrealised capital profits, established by revaluation of all the fixed assets of the company, in paying up unissued shares of the company as fully paid bonus shares to be issued to shareholders. That section was repealed by the 1983 Act. However "the availability of unrealised profits to fund a bonus issue remains, but with less clarity of draftsmanship, under the 1983 Act. First, by section 51(2)(a) a bonus issue is not a "distribution" so as to attract the new rules ...... and ...... the First Schedule, paragraph 24(f) adds a new capitalisation article to Table A, drafted to accord with the expressions employed in the 1983 Act, and allowing the use of unrealised profits."[18]

The relevant Article is as follows:

130A The company in general meeting may on the recommendation of the directors resolve that it is desirable to capitalise any part of the amount for the time being standing to the credit of any of the company's reserve accounts or to the credit of the profit and loss account which is not available for distribution by applying such sum in paying up in full un-issued shares to be allotted as fully paid bonus shares to those members of the company who would have been entitled to that sum if it were distributed by way of dividend (and in the same proportions), and the directors shall give effect to such resolution.

7.7.8 The Review Group recommends the clarification of the law on this subject so as expressly to permit such capitalisation issues.

Filings in CRO on allotment

7.7.9 Where shares are issued for a consideration other than cash, then s 58 of the 1963 Act requires the filing of either (i) the written contract documenting the agreement whereby the company acquired the non-cash asset (e.g. a land sale contract) or (ii) where there is no such contract, a *Form 52*, which provides the setting for the description of the consideration. It appears that the *Form 52* is the document that is usually filed, whether or not there is a written contract. In addition, a *Form B5*, must be filed, which will usually provide substantially the same amount of information as the *Form 52*.

7.7.10 The Review Group recommends the repeal of that part of s 58 of the 1963 Act providing for the contract or *Form 52* as the *Form B5* provides satisfactory information. To the extent that the *Form 52* is created so as to provide an opportunity to charge stamp duty, the *Form B5* can operate on that level also. It should be noted that no change is proposed to the level of taxation imposed on the transactions in question, merely the simplification of the process by which it is collected.

7.8 The transfer of existing shares

7.8.1 The Review Group considered a number of issues under this heading:
- stamping procedures
- share buyback provisions of the 1990 Act
- reporting of share transfers in annual returns
- appointment of director pending transmission of shares in a single member company

Stamping procedures

7.8.2 Under the Stamp Duties Consolidation Act 1999 stamp duty on stampable documents must be paid within 30 days of execution. The Review Group notes that the procedure for stamping share transfers has improved in recent years.
However, the Review Group believes that there is a change in legislation which would further improve matters, both for the stamp duty payer and the Revenue Commissioners.
Section 81(1) of the 1963 Act require that a transfer of shares being registered should be "a proper instrument of transfer". This is in practice interpreted as properly stamped. The Revenue Commissioners require adjudication of stamp duty in a number of situations, principally where the value of the transferred asset (in this case, shares) is uncertain; for example where the transferor and transferee are related or connected, or where the consideration is not immediately ascertainable.
Ordinarily this will mean that details of such share transfers and background interaction are furnished to the stamps adjudication office (SAO). The SAO, following a few weeks during which the transaction is scrutinised, issue an assessment to stamp duty.
The Review Group recommends that it should be possible for the stamp duty payer instead of waiting for an assessment, to tender and pay its computation of the stamp duty, and for the documents to be stamped accordingly, with the SAO retaining the share transfers for adjudication of stamp duty. Such transfers should be considered a proper "instrument of transfer", enabling it to be registered. Where the SAO compute and assess a different amount of duty the transferee of the shares would be entitled to a refund, or obliged to make a further payment, as the case may be.

7.8.3 The Review Group recommends that the Department of Finance and the Revenue Commissioners should consider such a change in the interests of the efficient operation of business.

Share buy backs

7.8.4 Part XI of the 1990 Act introduced the concept of treasury shares, being shares of a company purchased by the company. In addition it introduced the ability for a company's subsidiary to purchase shares of the company. The Review Group noted that there appeared to be unnecessary distinctions made between the purchased shares in each such circumstance of purchase and that the new Companies Bill should streamline the terminology.

7.8.5 The Review Group believes it will be helpful to have the exact status of treasury shares clarified. Currently a company has the option to re-issue, hold or cancel treasury shares, as it deems fit. Shareholders can have some say over the prices at which they are re-issued on the market under s 209 of the 1990 Act but no other say over their use.
It is noted that this recommendation will only apply only to companies dealt with under Group of Parts B of the proposed consolidation bill. Work on Group of Parts B has yet to be commenced.

Treasury Shares

7.8.6 Shares held as Treasury Shares (as defined by section 209 of the 1990 Act) should have their listing cancelled and any re-issue of such shares as ordinary shares will be subject to the normal listing requirements for a new issue of shares.

Reporting of share transfers in annual return

7.8.7 Under s 125 of the 1963 Act, as amended, and the current annual return form, a private company must in its annual return notify share transfers from the previous return whereas plcs are exempt from this requirement. The Review Group recommends no change in this exemption for plcs or in the continuing requirement for private companies.

7.9 Reduction of share capital
Court procedures

7.9.1 Section 72 of the 1963 Act provides the basis for the reduction of issued share capital or the cancellation or reduction of potential contributory liability on partly paid shares. Provided a special resolution is passed, a petition may be presented to the Court for such a reduction. The procedures, on the following page, are as follows:

Stage	Legal basis
Hold the meeting of shareholders and/or of creditors and pass special resoluton approving reduction of share capital	s 72
Issue petition to approve reduction	Rules of the Superior Courts, Order 75
Apply to court for directions as to how to advertise the approval of the reductionand the petition for court approval of the reduction	Rules of the Superior Courts, Order 75 Rule 6
Advertise the petition as directed	Order made by the court under Rules of the Superior Courts, Order 75 Rules 6(2)
Obtain court approval for reduction	s 72
Register Order approving reduction with Registrar	s 72

7.9.2 There is one procedural shortcoming in the above, the bringing of the matter before the court to seek directions to advertise the reduction of share capital, when the usual procedure is to advertise in newspapers.[19] It is not unusual either, for the Court to require direct communication to non-Irish creditors of the proposed reduction of share capital, whilst considering the newspaper advertisement satisfactory for Irish creditors. The Review Group recommends also that (what is now) the first court hearing – to approve the notification of/advertisement to the shareholders of the passing of the resolution to reduce share capital and presentation of petition – should be removed in most cases, by providing that any requirement to notify/advertise should be satisfied by (i) advertising in two daily national newspapers, as at present, along the lines of s 266(2) of the 1963 Act and (ii) notifying overseas creditors directly. The shareholders ought to have been notified of the reduction resolution, and therefore there ought to be no requirement to re-notify them of the passing of the resolution. To the extent that the Court considers it desirable to provide for further advertisement, that can be done in the context of the actual hearing of the petition.

Unlimited companies

7.9.3 Unlimited companies are not bound by the provisions as to maintenance of share capital to which limited companies are bound. Section 51 of the 1983 Act, which defines "distribution" for the purposes of the Companies Acts applies to unlimited companies as it does to limited companies. The Review Group recommends the disapplication of Part IV of the 1983 Act to unlimited companies.

7.10 Disclosure of ownership of share and loan capital and other matters

7.10.1 The Companies Acts, together with the Irish Takeover Panel Act 1997, contain a bewildering mish-mash of sometimes inconsistent provisions regarding disclosure of interests in shares and participation in concert party arrangements. For good measure, the Irish Listing Rules regarding disclosure to the market of major shareholdings in listed companies are modelled around the UK law, resulting in a need for hybrid regulatory requirements. The definitions of notifiable interest are inconsistent. There are two different definitions of concert party arrangement which may require to be used concurrently.

7.10.2 The notification requirements are summarised in the table below.

Notifiable Event	Who notifies who	Period within which	Statutory basis
Director acquires or disposes of shares in any company, its subsidiary or holding company	Director notifies the company (If company is a quoted plc, company notifies Stock Exchange	5 working days, begining on day after event (before 5.30p.m. on following day	1990 Act ss 53 et seq (Listing Rule 9.xx) 16.13/16.14
Person (including director) acquires or disposes of voting shares in a plc (quoted or unquoted) such as to bring shareholding through 5% or any percentage point above 5%	Person acquiring or disposing of shares notifies the company (If company is a quoted plc, company notifies Stock Exchange	5 working days, beginning on day after event (before 5.30pm on following day	1990 Act ss 67 et seq (Listing Rule 9.xx) 9.11
Persons (including director) collusively acquire or dispose of voting shares in a plc (quoted or unquoted) such as to bring shareholding through 5% or any percentage point above 5%	Person acquiring or disposing of shares notifies other concert parties and the company (If company is a quoted plc, company notifies Stock Exchange)	5 working days, beginning on day after event (before 5.30pm on following day)	1990 Act ss 67 et seq (Listing Rule 9.xx) 9.11
Person (including director) (or persons acting in concert) acquires or disposes of quoted shares in a plc quoted on the Irish Stock Exchange such as to bring shareholding through 10%, 25%, 50% or 75%	Person acquiring or disposing of shares notifies Irish Stock Exchange	5 Working days, beginning on day after event	1990 Act ss 91 et seq 9.11
Person, or persons acting in concert (other than a director) acquire or dispose of listed shares in a plc quoted on the Irish Stock Exchange such as to bring shareholding above 3% but below 5%	No legal requirement to notify the company or any other person. (However, if quoted company finds out, quoted company notifies Stock Exchange	(before 5.30pm on following day)	(Listing Rule 9.xx) 9.11
Any person with 1% acquires or disposes of any shares in any plc subject to the Irish Takeover Panel during an offer period	Person acquiring or disposing of shares notifies Irish Takeover Panel (This exempts the plc from any requirement it might have under the Listing Rules to notify the Stock Exchange	Before 12 noon on the day following dealing.	Irish Takeover Panel Act s xx and Substantial Acquisition Rules, Rule XX 9.11

7.10.3 Recommendation 11.10.8(i) in the First Report had proposed disapplication for both private and public companies of the requirement on Directors to make a notification under Part IV of the 1990 Act where the interest was less than 1% of the issued share capital. However the Review Group notes the opinion of the ISE that it is not appropriate to disapply this obligation in the case of public companies. Timely and accurate disclosure of information on directors' interests and changes therein is of interest to market participants generally and no materiality threshold should be generally applied. While the monetary value attributable to a 1 % holding in any company may not be significant, the fact of the shareholding and of any change therein, may be significant. The market benefits from certainty regarding the disclosure of directors' interests should outweigh other considerations. Amending the legislation as suggested would result in more subjectivity and less clarity

7.10.4 The Review Group recommends that disapplication of the notification requirement as recommended at 11.10.8(i) of the First Report should only be valid for all private companies.

7.10.5 Elaborating on recommendation 11.10.8(ii), the Review Group recommends the inclusion of a universal definition of "disclosable interest" in the new Companies Bill so as to align the meaning for all disclosure purposes under the Companies Acts. Similarly, the Group recommends that the distinct provisions defining concert party behaviour contained in ss 73 et seq of the 1990 Act and in the Irish Takeover Panel Act and Rules be merged, preferably based on the more common and more often analysed and used provisions in the Irish Takeover Panel Act and Rules.

7.10.6 Currently Irish law provides that, if a shareholder has, or in aggregate the parties to an agreement have, an interest that is equal to, or exceeds, 5% of the voting shares and is, therefore, notifiable under Section 59, they must each make the notification required by that Section. The Listing Rules require notification by the company, where the company is notified (by accident or deliberately by the relevant persons) where the interest is equal to, or exceeds, 3%. The Review Group recommends that the law should be consistent with the Listing Rules requirement and accordingly recommends that the law be amended to reduce the threshold for notification of individual and group acquisitions of shares in plcs from 5% to 3%.

Registration in the register of members of a financial interest in shares

7.10.7 With regard to the recording of a financial interest on the occasion of transmission of shares the Review Group noted that the legal provisions covering this were elsewhere than the Companies Acts, e.g. Order No. 46 of the Superior Courts. The Review Group will be examining the possible incorporation of the required procedure in the consolidated Companies Act.

Disclosure of shareholders' agreements

7.10.8 The articles of association of a company is a public document that governs how that company is run and sets out the rights and obligations of the shareholders and directors. Often the members of a private company adopt a shareholders' agreement, which supplements and often takes precedence over a number of the provisions contained in the articles. Unlike the articles, the shareholders' agreement is a private contract between the shareholders which is not subject to public scrutiny and to which the company is not a party. In effect, what this means is that where there is a shareholders' agreement in place, access to the articles of association of a company will not necessarily provide a third party with a complete picture of how the company is run and what special arrangements exist between the shareholders. However the Review Group is of the view that the shareholders of a private company should be free to privately agree such matters between themselves particularly in relation to commercially sensitive issues which are often addressed in the shareholder's agreement. To subject these arrangements to public scrutiny is unnecessary and would be unduly onerous.

7.10.9 From a listed company perspective, shareholder agreements are rare given the large number of shareholders. It is the view of the Review Group that the current disclosure requirements contained in the Listing Rules should be sufficient to keep the shareholders of a listed company and the public at large sufficiently informed. For example, where there is a Class 1 transaction, summary details of any share purchase agreement will usually be set out in the Class I documentation as a material contract and may also be required to be included as a document on display.

Bearer shares

7.10.10 Bearer shares are possible under Irish company law but are unusual. Private companies may not issue themwithout imperilling their private status. The Review Group does not propose any change vis-a-vis bearer shares. It is pertinent to note the following comment in an OECD paper which deals with "Countermeasures against Instruments for Achieving Anonymity":

> ***Bearer shares*** – in certain jurisdictions, bearer shares are commonly and legitimately used. However, the high level of anonymity that they provide makes them attractive for nefarious

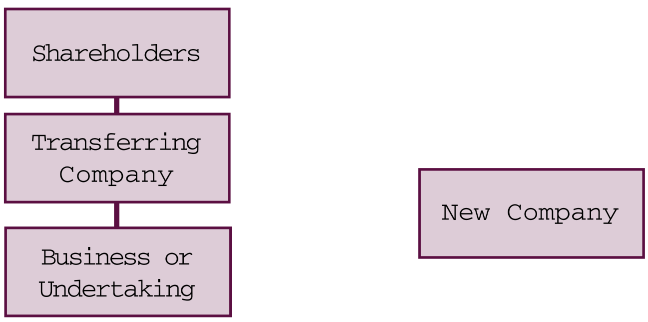
purposes, especially in certain jurisdictions and in certain commercial contexts, such as shell companies …. In order to curb their misuse, jurisdictions may wish to review the use of bearer shares. Options might include their abolition or the introduction of measures to ensure 1) their immobilisation (e.g., by requiring deposit of bearer shares with the authorities/licensed corporate service providers or by dematerialising shares) or 2) that their owners are known to the company or the authorities (e.g., mandatory reporting of identity of bearer shareholder as a condition to exercise voting rights or to receive dividends or upon attaining certain levels of control).

7.11 Maintenance of capital in corporate reconstructions

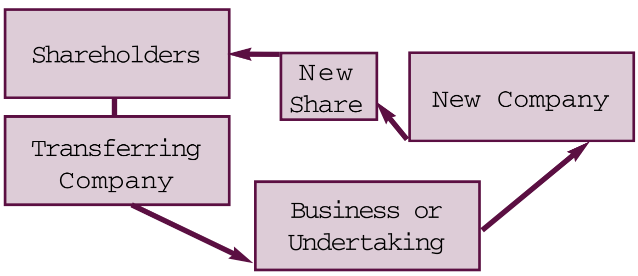
7.11.1 It is not unusual for there to be bona fide reconstructions of companies and the businesses of companies whereby a company's undertaking or part of an undertaking or a subsidiary is transferred or hived off into a new company, with the consideration for such transfer being the issue of new shares in the new company. Where the new shares of that new company are allotted to the company which has transferred the business, there is no particular legal difficulty. However, where the new shares are issued not to the company which has transferred the business or subsidiary, but instead to the shareholders of the transferring company, particular legal issues arise.

7.11.2 This can be illustrated in the following diagram.

Position before transaction:

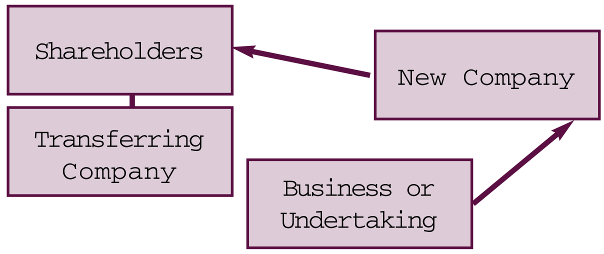


Transaction:



Position after transaction

After the transaction, the shareholders hold the same business, but through a different company



7.11.3 Such a transaction is not uncommon, and facilitates the splitting of the enterprises of a company whilst enabling the shares in the enterprises to be held by the same shareholders.

Recognition of merger transactions in company law

7.11.4 Section 30(4) of the 1983 Act envisages a transaction where a company transfers a business with the consideration being received not by the transferring company, but by its shareholders.

> *"For the purposes of subsection (2)(b) there is a proposed merger of two companies when one of them proposes to acquire all the assets and liabilities of the other in exchange for the issue of shares or other securities in that one to shareholders of the other, with or without any cash payment to those shareholders".*

Recognition of merger transactions under stamp duty and tax law

7.11.5 Section 80(2)(c) of the Stamp Duty Consolidation Act 1999 envisages transactions where a company (the new company referred to in the example at Para 5.11.2 above) issues new shares as consideration for the transfer to it of shares in a company or the undertaking of a company:

> the consideration for the acquisition …. consists as to not less than 90 per cent of that consideration –
>
> (i) where an undertaking is to be acquired, in the issue of shares in the acquiring company to the target company or to holders of shares in the target company, …

7.11.6 Comparable express recognition under tax law is given by section 587 of the Taxes Consolidation Act 1997.

Creditor protection in merger transactions

7.11.7 Where a company enters into a transaction such as is described in this section, it is "giving away" an asset, with its shareholders receiving a benefit. Company law controls this transaction by requiring that the value passed out of the company be not greater than the amount of profits available for distribution.[45] This means that unless there are distributable reserves equivalent in value to the transferred undertaking, such a transaction cannot proceed.

7.11.8 The Review Group is of the view that where the interests of creditors are not adversely affected (but in circumstances where there may be an inadequate amount of distributable reserves), such transactions ought to be allowed take place, subject to a validation procedure being followed. Indeed, it appears that up to the *Aveling Barford* decision[20], there was a practice among Irish legal practitioners to arrange just that, with the transferor companies passing resolutions (normally unanimous ordinary resolutions)[21] after the board of directors of the transferor company had made a statutory declaration of solvency, modelled on that used in the case of financial assistance validation procedures. Transactions such as these, whilst gratuitous in the strict sense of the word, are given effect to in the context of splitting one enterprise into two, with a continuance of common ownership.

7.11.9 Accordingly, the Review Group recommends that a company ought to be empowered to enter into transactions whereby an undertaking or part of an undertaking or a subsidiary is transferred to a new company which issues shares as consideration to the shareholders rather than to the transferring company, notwithstanding the absence of adequate distributable reserves, provided that a validation procedure is implemented with respect to that transaction. The scheme of head or the new Companies Bill provides accordingly

7.12 Other Share Capital Issues

Forfeiture and surrender and lien

7.12.1 The Review Group noted that these sections are little used but did not propose any amendment to them.

Rights/classes of shares

7.12.2 The provisions of the relevant section (Section 38 of the 1983 Act) apply only where the capital of a company is divided into shares of different classes. The shares in any company may of course be all exactly alike and carry the same rights as regards votes, dividends and distributions on liquidation. However, companies sometimes issue shares of different types with varying rights - they have different classes of shares, and the rights attached are called “class rights”. In addition to “ordinary”, the types of share may be, for example, preference shares, redeemable preference shares or special category shares and the class rights normally relate to voting, dividends, redemption or distribution of assets on liquidation. The class rights can be set out either in the memorandum or articles of the company or in the terms of issue of the shares concerned.

7.12.3 Provision for the variation of class rights attached to shares may be made in the memorandum or the articles of association. For instance, Regulation 3 of Table A provides that class rights can be altered with the written consent of the holders of three-fourths of the issued shares of the class, or with the sanction of a special resolution passed at a meeting of the holders of the shares of the class. If a company’s articles contain such a clause and class rights are stated in the articles, this method of variation will apply. Where the rights are stated in the memorandum, the memorandum may, either expressly or by reference to the articles, prescribe a method of alteration.

7.12.4 However, where the rights are attached to a class of shares in the company otherwise than by the memorandum, and the articles of the company do not contain provision with respect to the variation of the rights, s 38 provides that those rights may only be varied if,

- the holders of three-quarters in nominal value of the issued shares of that class consent in writing to the variation; or
- a special resolution passed at a separate general meeting of the holders of that class sanctions the variation.

7.12.5 The Section further requires that the necessary quorum at any such meeting other than an adjourned meeting shall be two persons holding or representing by proxy at least one-third in nominal value of the issued shares of the class in question and at an adjourned meeting one person holding shares of the class in question or his proxy.

7.12.6 This appears to be the only provision in the Companies Acts where a quorum of members voting is specified. As such, it might be considered anomalous. However the Review Group was of the view that the balance of interest lay in favour of its retention.

Shareholders’ rights and duties

7.12.7 No change proposed, except to clarify definitions of ‘members’ and ‘shareholders’.

Minority rights and remedies

7.12.8 The recommendations of the Review Group are set out at 6.9.4 of its First Report. In response to the discussion paper by the EU Expert Group on Company Law (April 2002) the Irish Government has set out its proposed approach which had as its central principle that the threshold percentage ownership of shares enabling a buy out should be set at national level, subject to it not being higher than 95%. The response outlined that in Ireland the Review Group had just completed an extensive review of this law in the context of a very busy and efficient capital market and came to the conclusion that the existing 80% value threshold for triggering compulsory acquisition entitlements in Irish law should remain.

7.12.9 The High Level Expert Group in its final report[22] in fact reached the conclusion that member states "should be required to create squeeze-out and sell-out rights at a level to be set at 90% as a minimum and 95% as a maximum majority on a class by class basis, for listed and open companies.[23] Before applying a similar regime to closed companies,[24] further study into the relationship with contractual exit arrangements is required." It would be important as this issue is elaborated in discussions at EU level, that Ireland makes the point that where national minimum levels apply, as in Ireland's case 80%, and are considered to operate satisfactorily, these should be maintained.

Company reporting/filing obligations

7.12.10 With regard to *Application and Allotment* there is also the possibility of reconstituting the annual return form into two distinct parts, with the capital structure of the company being a distinct part. In this scenario companies would only need to update the capital structure when changed. The other part of the form would need no updating. The implementation of such an innovation would not require legislation but could be accomplished by the Minister prescribing the content and format of the form. It is understood that the CRO may currently be examining the structure of these forms to determine whether they can be improved. The Review Group supports this approach.

7.12.11 ***Companies Capital Duty***

The Review Group confirms its recommendation at 5.8.5 of the First Report on capital duty on the allotment of shares.

7.13 Table A Analysis and Recommendations

Table A		Comment/Recommendation
Share Capital and Variation of Rights.		Import into statute, unamended. This is reflected in Part III Head 3 of the General Scheme of the Companies Bill.
2.	Without prejudice to any special rights previously conferred on the holders of any existing shares or class of shares, any share in the company may be issued with such preferred, deferred or other special rights or such restrictions, whether in regard to dividend, voting, return of capital or otherwise, as the company may from time to time by ordinary resolution determine.	
3.	[If at any time the share capital is divided into different classes of shares the rights attached to any class may, whether or not the company is being wound up, be varied or abrogated with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of a special resolution passed at a separate general meeting of the holders of the shares of the class].	Already embodied in s 38 of the 1983 Act, which deals with the same subject matter. This is reflected in Part III Head 15 of the General Scheme of new the Companies Bill.
4.	The rights conferred upon the holders of the shares of any class issued with preferred or other rights shall not, unless otherwise expressly provided by the terms of issue of the shares of that class, be deemed to be varied by the creation or issue of further shares ranking pari passu therewith.	Import into statute, unamended. This is reflected in Part III Head 15 of the General Scheme of the Companies Bill.
5.	Subject to the provisions of these Regulations relating to new shares, the shares shall be at the disposal of the directors, and they may (subject to the provisions of the Companies Acts, 1963 to 1983) allot, grant options over or otherwise dispose of them to such persons, on such terms and conditions and at such times as they may consider to be in the best interests of the company and its shareholders, but that so that no shares shall be issued at a discount and so that, in the case of shares offered to the public for subscription by a public limited company, the amount payable on application on each share shall be not less than one-quarter of the nominal amount of the share and the whole of any premium thereon.	Import its provisions into an amended s 20 of the 1983 Act, which deals with the same subject matter. This is reflected in Part III Head 4 (3) of the General Scheme of the Companies Bill.
6.	The company may exercise the powers of paying commissions conferred by section 59 of the Act, provided that the rate per cent and the amount of commission paid or agreed to be paid shall be disclosed in the manner required by that section, and the rate of the commission shall not exceed the rate of 10 per cent. of the price at which the shares in respect whereof the same is paid are issued or an amount equal to 10 per cent. of such price (as the case may be). Such commission may be satisfied by the payment of cash or the allotment of fully or partly paid shares or partly in one way and partly in the other. The company may also, on any issue of shares, pay such brokerage as may be lawful.	Import into statute, and integrate with s 60 of the 1963 Act. This is reflected in Part III Head 10(2)(m) of the General Scheme of the Companies Bill.
7.	Except as required by law, no person shall be recognised by the company as holding any share upon any trust, and the company shall not be bound by or be compelled in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any interest in any fractional part of a share or (except only as by these regulations or by law otherwise provided) any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder: this shall not preclude the company from requiring the members or a transferee of shares to furnish the company with information as to the beneficial ownership of any share once such information is reasonably required by the company.	Import into statute, unamended. This is reflected in Part III Head 3(6) and 3(7) of the General Scheme of the Companies Bill.

Table A		Comment/Recommendation
8.	[Every person whose name is entered as a member in the register shall be entitled without payment to receive within 2 months after allotment or lodgement of a transfer (or within such other period as the conditions of issue shall provide) one certificate for all his shares or several certificates each for one or more of the shares upon payment of 12 new pence for every certificate after the first or such less sum as the director shall from time to time determine, so, however, that in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint holders shall be sufficient delivery to all such holders.	Import into statute, modernise and integrate with ss 86 et seq of the 1963 Act. This is reflected in Part III Head 23 of the General Scheme of the Companies Bill.
	Every certificate shall be under the seal or under the official seal kept by company by virtue of section 3 of the Companies (Amendment) Act, 1977, and shall specify the shares to which it relates and the amount paid].[52]	Import into statute, and integrate with ss 86 et seq of the 1963 Act and s 3 of the 1977 Act. Import into Group of Parts B.
9.	If a share certificate be defaced, lost or destroyed, it may be renewed on payment of [12 new pence] or such less sum and on such terms (if any) as to evidence and indemnity and the payment of out-of-pocket expenses of the company of investigating evidence as the directors think fit.	Import into statute, and integrate with ss 86 et seq of the 1963 Act. This is reflected in section Part III Head 23 of the General Scheme of the Companies Bill.
10.	The company shall not give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company, but this regulation shall not prohibit any transaction permitted by section 60 of the Act.	Already embodied in s 60 of the 1963 Act, as amended. This is reflected in Part III Head 10(1)of the General Scheme of the Companies Bill.
Lien		
11.	The company shall have a first and paramount lien on every share (not being a fully paid share) for all moneys (whether immediately payable or not) called or payable at a fixed time in respect of that share [and the company shall also have a first and paramount lien on all shares (other than fully paid shares) standing registered in the name of a single person for all moneys immediately payable by him or his estate to the company];[53] but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this regulation. The company's lien on a share shall extend to all dividends payable thereon.	Import into statute, unamended. This is reflected in Part III Head 8(a) and 8(b) of the General Scheme of the Companies Bill.
12.	The company may sell, in such manner as the directors think fit, any shares on which the company has a lien, but no sale shall be made unless a sum in respect of which the lien exists is immediately payable, nor until the expiration of 14 days after a notice in writing, stating and demanding payment of such part of the amount in respect of which the lien exists as is immediately payable, has been given to the registered holder for the time being of the share, or the person entitled thereto by reason of his death or bankruptcy.	Import into statute, unamended. This is reflected in Part III Head 8(c) of the General Scheme of the Companies Bill.
13.	To give effect to any such sale, the directors may authorise some person to transfer the share sold to the purchaser thereof. The purchaser shall be registered as the holder of the shares comprised in any such transfer, and he shall not be bound to see to the application of the purchase money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.	Import into statute, unamended. This is reflected in Part III Head 8(d) of the General Scheme of the Companies Bill.
14.	The proceeds of the sale shall be received by the company and applied in payment of such part of the amount in respect of which the lien exists as is immediately payable, and the residue, if any, shall (subject to a like lien for sums not immediately payable as existed upon the shares before the sale) be paid to the person entitled to the shares at the date of the sale.	Import into statute, unamended. This is reflected in Part III Head 8(e) of the General Scheme of the Companies Bill.

Table A		Comment/Recommendation
Calls on Shares		
15.	The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares (whether on account of the nominal value of the shares or by way of premium) and not by the conditions of allotment thereof made payable at fixed times, provided that no call shall exceed one-fourth of the nominal value of the share or be payable at less than one month from the date fixed for the payment of the last preceding call, and each member shall (subject to receiving at least 14 days' notice specifying the time or times and place of payment) pay to the company at the time or times and place so specified the amount called on the shares. A call may be revoked or postponed, as the directors may determine.	Import into statute, unamended. This is reflected in Part III Head 6(a) and 6(b) of the General Scheme of the Companies Bill.
16.	A call shall be deemed to have been made at the time when the resolution of the directors authorising the call was passed and may be required to be paid by instalments.	Import into statute, unamended. This is reflected in Part III Head 6(c) of the General Scheme of the Companies Bill.
17.	The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.	Import into statute, unamended. This is reflected in Part III Head 6(d) of the General Scheme of the Companies Bill.
18.	If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest on the sum from the day appointed for payment thereof to the time of actual payment of such rate, not exceeding 5 per cent. per annum, as the directors may determine, but the directors shall be at liberty to waive payment of such interest wholly or in part.	Import into statute, unamended. This is reflected in Part III Head 6(e) of the General Scheme of the Companies Bill.
19.	Any sum which by the terms of issue of a share becomes payable on allotment or at any fixed date, whether on account of the nominal value of the share or by way of premium, shall, for the purposes of these regulations, be deemed to be a call duly made and payable on the date on which, by the terms of issue, the same becomes payable, and in case of non-payment all the relevant provisions of these regulations as to payment of interest and expenses, forfeiture or otherwise, shall apply as if such sum had become payable by virtue of a call duly made and notified.	Import into statute, unamended. This is reflected in Part III Head 6(f) of the General Scheme of the Companies Bill.
20.	The directors may, on the issue of shares, differentiate between the holders as to the amount of calls to be paid and the times of payment.	Import into statute, unamended. This is reflected in Part III Head 6(g) of the General Scheme of the Companies Bill.
21.	The directors may, if they think fit, receive from any member willing to advance the same, all or any part of the moneys uncalled and unpaid upon any shares held by him, and upon all or any of the money so advanced may (until the same would, but for such advance, become payable) pay interest at such rate not exceeding (unless the company in general meeting otherwise directs) 5 per cent. per annum, as may be agreed upon between the directors and the member paying such sum in advance.	Import into statute, unamended. This is reflected in Part III Head 6(h) of the General Scheme of the Companies Bill.
Transfer of Shares		
22.	The instrument of transfer of any share shall be executed by or on behalf of the transferor and transferee, and the transferor shall be deemed to remain the holder of the share until the name of the transferee is entered in the register in respect thereof.	Import into statute. In the case of limited companies (private or public), amend to remove the requirement for execution by or on behalf of the transferee, unless the company's constitution otherwise expressly so provides or in the case of shares that are only partially paid. This is reflected in Part III Head 19(2) of the General Scheme of the Companies Bill. This has been amended.
23.	Subject to such of the restrictions of these regulations as may be applicable, any member may transfer all or any of his shares by instrument in writing in any usual or common form or any other form which the directors may approve.	Import into statute, unamended. This is reflected in Part III Head 19(1) of the General Scheme of the Companies Bill.

Table A		Comment/Recommendation
24.	The directors may decline to register the transfer of a share (not being a fully paid share) to a person of whom they do not approve, and they may also decline to register the transfer of a share on which the company has a lien. The directors may also decline to register any transfer of a share which, in their opinion, may imperil or prejudicially affect the status of the company in the State or which may imperil any tax concession or rebate to which the members of the company are entitled or which may involve the company in the payment of any additional stamp or other duties on any conveyance of any property made or to be made to the company.	Import into statute to include common law rule of lapse of ability of directors to decline to register transfer after 2 months. The regulations in Part II, Table A to the 1963 Act, applicable to private companies is reflected in Part III Head 20 of the General Scheme of the Companies Bill.
25.	The directors may also decline to recognise any instrument of transfer unless - (a) a fee of [12 new pence] or such lesser sum as the directors may from time to time require, is paid to the company in respect thereof; and (b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer; and (c) the instrument of transfer is in respect of one class of share only.	Import into statute, unamended, save that the actual costs of processing the transfer ought to be capable of being charged by the Company and modernised. This is reflected in Part III Head 20 of the General Scheme of the Companies Bill.
26.	If the directors refuse to register a transfer they shall, within two months after the date on which the transfer was lodged with the company, send to the transferee notice of the refusal.	Import into statute. This is reflected in Part III Head 20(3) of the General Scheme of the Companies Bill.
27.	The registration of transfers may be suspended at such times and for such periods, not exceeding in the whole 30 days in each year, as the directors may from time to time determine.	Import into statute, integrated with s 121 of the 1963 Act. This is reflected in Part III Head 20 of the General Scheme of the Companies Bill.
28.	The company shall be entitled to charge a fee not exceeding [12 new pence] on the registration of every probate, letters of administration, certificate of death or marriage, power of attorney, notice as to stock or other instrument.	Import into statute, amended to provide that the actual costs of processing the transfer ought to be capable of being charged by the Company and modernised. This is reflected in Part III Head 21(e) of the General Scheme of the Companies Bill.
Transmission of Shares		
29.	In the case of the death of a member, the survivor or survivors where the deceased was a joint holder, and the personal representatives of the deceased where he was a sole holder, shall be the only persons recognised by the company as having any title to his interest in the shares; but nothing herein contained shall release the estate of a deceased joint holder from any liability in respect of any share which had been jointly held by him with other persons.	Import into statute, unamended. This is reflected in Part III Head 21(a) of the General Scheme of the Companies Bill.
30.	Any person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such evidence being produced as may from time to time properly be required by the directors and subject as hereinafter provided, elect either to be registered himself as holder of the share or to have some person nominated by him registered as the transferee thereof, but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by that member before his death or bankruptcy, as the case may be.	Import into statute, unamended. This is reflected in Part III Head 21(b) of the General Scheme of the Companies Bill.
31.	If the person so becoming entitled elects to be registered himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects. If he elects to have another person registered, he shall testify his election by executing to that person a transfer of the share. All the limitations, restrictions and provisions of these regulations relating to the right to transfer and the registration of transfers of shares shall be applicable to any such notice or transfer as aforesaid as if the death or bankruptcy of the member had not occurred and the notice or transfer were a transfer signed by that member.	Import into statute, unamended. This is reflected in Part III Head 21(c) of the General Scheme of the Companies Bill.

Table A		Comment/Recommendation
32.	A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company, so, however, that the directors may at any time give notice requiring any such person to elect either to be registered himself or to transfer the share, and if the notice is not complied with within 90 days, the directors may thereupon withhold payment of all dividends, bonuses or other moneys payable in respect of the share until the requirements of the notice have been complied with.	Import into statute, unamended. This is reflected in Part III Head 21(d) of the General Scheme of the Companies Bill.
Forfeiture of Shares		
33.	If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of the call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid together with any interest which may have accrued.	Import into statute, unamended. This is reflected in Part III Head 9(a) of the General Scheme of the Companies Bill.
34.	The notice shall name a further day (not earlier than the expiration of 14 days from the date of service of the notice) on or before which the payment required by the notice is to be made, and shall state that in the event of non-payment at or before the time appointed the shares in respect of which the call was made would be liable to be forfeited.	Import into statute, unamended. This is reflected in Part III Head 9(b) of the General Scheme of the Companies Bill.
35.	If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.	Import into statute, unamended. This is reflected in Part III Head 9(c) of the General Scheme of the Companies Bill.
36.	A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors deem fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.	Import into statute, unamended. This is reflected in Part III Head 9(d) of the General Scheme of the Companies Bill.
37.	A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture were payable by him to the company in respect of the shares, but his liability shall cease if and when the company shall have received payment in full of all such moneys in respect of the shares.	Import into statute, unamended. This is reflected in Part III Head 9(e) of the General Scheme of the Companies Bill.
38.	A statutory declaration that the declarant is a director or the secretary of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share. The company may receive the consideration, if any, given for the share on any sale or disposition thereof and may execute a transfer of the share in favour of the person to whom the share is sold or disposed of and he shall thereupon be registered as the holder of the share, and shall not be bound to see to the application of the purchase money, if any, nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.	Import into statute, amended to remove the reference to statutory declaration, and instead refer to a statement made for the purposes of s 242 of the 1990 Act. This is reflected in Part III Head 9(f) and (g) of the General Scheme of the Companies Bill.
39.	The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the nominal value of the share or by way of premium, as if the same had been payable by virtue of a call duly made and notified.	Import into statute, unamended. This is reflected in Part III Head 9(h) of the General Scheme of the Companies Bill.
Conversion of Shares into Stock		
40.	The company may by ordinary resolution convert any paid up shares into stock, and reconvert any stock into paid up shares of any denomination	Import into statute, unamended. This is reflected in Part III Head 11(1)(b) of the General Scheme of the Companies Bill.

Table A		Comment/Recommendation
41.	The holders of stock may transfer the same, or any part thereof, in the same manner, and subject to the same regulations, as and subject to which the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit; and the directors may from time to time fix the minimum amount of stock transferable but so that such minimum shall not exceed the nominal amount of each share from which the stock arose.	Import into statute, unamended. This is reflected in Part III Head 1(5)(a) of the General Scheme of the Companies Bill.
42.	The holders of stock shall, according to the amount of stock held by them have the same rights, privileges and advantages in relation to dividends, voting at meetings of the company and other matters as if they held the shares from which the stock arose, but no such right, privilege or advantage (except participation in the dividends and profits of the company and in the assets on a winding up) shall be conferred by an amount of stock which would not, if existing in shares, have conferred that right, privilege or advantage.	Import into statute, unamended. This is reflected in Part III Head 1(5)(b) of the General Scheme of the Companies Bill.
43.	Such of the Regulations of the company as are applicable to paid up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and "stockholder".	Import into statute, unamended. This is reflected in Part III Head 1(5)(c) of the General Scheme of the Companies Bill. Shareholder and Stockholder do not appear as defined terms.
Alteration of Capital		
44.	The company may from time to time by ordinary resolution increase the share capital by such sum to be divided into shares of such amount, as the resolution shall prescribe.	Import into statute, taking account of the proposed reorientation of "authorised capital" to mean such amount of share capital as is available to be allotted by the directors. This is reflected in Part III Head 2(i) of the General Scheme of the Companies Bill.
45.	The company may by ordinary resolution:- (a) consolidate and divide all or any of its share capital into shares of a larger amount than its existing share; (b) sub-divide its existing shares, or any of them, into shares of a smaller amount than is fixed by the memorandum of association subject, nevertheless, to section 68(1)(d) of the Act; (c) Cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person.	Import (a) and (b) into statute, taking account of (i) the proposed reorientation of "authorised capital" to mean such amount of share capital as is available to be allotted by the directors (ii) the ability to increase and reduce the par value of issued shares. Repeal (c) in view of the foregoing. This is reflected in Part III Head 11 of the General Scheme of the Companies Bill.
46.	The company may by special resolution reduce its share capital, any capital redemption reserve fund or any share premium account in any manner and with and subject to any incident authorised, and consent required, by law.	Already embodied in s 72 of 1963 Act as amended by proposal that companies are authorised to reduce their share capital, unless the constitution provides otherwise. This is reflected in Part III Head 12 of the General Scheme of the Companies Bill.
Dividends and Reserve		
116.	The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors.	Import into statute, unamended. This is reflected in Part III Head 42(a) of the General Scheme of the Companies Bill.
117.	The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.	Import into statute, integrated with Part III of the 1983 Act. This is reflected in Part III Head 42(b) of the General Scheme of the Companies Bill.
118.	[No dividend or interim dividend shall be paid otherwise than in accordance with the provisions of Part IV of the Companies (Amendment) Act, 1983, which apply to the company].	Already embodied in s 45 of 1983 Act. This is reflected in Part III Head 37(i) of the General Scheme of the Companies Bill.

119.	The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for any purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion either be employed in the business of the company or be invested in such investments as the directors may lawfully determine. The directors may also, without placing the same to reserve, carry forward any profits which they may think prudent not to divide.	Import into statute, unamended. This is reflected in Part III Head 42(b)(ii) of the General Scheme of the Companies Bill.
120.	Subject to the rights of persons, if any, entitled to shares with special rights as to dividend, all dividends shall be declared and paid according to the amounts paid or credited as paid on the shares in respect whereof the dividend is paid, but no amount paid or credited as paid on a share in advance of calls should be treated for the purposes of this regulation as paid on the share. All dividends shall be apportioned and paid proportionally to the amounts paid or credited as paid on the shares during any portion or portions of the period in respect of which the dividend is paid; but if any share is issued on terms providing that it shall rank for a dividend as from a particular date, such share shall rank for dividend accordingly.	Import into statute, unamended. This is reflected in Part III Head 42(c) of the General Scheme of the Companies Bill.
121.	The directors may deduct from any dividend payable to any member all sums of money (if any) immediately payable by him to the company on account of calls or otherwise in relation to the shares of the company.	Import into statute, unamended. This is reflected in Part III Head 42(d) of the General Scheme of the Companies Bill.
122.	Any general meeting declaring a dividend or bonus may direct payment of such dividend or bonus wholly or partly by the distribution of specific assets and in particular paid up shares, debentures or debenture stock of any other company or in any one or more of such ways, and the directors shall give effect to such resolution, and where any difficulty arises in regard to such distribution, the directors may settle the same as they think expedient, and in particular may issue fractional certificates and fix the value for distribution of such specific assets or any part thereof and may determine that cash payments shall be made to any members upon the footing of the value so fixed, in order to adjust the rights of all the parties, and may vest any such specific assets in trustees as may seem expedient to the directors.	Import into statute, unamended. This is reflected in Part III Head 42(e) of the General Scheme of the Companies Bill.
123.	Any dividend, interest or other moneys payable in cash in respect of any shares may be paid by cheque or warrant sent through the post directed to the registered address of the holder, or, where there are joint holders, to the registered address of that one of the joint holders who is first named on the register or to such person and to such address as the holder or the joint holders may in writing direct. Every such cheque or warrant shall be made payable to the order of the person to whom it is sent. Any one of two or more joint holders may give effectual receipts for any dividends, bonuses or other moneys payable in respect of the shares held by them as joint holders.	Import into statute, unamended. This is reflected in Part III Head 42(f) of the General Scheme of the Companies Bill.
124.	No dividend shall bear interest against the company.	Import into statute, unamended. This is reflected in Part III Head 42(g) of the General Scheme of the Companies Bill.

Capitalisation of Profits

130.	The company in general meeting may upon the recommendation of the directors resolve that any sum for the time being standing to the credit of any of the company's reserves (including any capital redemption reserve fund or share premium account) or to the credit of profit and loss account be capitalised and applied on behalf of the members who would have been entitled to receive the same if the same had been distributed by way of dividend and in the same proportions either in or towards paying of amounts for the time being unpaid on any shares held by them respectively or in paying up in full on issued shares or debentures of the company of a nominal amount equal to the sum capitalised (such shares or debentures to be allotted and distributed credited as fully paid up to and amongst such holders and the proportions aforesaid) or partly in one way and partly in another, so however, that the only purpose for which sum standing to the credit of the capital redemption reserve fund or the share premium account shall be applied and shall be thus permitted by sections 62 and 64 of the Act.	Incorporate into the statute, amended to take account of the proposal in this Chapter 7.6.4 permitting fungibility of share capital and other undistributable reserves. This is reflected in Part III Head 43(a) of the General Scheme of the Companies Bill.

Table A		Comment/Recommendation
130A	The company in general meeting may on the recommendation of the directors resolve that it is desirable to capitalise any part of the amount for the time being standing to the credit of any of the company's reserve accounts or to the credit of the profit and loss account which is not available for distribution by applying such sum in paying up in full unissued shares to be allotted as fully paid bonus shares to those members of the company who would have been entitled to that sum if it were distributed by way of dividend (and in the same proportions), and the directors shall give effect to such resolution.	Incorporate into the statute unamended. This is reflected in Part III Head 43(b) of the General Scheme of the Companies Bill.
131.	Whenever a resolution is passed in pursuance of Regulation 130 or 130A, the directors shall make all appropriations and applications of the undivided profits resolved to be capitalised thereby and all allotments and issues of fully paid shares or debentures, if any, and generally shall do all acts and things required to give effect thereto with full power to the directors to make such provision as they shall think fit for the case of shares or debentures becoming distributable in fractions (and, in particular, without prejudice to the generality of the foregoing, to sell the shares or debentures represented by such fractions and distribute the net proceeds of such sale amongst the members otherwise entitled to such fractions in due proportions) and also to authorise any person to enter on behalf of all the members concerned into an agreement with the company providing for the allotment to them respectively credited as fully paid up of any further shares or debentures to which they may become entitled on such capitalization or, as the case may require, for the payment by the application thereto of their respective proportions of the profits resolved to be capitalised of the amounts remaining unpaid on their existing shares and any agreement made under such authority shall be effective and binding on all such members.	Incorporate into the statute unamended. This is reflected in Part III Head 43(c) of the General Scheme of the Companies Bill.
Part II		
3.	The directors may, in their absolute discretion, and without assigning any reason therefore, decline to register any transfer of any share, whether or not it is a fully paid share.	Regulation 3 of this Part is alternative to Regulation 24 of Part I for private companies. Incorporate in statute. This is reflected in Part III Head 21(a) of the General Scheme of the Companies Bill.
10.	Every person whose name is entered as a member in the register shall be entitled without payment to receive within two months after allotment or lodgement of a transfer (or within such other period as the conditions of issue shall provide) one certificate for all his shares or several certificates each for one or more of his shares upon payment of 12 new pence for every certificate after the first or such less sum as the director shall from time to time determine, so, however, that in respect of a share or shares held jointly by several persons, the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint holders shall be sufficient delivery to all such holders. Every certificate shall be under the seal and shall specify the shares to which it relates and the amount paid up thereon. Regulation 10 of this Part is alternative to Regulation 8 of Part I.	Incorporate into statute unamended save modernised. This is reflected in Part III Head 23(1), (5) and (6) of the General Scheme of the Companies Bill.

7.14 Summary of Recommendations

- In the appropriate EU forums Ireland should express support for and work towards the possibility of introducing no par value shares. (7.5.7)

- The par value of shares should be capable of being reduced, on the basis that the amount of the reduction is retained in the company capital account, and with identical limitations on distribution to shareholders as at present applies to share capital, share premium account, capital redemption reserve fund, and capital conversion reserve fund. (7.6.4)

- The par value of issued shares should be capable of being increased from other company capital (i.e. share premium account, capital redemption reserve fund, and capital conversion reserve fund), from distributable reserves and from un-distributable reserves. (7.6.5)

- While s 68(1)(c) of the 1963 Act is little used, and almost never used by a private company, there is little virtue in either repealing it or amending it and therefore no change is necessary. (7.6.8)

- The need to cite authorised share capital in the CLS should be abolished. (7.7.2)

- There is no need to vary section 23 of the 1983 Act whereby non-pre-emptive issues of shares and grants of options over shares under employee share schemes may be made by a board of directors without the requirement for a section 23 special resolution. (7.7.3)

- Section 53(3) of the 1963 Act, which states that the amount payable on application on each share shall not be less than 5% of the nominal amount of the share, should be deleted. (7.7.6)

- The law relating to capitalisation issues from revaluation reserve should be clarified so as to expressly permit capitalisation issues. (7.7.8)

- Where shares are issued for a consideration other than cash, the requirement in section 58 of the 1963 Act to file a written contract documenting the agreement whereby the company acquired the non-cash asset or a Form 52 where there is no such written contract documenting the agreement should be repealed. (7.7.10)

- The Department of Finance and the Revenue Commissioners should consider changing the procedure for the stamping of documents in the interests of the efficient operation of business. (7.8.3)

- The exact status of treasury shares should be clarified. (7.8.5)

- Shares held as Treasury Shares (as defined by section 209 of the 1990 Act) should have their listing cancelled and any re-issue of such shares as ordinary shares will be subject to the normal listing requirements for a new issue of shares. (7.8.6)

- There should be no change in exemption for plcs from, or in the continuing requirement for private companies to, notify share transfers from the previous return in its annual return under section 125 of the 1963 Act. (7.8.7)

- The procedure for the reduction of capital under section 72 of the 1963 Act should be amended to remove, in most cases, (what is now) the first court hearing – to approve the notification of/advertisement to the shareholders of the passing of the resolution to reduce share capital and presentation of petition – by providing that any requirement to notify/advertise should be satisfied by (i) advertising in two daily national newspapers, as at present, along the lines of s 266(2) of the 1963 Act and (ii) notifying overseas creditors directly. (7.9.2)

- Part 4 of the 1983 Act should be disapplied to unlimited companies. (7.9.3)

- Recommendation 11.10.8(i) of the First Report, which proposed the disapplication of the requirement on directors to make a notification under Part IV of the 1990 Act where the interest was less than 1% of the issued share capital, should be limited to private companies. (7.10.4)

- A universal definition of "disclosable interest" should be added to the new Companies Bill so as to align the meaning for all disclosure purposes under the Companies Acts. (7.10.5)

- The distinct provisions defining concert party behaviour contained in ss 73 et seq of the 1990 Act and in the Irish Takeover Panel Act and Rules should be merged, preferably based on the more common and more often analysed and used provisions in the Irish Takeover Panel Act and Rules. (7.10.5)

- The law on notifiable interest should be consistent with the Listing Rules requirement. Accordingly the law should be amended to reduce the threshold for notification of individual and group acquisitions of shares in plcs from 5% to 3%. (7.10.6)

- There is no change in the law proposed *vís-à-vís* bearer shares. (7.10.10)

- A company ought to be empowered to enter into transactions whereby an undertaking or part of an undertaking or a subsidiary is transferred to a new company which issues shares as consideration to the shareholders rather than to the transferring company, notwithstanding the absence of adequate distributable reserves, where a validation procedure is implemented with respect to that transaction. (7.11.9)

- Although the provisions concerning forfeiture, surrender and lien are little used, there is no amendment to them proposed. (7.12.1)

- Section 38 of the 1983 Act appears to be the only provision in the Companies Acts where a quorum of members voting is specified. As such, it might be considered anomalous. However the Review Group was of the view that the balance of interest lay in favour of its retention. (7.12.6)

- No change proposed to shareholders' rights and duties, except to clarify definitions of 'members' and 'shareholders'. (7.12.7)

Endnotes

1 See para. 5.6.7
2 1990 Act, s 208.
3 As no shares are issued, this also has the effect of avoiding a charge to 1% companies capital duty.
4 Lipton, P and Herzberg, A., *Understanding Company Law*, ISBN 0 455 21718 1
5 Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels, 4 November 2002, page 82.
6 The "SLM" group is an advisory group to the Commission on Simpler Legislation for the Internal Market proposals.
7 "SLIM-Plus" is the term used in the High Level Expert Group Report to cover the set of proposals for reform of the Second Company Law Directive suggested by the SLIM Group, along with the modifications and further recommendations proposed by the High Level Group.
8 Modernising Company Law and Enhancing Corporate Governance in the European Union, COM (2003) 284 final, 21 May 2003.
9 1963 Act, s 68.
10 It is in fact possible through convoluted reorganisations to achieve a reduction in share capital - (i) split existing shares into surviving shares and redeemable shares, all redeemable say for 1¢ (ii) issue one new redeemable share at par (iii) redeem all the redeemable shares for an aggregate sum of 1¢ (iii) a sum equivalent to the par value of the redeemed shares is transferred into a capital redemption reserve account.
11 Section 26 provides for companies wishing to renominalise, i.e. to express share capital figures in convenient amounts in euro if simple redenomination in euro leads to inconvenient (uneven) amounts. The section provides for such renominalisation up to 30 June 2003, provided that a resolution approving renominalisation is passed by shareholders. In cases where renominalisation would lead to a decrease in share capital, the section provides that a special resolution of shareholders will be required to the effect that an amount equal to the decrease will be paid into a fund to be known as the capital conversion reserve fund.
12 Section 64 of the 1963 Act provided for redeemable preference shares, re-enacting s 2 of the Companies Act 1959, which introduced them.
13 It is also usual for there to be an article in the articles of association of the company along the lines of Regulation 5 of Table A Part I which reads as follows: 5. Subject to the provisions of these regulations relating to new shares, the shares shall be at the disposal of the directors, and they may (subject to the provisions of the Act) allot, grant options over or otherwise dispose of them to such persons, on such terms and conditions and at such times as they may consider to be in the best interests of the company and its shareholders, but so that no share shall be issued at a discount, except in accordance with the provisions of the Act, and so that in the case of shares offered to the public for subscription, the amount payable on application on each share shall not be less than 5 per cent. of the nominal amount of the share.
14 Other than shares taken by subscribers on incorporation.
15 See definition of "equity security" in s 23(13) of the 1983 Act.
16 Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels, 4 November 2002, p. 82.
17 S 23(5) of the 1983 Act.
18 Ussher, Company Law in Ireland, 1986, Sweet & Maxwell.
19 First Report, Recommendation 11.8.11.
20 Options for Obtaining Beneficial Ownership and Control Information: a Template, OECD Steering Group on Corporate Governance, 9 July 2002
21 Re *Aveling Barford Ltd v Perion Ltd* (1989) B.C.L.C. 626 following a line of authority back to *Trevor v Whitworth* (1887) 12 App Cas 409
22 Op. cit.
23 In order to avoid the compulsory filing requirement for special resolutions.
24 Published 4 November 2002, page 110.
25 The report defines "Open" companies as companies whose shares are not admitted to trading on a regulated market or otherwise regularly traded, but whose internal structures would allow for listing, free transferability of shares and dispersed ownership outside a securities market.
26 The report defines "Closed" companies as companies whose shares are not freely transferable and which therefore cannot be admitted to listing on a stock exchange, and in the case of which dispersed ownership outside a securities market is inconceivable.
27 Inserted by 1983 Act, s3 (1) Schedule I, Paragraph 24 (a).
28 Inserted by 1977 Act, s 5(2).

8

CHAPTER 8

Debentures and Registration of Charges

eight

8.1 Debentures

8.1.1 Sections 91 to 97 of the 1963 Act may be taken collectively. Some of these provisions date back to pre 1922 days[54]. At the time of the enactment of the 1963 Act, it was quite common for companies incorporated in Ireland to incur debt by the issue of debentures in favour of its bankers and others. Often the issue of such debentures was secured by charges over the company's assets – hence the layout of the 1963 Act provides for the registration of charges immediately following the provisions dealing with debentures.[1]

8.1.2 Currently, companies incur debt by obtaining loans from bankers, the terms of which are set out in a private facility letter or facility agreement. A number of companies issue bonds, commercial paper or other note instruments to creditors both in and outside the State. While bonds, commercial paper and note instruments fall within the definition of debenture under section 2 of the 1963 Act, the provisions of sections 93 to 97 have become less relevant. However they have not become redundant and should be retained so that the substantive law applicable to existing debentures is preserved.

8.1.3 This is not the position with sections 91 and 92. A point in particular might be made concerning section 91(1) which imposes a requirement on a company to keep a register of debentures. Even as far back as 1895, this provision was regarded as almost a "dead letter"[2]. Accordingly, the Review Group recommends the repeal of sections 91 and 92.

8.2 Categories of Charges for Registration

8.2.1 Credit has been described often as being the lifeblood of industry.[3] Credit is often given on the security of a charge[4] over the property of the corporate borrower and/or corporate guarantor. The importance of having an independent Register of Charges was recognised over a hundred years ago.[5] Even where credit is being given on an unsecured basis, a creditor of a large facility will usually wish to ensure the corporate borrower does not create any charges.

8.2.2 The categories of charges created by companies requiring registration have been extended over the past century but currently do not include a number of categories.[6] The current law is set out in section 99(2) of the 1963 Act. Although some amendments were proposed in the Companies Bill 1987,[7] detailed consideration of this "very technical and complex part of company law",[8] has not been undertaken in the State since the report of the Company Law Reform Committee in 1958.[9] Since that time, a number of useful and thought provoking Reports have emanated from the United Kingdom.[10] However, despite such Reports, and indeed lapsed and unimplemented legislation,[11] the law in the United Kingdom remains much the same as that applying in Ireland.

8.2.3 The over-riding public requirements of legislation governing companies is the need to provide timely information on a company and such information should be transparent, so that those dealing with a company can make themselves familiar with the company's financial soundness and credit position.

8.2.4 As a result of the provisions of section 99, a person making a search in the CRO can ascertain to a significant extent what assets a company has created a charge over and the beneficiary of such charge. The requirement to file particulars of charges in the CRO provides useful information to creditors and potential creditors as well as enhancing the information available to the public concerning companies.

8.2.5 The division of charges into categories is an historical anachronism which for practitioners has become cumbersome. This has recently been evidenced by the requirement to categorise the headings within which the charge comes when presenting to the CRO, particulars of the charge to be registered on the companies form C1. The Review Group believes that, subject to any EU requirements, in order to bring greater consistency and transparency as well as greater certainty to the law, every charge[12] created by a company should be subject to the requirement to register particulars in the CRO.[13] In making this recommendation, the Review Group has borne in mind perhaps the principal rationale dating back to the Bills of Sale Acts,[14] namely that creditors should not be misled by a person appearing to have full title to an asset which it possesses where such asset is already encumbered in favour of another creditor.

8.2.6 An exception to the registration requirement should be any charge which falls within the ambit of Directive 2002/47/EC of the European Parliament and of the Council of 6th June, 2002, on financial collateral arrangements. The Directive was implemented in Ireland by S.I. No. 1 of 2004. The Directive provides that Member States of the EU shall not provide that charges over financial collateral in favour of certain categories of financial institutions over financial collateral shall be contingent for their enforceability on the performance of any formal act.[15] A formal act would be registration of the charge in a register such as that kept by the CRO. Accordingly, the Review Group approves and recommends that charges, whether fixed or floating, over cash, money credited to an account of a financial institution, money market deposits, shares, bonds and debt instruments, units in collective investment undertakings, money market instruments and claims and rights (such as dividends or interest) in respect of any of the foregoing would not be registerable[16].

8.2.7 A number of benefits arise out of this exclusion, namely:

(i) Currently there is no requirement to register a fixed charge over cash or indeed over monies credited to an account of a financial institution. There is, however, a requirement to register a fixed charge on book debts[17]. While the courts have indicated that monies in a bank account are not book debts[18], the legal position is not free from doubt and accordingly in practice such charges are almost invariably registered.

(ii) Currently, a fixed charge over shares (unless securing an issue of debentures) is not registerable, but in practice such charges are registered as such charges will invariably include a charge over all dividends payable in respect of such shares; dividends are perceived as being possibly book debts and therefore a charge on dividends is registerable.

(iii) Although there was a specific opt-out in the Directive[19] to the effect that Member States may exclude from the scope of the Directive charges created by a company (other than credit or financial institutions, insurance undertakings, collective investment undertakings or management companies), to have used this opt out for such companies, the Review Group believe, would have hindered access to the capital markets by Irish incorporated companies – whether they be trading out of the IFSC or otherwise, to the detriment of the companies themselves and ultimately the economy of the State.[20]

8.2.8 Certain well established security interests involving the transfer of possession in the creation of the security, such as the pledge (and delivery) of goods or negotiable instruments, should not require registration. The reason for this is that the goods are not in the purported possession of the debtor/pledger. This would maintain the current position of not registering such security – a practice which has benefited commerce and trade and is widely recognised.

8.2.9 Certain types of retention of title clauses have been held by the courts to be registrable as a charge.[21] Particulars of such clauses should continue to be registered where they are deemed to be a charge. This report does not review what may or may not be a charge, but it does contain proposals for the reform of the registration of charges created by companies.

8.2.10 Section 99(10) (a) of the 1963 Act provides that in this part of the Act "charge" includes "mortgage". This definition should be amended to provide that "for the purposes of this Part the expression "charge" means a mortgage or a charge in an agreement (written or oral) created by a company over an interest in any property, assets or undertaking of that company, but shall not include a mortgage or charge in an agreement (written or oral) created by a company over an interest in cash, money credited to an account of a financial institution, or any other deposits, shares, bonds and debt instruments, units in collective investment undertakings, money market instruments and claims and rights (such as dividends or interest) in respect of any of the foregoing".

8.3 Filing

8.3.1 The law currently provides that failure to file the prescribed particulars of a registerable charge within 21 days after the date of its "creation" will render the charge void against any creditor or liquidator of the company[22]. The horrendous consequences for a secured creditor failing to file particulars of a charge within the 21-day period ensures compliance with the requirement.[77] The Review Group believe the ability to obtain late registration ensures that the invalidity provision under section 99 is not contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[23]

8.3.2 However, the present system can create anomalies because, aside from priority under any specialist registries dealing with particular assets, charges acquire their priority from the date they are created not the date they are registered, provided they are subsequently registered within the 21-day period. An example to illustrate the defect in the present system is as follows: A lender may arrange to make available finance to a corporate borrower on day 10 subject to receiving a charge over the borrower's assets, at the time it advances the loan, and obtaining also at that time a search from the CRO (carried out on day 10), showing that the borrower has no outstanding charges registered against it. If the lender files the form C1 in the CRO (containing the prescribed particulars of the charge created on day 10) and such filing is made on day 12, the lender might reasonably assume that it has priority over any other charge created by the borrower. However, aside from priority under any specialist registries dealing with particular assets,[24] if the corporate borrower had created a charge on the same assets on day 2 (8 days prior to day 10) but had not registered particulars of the charge until day 20, this latter charge would in fact rank in priority to the charge given on day 10, as it had been created although not filed, prior to the date of the creation of the day 10 charge.

8.3.3 Thus, for example, charge "A", created on day 2 over specific assets, takes priority over charge "B" on the same assets, created on day 10, even if its particulars are not filed with the CRO, and thus publicly known, until day 20 and charge "B" is disclosed on day 12. The lender in respect of charge "B" has no notice of the existence of charge "A" at the time of the creation of his charge.

8.3.4 This system is clearly open to abuse; in the example given the lender although taking all appropriate precautions will not have attained a first ranking charge. Although to date there has been no evidence of abuse, and whilst irrelevent in cases of charges over real property which are the subject of the vast majority of charges created, the Review Group believe it should not be left open for abuse to the detriment of potential providers of finance.

8.3.5 To minimise the potential for fraudulent abuse, the Review Group recommend that priority be given to the creditor who files the first in time. This priority will be subject to any over-riding priority applicable to certain assets, such as land, under already established principles applicable to the Registry of Deeds or the Land Registry (as the case may be). The priority would also be subject to any contrary agreement between the creditors such as an inter-lender or priority agreement often entered into by financial institutions where more than one such institution lends to a particular company.

8.3.6 To ensure that another charge does not obtain priority in the period between obtaining a clear search and filing a form C1, namely on day 11 in the example given above, a filing could be submitted prior to the completion of a transaction, provided a further filing evidencing the actual creation of a charge was filed (within 21 days of its creation) within 21 days of the first filing. The charge would take effect as to priority on the date of the first preliminary filing, or where there is no preliminary filing, on the date of the filing of the form C1. Such a notice filing system has been applied for over 50 years in the United States[24] and applies also in Canada[25] and New Zealand.[26] It has been and is recommended in the United Kingdom.[27] To avoid abuse, particulars of the first filing should be signed on behalf of the chargor and the chargee. In the absence of a second filing within 21 days, the first filing would lapse, thereby avoiding the cumbersome requirement of filing a satisfaction. Accordingly, the Review Group recommends that a notice filing system be implemented in the State.

8.3.7 This preliminary filing would be a useful safeguard to secured lenders, to put in place at the time a completion date for the transaction is imminent, for example seven days prior to the completion date. A search on the completion date should show the filing in place. Where there is no other filing, the lender would be secure in the knowledge of having priority by advancing funds on the completion date and then subsequently filing the form C1 within 21 days of the first filing date. Subject to other specialist registries, filings made on the same day in respect of more than one charge against a company would result in an equal priority for the charges, irrespective of the time of day or whether or not filing was made by post, in person or electronically.

8.3.8 The lender would not be obliged to make two filings. It could simply make one filing of the completed *Form C1* within 21 days of the creation of the charge as currently applies. Many lenders may consider it prudent to make two filings. Where two filings are made, the first filing would contain all the required details of the *Form C1* other than the date of the charge. The second filing would confirm the creation of the charge (specified in the first filing) and indicate its date. Thus, completion of the second filing statement would not be time consuming or cumbersome.

8.4 Prescribed particulars

8.4.1 Section 99(1) of the 1963 Act requires the filing of prescribed particulars in the CRO. Up to recent times these prescribed particulars were filed on the Companies Office form 47- currently these particulars are filed on a Companies Office form C1. The prescribed particulars include

(1) the name of the charging company,
(2) the registration number of the company,
(3) the date of the charge,
(4) the category or categories of the charge by reference to section 99(2),
(5) the amount secured by the charge,
(6) whether or not particulars of the charge are to be filed in a foreign jurisdiction to make it effective,
(7) the name and contact details of the presenter of the form,
(8) the name and address of the person entitled to the charge,
(9) short particulars of the charged property,
(10) the signature on behalf of the chargor and/or the chargee.

8.4.2 The completion of the *Form C1* often utilises a high degree of time unappreciated by chargors and chargees. The law needs reforming so that the form informs the public of the essential details of the charge at a cost to industry and indeed the CRO which is competitive to similar systems in other low cost jurisdictions.

8.4.3 The information specified in (1), (2), (3), (7), and (8) above, being essential, should be retained. If particulars of all charges, other than specific exceptions (as outlined in paragraph 8.2.10 above) are to be filed, the categories as set out in section 99(2) should be abolished. It is wasteful of time to duplicate information on the form, as the brief particulars will set out the details of the property charged – thus the information in point (4) above, which in any event is not required by primary legislation, should be abolished.[28]

8.4.4 Historically, information as to the amount secured by the charge was useful as charges were created usually to secure the issue of debentures for specific amounts. This category of information has become redundant and is of little relevance today to a person making a search. Most charges now secure all sums due or to become due by the chargor to the chargee. Some charges are created to secure specific obligations under a contract. Once a charge is in place, a subsequent potential creditor is likely to require the first charge to be released or to have sight of the first charge, which can be provided by the chargor, to ascertain exactly the nature of the security which will have priority. The information under this category as filed has little practical relevance and should be repealed.

8.4.5 The requirement (under category (6)) to indicate whether or not the charge needs to be filed in a foreign jurisdiction and the requirement to file an additional *form 47C* arises under section 99(5). It should be of no concern to the Registrar or indeed the public whether the charge needs to be perfected in a foreign jurisdiction – it is of course a concern for the chargee and its advisor. The requirement however to inform the Registrar of this is creating work for the sake of it and should be repealed.

8.4.6 The name and address of the person entitled to the charge is useful information. There are instances where the chargee transfers its charge to a third party. Currently, there is no CRO form informing the Registrar of the transfer. In practice, the Registrar is notified of some transfers, but many disposals are not notified to the Registrar. The filing of this information would be helpful and the Review Group recommend that a form be instituted to inform the Registrar. The form should state the same information as in the amended *form C1*, subject to adding details of the new chargee replacing the retiring one. However, the failure to file such a form should not, of itself, affect the validity, or transfer, of the charge.[28] It would usually be in the transferor's interest to have the form filed. To avoid a duplication of filing, the Review Group suggest that where charges are transferred pursuant to a statutory instrument, such as a transfer of banking business approved by the Minister for Finance pursuant to the Central Bank Act 1971, no filing would be required or accepted by the Registrar.

8.4.7 The area which has caused the most difficulty is the category of brief particulars of the property charged. Currently, the Registrar limits these particulars to 250 words although an additional page(s) can be provided by the applicant for registration.

8.4.8 At the time the 1963 Act was enacted, a typical corporate debenture in favour of its bankers would create a fixed charge over its land and a floating charge over all its undertaking, assets and property. Following the English High Court decision in *Siebe Gorman & Co., Limited v Barclays Bank Ltd.*,[29] a fixed charge was often created over present and future book debts. In more recent times, a fixed charge is usually created over all assets save stock (in trade), the undertaking generally and often book debts (because since 1986 where a fixed charge over book debts is created a super preferential status is given to the Revenue Commissioners[30]). A modern corporate debenture will contain two or three pages of A4 listing specific details of the property caught by a fixed charge – for example, details of intellectual property will often run to nearly 20 lines.

8.4.9 Practitioners have been fearful that, despite the conclusiveness of the Registrar's certificate under section 104, because of the rules of constructive notice, by shortening or providing a precis of the property charged, something may be missed which would adversely affect the chargee. Full details (and not short particulars) of the property charged are often attached to the *Form C1*. In most instances of a comprehensive mortgage debenture it has proved difficult to safely confine the short particulars to 250 words. The process in completing the *Form C1* is time consuming and its extraction has proved exasperating for the Registrar and his staff. It clearly needs reforming. At present nearly all charges by companies can be broken down into three broad categories namely, (1) a charge over all the company's property, assets and undertaking, (2) a charge over specific land, (3) a charge over another specific asset such as, a bank account (which should now be exempt – see para 8.2.6 above) or, an aircraft.

8.4.10 It is recommended that the prescribed particulars be broken into three boxes requiring an 'x' in the 'yes' or 'no' column (with at least one 'yes' column to be completed). Box 1 will indicate whether or not a mortgage or fixed charge has been created over real property, Box 2 will indicate whether a mortgage or fixed charge has been created over personal property and Box 3 will indicate whether a floating charge over any assets has been created. Where real or personal property has been itemised in a schedule or definition in the security document, such itemisation should be inserted into or attached to the *Form C1*. Legislation should provide that compliance with the foregoing will be deemed to have satisfied the legislative requirement of providing particulars of the charge on the *Form C1*.

8.4.11 The final part of the form C1 deals with the signature. Ideally the form should be signed on behalf of both the chargor and the chargee. There are occasions when this may be difficult to accomplish within the 21-day period. One party or its solicitor may sign the form, provided a certified copy of the charge is filed with the form. Providing a certified copy of the charge involves the CRO comparing the particulars with the charge. This is an unnecessary burden on the CRO. Furthermore, it makes electronic filing unworkable. Accordingly the requirement or option of filing a copy of the charge should be terminated.[32] The form should be acceptable if signed by a solicitor, being an officer of the court, acting on behalf of either the chargor or the chargee. It is not expected that having the form signed by only one solicitor should lead to abuse. In the absence of a solicitor signing, as a protective measure for companies, the form should be signed by an officer of the chargor (or a registered agent of the chargor) and an authorised person on behalf of the chargee. This latter approach would apply to a form filed prior to the creation of a charge (as indicated in paragraph 8.3.6 above).

8.5 Negative Pledge

8.5.1 It has become customary to insert additional details on a *Form C1*, the most common of which is that where a floating charge is created the company covenants in the deed, creating the floating charge, that it will not create any further charge ranking pari passu with or in priority to the floating charge. Failure to do this may result in a subsequent chargee obtaining priority. Thus, the purpose of the note is to put third parties on notice of the restriction. A third party would not then be able to claim that he took a subsequent charge in good faith without notice of a previous restriction. The law is unsettled on the effect of such restrictions – the Supreme Court have indicated that actual or express notice of such restrictions must be shown, rather than constructive notice.[89] Other contractual restrictions in the deed of charge which are commonly filed include, where there is a fixed charge on book debts, a requirement to pay the proceeds of book debts into a designated account or, where a floating charge is created, reference is sometimes made to an automatic crystallisation clause.

8.5.2 It is recommended that this additional material should be discontinued and any such material on a form submitted be ignored by the Registrar (which he currently does ignore) when transcribing details onto the register of charges applicable to the charging company. The amending legislation, or statutory instrument enacting the form, should so provide. It would be quite exceptional for a floating charge not to contain a restriction on subsequent charges or even not to have an automatic crystallisation clause. Accordingly, it should be regarded by the public as a given that a floating charge will contain these clauses just as a fixed charge over book debts will contain a provision that the proceeds are to be paid to a designated account.[33]

8.5.3 A number of companies have no charges registered against them. As the law currently stands this does not necessarily mean that no charges have been created as an unregisterable charge may have been created.[34] Many of such companies will have given what is usually described as a negative pledge to their bankers. Such a company may have received financial facilities, on its covenant to the financier that it will not, until the facilities are repaid, create any charge over any of its assets.

8.5.4 Some jurisdictions provide that a negative pledge, unaccompanied by any charge, should be notified to the equivalent of the CRO.[35] Notifying such a negative pledge may be helpful to lenders who lend on the strength of it and in the knowledge that a subsequent lender will be on constructive notice of the negative pledge. Although it may be helpful if notice of a negative pledge could be filed when given in the absence of any charge,[36] the Review Group believes consideration of this and its consequences as to notice, or otherwise, should more properly be left to the reform of the law of security (including a review of the Conveyancing Acts, 1881 to 1911).

8.5.5 There is however one exception to this introduced by the Central Bank and Financial Services Authority of Ireland Bill 2003. The Bill, as amended in Select Committee, provides that particulars of negative pledges incorporated in floating charges be filed in the CRO, but only where created by a company in favour of the CBFSAI for the purpose of providing or securing collateral.

8.5.6 The proposal arose at the behest of the CBFSAI in order to increase the European Central Bank's level of comfort with mortgage backed promissory note arrangements entered with the Irish Credit Institutions. The mortgage backed promissory note has been utilised to facilitate a number of the major Irish credit institutions in their monetary policy operations with the CBFSAI. Mortgage-backed promissory notes secured by floating charges over pools of mortgage assets are held by a number of Irish counterparties to European System of Central Banks (ESCB) credit operations. These are currently eligible as 'tier two' assets for the collateralisation of ESCB credit operations. During the subsistence of the security, the belief is that a negative pledge would prohibit these counterparties from creating or permitting any encumbrance whatsoever over the charged property.

8.5.7 The European Central Bank (ECB) believes that the legal security of the floating charge should be further enhanced by making the standard market practice of registering negative pledges contained in floating charges mandatory. It is the view of the ECB that this reform should reinforce the view that such registration constitutes notice of the negative pledge restriction contained in the floating charge, and that a fixed charge granted to a party which had notice of the existence of the negative pledge would not therefore have priority over that floating charge.

8.5.8 The focus of the concern expressed by the ECB is with regard to credit institutions. Accordingly the requirement for registration of negative pledges will apply only to such companies giving floating charges to the CBFSAI.

8.6 Charge over property situate outside the State

8.6.1 Section 99 (3) of the 1963 Act provides that where a charge is created out of the State comprising property situate outside the State, the 21-day period is extended to allow time for posting. In the current age of overnight couriers this provision is outdated and should be repealed.

8.6.2 Section 99 (4) of the 1963 Act provides that where a charge comprises property outside the State prescribed particulars may be sent for registration notwithstanding that further proceedings may be necessary to make the charge valid in the State where the property is located. All charges, subject to the specified exceptions, created by companies incorporated in Ireland should be registered. Accordingly, section 99(4) is superfluous and should be repealed.

8.6.3 Section 99 (5) of the 1963 Act provides that where a charge comprises property outside the State and registration in the country where the property is situate is necessary to make the charge valid, a further certificate in the prescribed form (currently *Form 47C*) is to be delivered to the CRO. For the reasons specified in paragraph 8.4.5, the section and the requirement to file a *Form 47C* should be repealed.

8.7 Negotiable Instrument

8.7.1 Encumbrances involving delivery of the encumbered asset to the person entitled to the encumbrance should not be subject to section 99 of the 1963 Act as the asset is not in the purported ownership of the company and the encumbrance not a 'charge'. Accordingly, the continuation of section 99(6) is unnecessary and should be repealed.[37]

8.8 Debentures

8.8.1 Sub-sections (7), (8), and (9) of section 99 refer to debentures. The relevance of these sub-sections have become redundant and should be repealed.

8.9 Duty of Company to Register Charges

8.9.1 Although under section 100 of the 1963 Act it is the duty of the company creating a charge to register particulars of the charge, in practice most particulars are filed by the chargee or its solicitor. The reason for the practice is that as the failure to file within 21 days of the charge's creation will render the charge void against creditors and the liquidator of the company, the beneficiary of the charge wishes to ensure filing is done in a timely manner. Invariably the company willingly permits the chargee the burden of preparing and filing the form, although the cost of so doing is usually borne by the company (as provided for in section 100(2)). Although the practice might warrant the repeal of section 100, the Review Group considers it is of over-riding importance that the officers of the company ensure that its file contains up to date correct information for inspection by the public. However, because of the sanction of failing to file within the statutory time period the Review Group recommends the repeal of sections 100(3) and (4). Similarly, sections 101(2) and 106(2) should be repealed.

8.10 Judgment Mortgage

8.10.1 Section 102 of the 1963 Act provides that only the company (the debtor) shall file details of the judgment mortgage with the CRO. Failure of the company to do so results in a small financial penalty on the company and its officers. It seems this provision can be open to much abuse. The role of the debtor company should be taken out and the requirement for the creditor to deliver certified copies of the affidavit to the company should be replaced with the requirement that it deliver one certified copy to the CRO. The requirement for the creditor to file was recommended in 1958 by the Cox Committee.[38] There should not be a requirement to deliver such copies also to the company whose officers should be aware of its own default and judgment against it without requiring further copies to be delivered to it by the creditor who is still owed sums of money by the company. Furthermore a judgment mortgage should not be rendered invalid by the failure to deliver the affidavit to the CRO within 21 days of the creation of the judgment mortgage. Priority, subject to the priority of other registries (where appropriate), arises from the date of filing.

8.11 Register and Certificate of Registration

8.11.1 The requirement for the Register of Charges (for each company) to be kept by the CRO and for it to be open to public inspection, set out in section 103 of the 1963 Act, should be retained as it serves a useful purpose for the provision of relevant information on companies registered in the State. However, section 103(1)(b)(iv) should be repealed – it should not be a requirement to state the amount secured by the charge (see par 8.4.4 above).

8.11.2 Section 104 of the 1963 Act provides that following the filing of the form C1, the Registrar shall issue a certificate, which certificate shall be conclusive evidence that the registration requirements have been complied with.

8.11.3 In response to a submission from the Law Society, the Registrar has recently taken steps to ensure that where the *Form C1* is filed electronically, a Certificate of Registration of Charge will be issued within two weeks of filing the *Form C1*. The Review Group supports the development by the Registrar in endeavouring to have particulars of charges filed electronically with a view to issuing certificates of registration of charges in a timely manner commensurate with other jurisdictions.

8.11.4 Section 104 has been adopted from that applying in England and Wales where there has been a requirement to file the charge as well as particulars so that the two may be compared before the Certificate of Charge is issued. In Ireland, while a certified copy of the charge may be filed, there has, since the 1963 Act, been no requirement to file a copy of the charge where the particulars have been signed on behalf of both the chargor and the chargee.[39] Thus it is quite possible in such instances that Certificates of Charge, confirming compliance with the section, have been issued by the Registrar where the requirements have not in fact been complied with, for example by omitting details of a Land Registry folio number from the *Form 47* or *C1* filed. No criticism can be made against the Registrar for so doing, as he is obliged by statute to issue such a certificate following receipt of a form which on its face appears to be correct.

8.11.5 Without sight of the charge, the Registrar should not be required to issue a certificate which shows conclusively that the filing requirements for all the charges in a security document have been complied with. To require that a copy of the charge be submitted is an added burden for the CRO to cross check when the presenter, usually a solicitor, has already extracted the relevant particulars to the registration form. The Review Group recommends that the security document, or a copy of it, be incapable of filing in the CRO.

8.11.6 Where a company has charged say three real properties which are specifically identified in a schedule to the security,[40] and the *Form C1* omits to specify particulars of one of the properties charged, the charge over that omitted property should be deemed not to have been registered pursuant to section 99,[41] but such omission should not affect the registration of the charge over the other specified properties. Accordingly, the Review Group recommends that the Registrar continue to accept the prescribed particulars and issue, as soon as resources permit, a Certificate of Charge. However, such Certificates of Charge should continue to be conclusive evidence that the registration requirements have been complied with,[42] but only as to the charges particulars of which have been filed.

8.12 Satisfaction of Charges

8.12.1 The current system of registering satisfactions requires the company to submit a *Form C6* whereby the secretary and a director of the company sign the form and make a statutory declaration. The Registrar then notifies the chargee and, unless he hears from the chargee within 21 days, he records the satisfaction. This could be open to abuse as the notification to the chargee could go astray or simply not reach the chargee due to a change of address. In such circumstances where the *Form C6* has been filed fraudulently, notice of the release of the charge could be registered without the chargee's knowledge. The requirement to swear puts an onus of personal liability on the signatories should they be making a fraudulent declaration. The process is cumbersome but appears to have worked – no cases of fraud have been notified to the CRO. To avoid having to swear (which can cause difficulty where only one director is resident in the State), and at the same time to guard against abuse, the Review Group recommends that a statement, in a prescribed form signed by a director and the secretary of the company or signed by two directors of the company, be signed and submitted to the registrar, who would then send the 21 day notice to the creditor. To guard against abuse, the Review Group recommends that a person who signed such a statement and in doing so did not honestly believe on reasonable grounds that the statement was true should be personally liable for such portion of the debts of the company as the court considers to be just and equitable.

8.13 Extension of Time

8.13.1 Section 106 of the 1963 Act provides that where there is a failure to file the prescribed particulars of a charge within 21 days, an application may be made to Court for late registration. The Court, when permitting late registration, is required to be satisfied that the late registration will not prejudice the position of the creditors or shareholders of the company. In practice, such an application to Court is both costly and embarrassing for the chargee and/or its solicitor. The consequences however focus the attention on those taking charges to ensure that the correct particulars are filed in a timely manner. In the year 2002, over 7,000 charges were registered in the CRO; only 14 (namely 0.2 per cent) were registered pursuant to a court order. These figures indicate that although lenders may prefer an easier registration route such as retaking the security where possible when they are out of time, in practice it does not cause a regular difficulty. Accordingly, the Review Group does not recommend the alteration of this section.

8.14 Copies of Charges

8.14.1 Sections 109 and 110 of the 1963 Act require a company to keep copies of its charges at its registered office and to allow such copies to be inspected by any of its members or creditors without fee. While in practice the Review Group believes such inspection rarely happens, it believes creditors and members should have the right of inspection. However, to minimise disruption and to discourage frivolous or vexatious inspections the Review Group recommends a fee, fixed at the same rate as the fee payable for a physical inspection of the company's file at the CRO be payable to the company for each inspection.

8.15 Companies incorporated outside the State

8.15.1 Section 111 of the 1963 Act provides for the filing in the CRO (on a *Form 8E*) of prescribed particulars of charges created by a company incorporated outside the State on property situated in the State where such company has an established place of business in the State. Such companies are required, by section 352 of the 1963 Act, to inform the CRO of their established place of business in the State and thus such companies, in so doing, are registered on the external register.

8.15.2 *Form 8E*, which is similar to the *Form C1*, should be amended in accordance with Review Group recommendations for the amendment for *Form C1* – see paragraphs 8.4.3 to 8.4.11 above.

8.15.3 Following the English decision in *NV Slavenburg's Bank v Intercontinental Natural Resources Limited*[101], the Registrar has developed a practice of accepting *Forms 8E* even where the company creating the charge is not registered on the external register. Such forms have been filed even when it should be apparent that the company has no established place of business in the State on the grounds that the company might, unknown to the chargee, have an established place of business in the State or indeed have one in the future. Failure to file within the 21-day period, where the charging company has an established place of business in the State, would on the authority of the Slavenburg decision render the charge void as against any liquidator or creditor. Accordingly, to be safe, many *Forms 8E* are filed by companies which are not registered on the external register. The effect of this is that the Registrar is unable to register the charge against the company (of which the Registrar has no record), so the form is filed in what has become known as the "*Slavenburg file*" and a notice to this effect is issued by the Registrar to the presenter of the form.

8.15.4 This is a meaningless system as the company is not registered and accordingly it is not possible to do a search against the company. However, the Registrar has recently established an index (in alphabetical order) of unregistered companies against which a *Form 8E* has been filed, together with details of the *Form 8E*. Nevertheless, the Review Group believes that legislation should provide that particulars of a charge created by a company incorporated outside of the State, which has not registered on the external register should not be delivered to the Registrar and if delivered should not be received by the Registrar. The legislation should be amended to expressly provide that only companies incorporated outside the State which have registered on the external register are required to deliver particulars of charges created by them over Irish property. The obligation of a company which establishes a place of business in the State to register on the external register will be considered by the Review Group at the time it considers external companies.

8.15.5 No change is recommended as to the filing of a *Form 8E* where a charge is created by a branch of a company registered in the CRO pursuant to the European Communities (Branch Disclosure) Regulations, 1993.[102]

8.16 Receivers

8.16.1 Sections 98 and 107 of the 1963 Act deal with preferential payments to be made by a receiver and notice of appointment and cessation of receiver. These sections should more properly be relocated to the part dealing with receivers in the new Companies Bill.

8.17 Previous Companies Acts

8.17.1 Sections 108 and 112 of the 1963 Act as well as section 99(10)(b) deal with the consequential provisions on the enactment of new legislation. Similar provisions as appropriate should be incorporated in the new Companies Bill.

8.18 Netting of Financial Contracts Act, 1995

8.18.1 The Netting of Financial Contracts Act, 1995 ("the Netting Act") facilitates the use of swap instruments and provides inter alia that a mortgage or charge, to secure a liability under a "financial contract",[43] shall be legally enforceable against the chargor notwithstanding any "rule of law relating to bankruptcy, insolvency or receivership, or in the Companies Acts."[44] The Netting Act was implemented in response to international bodies wishing to do business in Ireland. Such bodies were concerned particularly as to the effect of the appointment of an examiner to an Irish incorporated counterparty. The prohibition on set-off or other creditor remedies on the appointment of an examiner discouraged contractual relations for swaps and similar arrangements with Irish incorporated companies. The effect of the Netting Act has been to enable persons to enter into financial contracts with Irish incorporated counterparties without the risk that an examiner appointed to the counterparty would put a stay on the enforcement of the financial contracts.

8.18.2 The terms of the Netting Act are so broad that particulars of security created over a company's assets to secure its obligations under a "financial contract" may not require to be filed under section 99 of the 1963Act. This goes beyond "the examinership difficulty" which the Netting Act successfully addressed. The absence of a requirement to register can give a distorted picture to a person inspecting a company's file at the CRO. Accordingly, the Review Group recommends the Netting Act be amended by specifying that particulars of a charge, within the meaning of the definition at para 8.2.10, be filed in accordance with section 99(2) of the 1963 Act.

8.18.3 A charge, to secure obligations under a "financial contract", over cash, a bank account, shares, bonds and debt instruments would not require registration as it would not fall within the category of a registerable charge (under the definition outlined in para 8.2.10 above). Particulars of charges over other assets such as land or equipment, to secure obligations under a "financial contract" are generally filed with the CRO. Accordingly, the Review Group believes the foregoing recommendation at para 8.18.2 above will have no adverse effect on companies registered in the State which conclude financial contracts.[45]

8.19 Summary of Recommendations

- Sections 93 to 97 of the 1963 Act have become less relevant. However they have not become redundant and should be retained so that the substantive law applicable to existing debentures is preserved. (8.1.2)

- The sections (91 and 92) dealing with the register of debentures should be repealed. (8.1.3)

- All charges created by companies should be registered in the CRO within 21 days of creation, save for any charge over categories exempted. (8.2.5)

- The only exempted category should be charges over those assets specified in SI No.1 of 2004. (8.2.6)

- Section 99(10) (a) of the 1963 Act should be amended to provide that "for the purposes of this Part the expression "charge" means a mortgage or a charge in an agreement (written or oral) created by a company over an interest in any property, assets or undertaking of that company, but shall not include a mortgage or charge in an agreement (written or oral) created by a company over an interest in cash, money credited to an account of a financial institution, or any other deposits, shares, bonds and debt instruments, units in collective investment undertakings, money market instruments and claims and rights (such as dividends or interest) in respect of any of the foregoing". (8.2.10)

- Priority of charges, subject to rules of other specialist registries, should run from the date of filing (or preliminary filing, if done), and not from the date of creation, of the charge. (8.3.5)

- A preliminary filing of an anticipated charge should be permitted; such preliminary filing to be effective if particulars of the charge are registered within 21 days of the filing and 21 days of its creation. (8.3.6)

- The form C1 should not require the presenter to categorise the charges, to state the amount secured by the charge, or to indicate, whether by ticking a box or filing another form, whether the charge requires to be perfected in another jurisdiction. (8.4.3, 8.4.4 & 8.4.5)

- The transfer of a charge should be notifiable to the CRO. Failure to notify should not invalidate the charge or transfer. (8.4.6)

- The prescribed particulars should be categorised under three boxes in the form C1 with additional details of property specifically listed in the security document. (8.4.10)

- The form C1 should be acceptable if signed by a solicitor acting for one party. (8.4.11)

- Details of any covenants, including any negative pledge, should not be inserted on any *Form C1*, and if inserted should be ignored by the Registrar (other than in respect of a floating charge created in favour of the CBFSAI). (8.5.2)

- The 21-day registration period should not be extended to allow time for posting as currently permitted under section 99(3). (8.6.1)

- There should be no requirement to file a form (*Form 47C*) that a charge, over property situate outside the State requiring registration outside the State to make the charge valid, has been presented for registration (outside the State) as currently required under section 99(5). (8.6.3)

- Subsections (4), (6), (7) (8) and (9) of Section 99 should be repealed. (8.6.2, 8.7.1 & 8.8.1)

- The company and its officers should not be subject to a penalty for failing to register particulars of charges as currently required by section 100. Sections 100(3), 100(4), 101(2) and 106(2) should also be repealed. (8.9.1)

- A judgment creditor and not debtor should be required to file details of the judgment mortgage. The 21-day registration period should not apply to judgment mortgages. (8.10.1)

- The Registrar should continue to be required to maintain a register of charges for each company and that such register be open to the public – retention of section 103 (other than section 103(1)(b)(iv). (8.11.1)

- When filing the *Form C1*, there should be no requirement or facility to file a copy of the charge. (8.11.5)

- The Certificate of Registration of Charge should be conclusive evidence that the requirements as to registration have been complied with only in respect of the charges particulars of which have been filed. (8.11.6)

- Satisfaction of a charge may be registerable by a statement signed by two directors of the chargor or by a director and the secretary of the chargor. Where the statement is false, the signatories could in certain circumstances, be personally liable for the debts of the company. (8.12.1)

- Late registration should continue to be effected, only, through court order – retention of section 106(1). (8.13.1)

- Copies of charges may be inspected by a company's members or creditors, subject to a fee. The fee shall be fixed at the same rate as the fee payable for a physical inspection of the company's file at the CRO be payable to the company for each inspection (8.14.1)

- *Form 8E*, which is similar to the *Form C1*, should be amended in accordance with Review Group recommendations for the amendment to the *Form C1*. (8.15.2)

- Particulars of charges created by companies incorporated outside Ireland which have not registered on the external register should not be capable of registration and only companies incorporated outside Ireland which have registered on the external register should be required to deliver particular of charges created over Irish property. (8.15.4)

- No change is recommended as to the filing of a *Form 8E* where a charge is created by a branch of a company registered in the CRO pursuant to the European Communities (Branch Disclosure) Regulations 1993. (8.15.5)

- Sections 108 and 112 of the 1963 Act, as well as section 99(10)(b), deal with the consequential provisions on the enactment of new legislation. Similar provisions as appropriate should be incorporated in the new Bill. (8.17.1)

- Security for an obligation under a financial contract within the meaning of the Netting of Financial Contracts Act, 1995 should be subject to the requirements of registration where such security falls within the definition of a charge. (8.18.2)

Endnotes

1 See the Companies Act, 1907 and the Companies (Consolidation) Act, 1908
2 See the discussion on this in para 157 of the Report of the Company Law Reform Committee 1958 (pr4523)
3 Davey Committee; see also the recommendation of the UK Company Law Review Steering Group's Final Report on Modern Company Law at para 12.68 and 12.69
4 Irish Times editorial January 1994; see also Report of the Review Committee (chaired by Sir Kenneth Cork) on Insolvency Law and Practice (cmnd 8558) para 10
5 Charge includes mortgage and security assignment
6 The Companies Act, 1900 section 14 of which provided for the registration of four categories of charges
7 The last extension, introduced by section 122 of the Companies Act, 1990 requires the registration of a charge over an aircraft (which in practice has previously been registerable under section 99(2)(c) of the Act as being a charge if executed by an individual would require registration under the Bill-of-Sale Acts)
8 Companies Bill 1987 proposed to require the registration of fixed charges over shares and over debts (in addition to book debts)
9 UK's Company Law Review Steering Group's Final Report on Modern Company Law - para 12.1
10 Pr4523
11 Report of the Company Law Committee (chaired by Lord Jenkins) Cmnd.1749, Report of the Consumer Credit Committee (chaired by Lord Crowther) Cmnd. 4596, Report of the Scottish Law Commission (chaired by Professor Halliday), Review of Security Interests in Property by Professor Diamond, the Company Law Review Steering Group's Final Report on Modern Company Law and the Law Commission Consultation Paper No 164 – Registration of Security Interests: Company Charges and Property other than land.
12 Companies Bill 1973, and part IV of the Companies Act 1989
13 See the proposed definition of charge in para 8.2.10 below; this would not include liens arising by operation of law such as a repairer's lien, see *Waitomo Woods (NZ) Ltd v Nelsons (NZ) Ltd* [1974] I NZLR 484
14 See also the recommendation of the UK's Company Law Review Steering Group's Final Report on Modern Company Law para 12.60
15 Bills of Sale (Ireland) Act, 1879 and Bills of Sale (Ireland) Act 1879 Amendment Act, 1883.
16 The Directive enables Member States to provide that such charges given by corporate bodies to such financial institutions do not require registration.
17 The exempted category of charges outlined in the European Communities (Financial Collateral Arrangements) Regulations 2004 (SI 1 of 2004).
18 See Walsh J in re *Keenan Brothers Limited* [1985] IR 401 at 417, see also Hoffman J in re *Brightlife Ltd* [1986] BCLC 418 and in re Permanent Homes (Holdings) Ltd [1988] BCLC 563; see also the Northern Ireland decision in *Northern Bank Ltd v Ross* [1991] BCLC 504.
19 See the Supreme Court of South Australia's decision in re *Rick Cobby Haulage Pty. Ltd.* [1992] 11 JIBL
20 Article 1.3
21 See also the submission by the Law Society of Ireland to the Department of Finance
22 See Law Reform Commission Report on Debt Collection: (2) Retention of Title, 28.1939
23 Companies Act, 1963 section 99(1) subject to late registration pursuant to section 106
24 In 2002, less than one in 500 registerable charges were filed after the 21 day period, pursuant to a court order under section 106.
25 See the decision of the English Court of Appeal in *Wilson v First County Trust Ltd* [2001] 3 All ER 229.
26 Registry of Deeds, Land Registry, Shipping Register, Patents Register, Trade Marks Register, and agricultural chattel Mortgage Register
27 Uniform Commercial Code - Article 9
28 Nearly all Provinces and Territories under their respective Personal Property Security Acts
29 With effect from 1 May 2002 under the New Zealand Personal Property Security Act 1999.
30 Crowther Report of Consumer Credit; Diamond Review of Security Interests in Property Report para 1.11, 11.2.9 and 11.2.12; UK's Company Law Review Steering Group's Final Report on Modern Company Law para 12.19, the Law Commission Consultation Paper No. 164 – The Registration of Security Interests: Company Charges on Property other than land, Part IV and the response of the English Law Society
31 This information was not required on the form 47, the predecessor of the form C1.
32 See also recommendation of the UK's Company Law Review Steering Group's Final Report on Modern Company Law at para 12.38
33 [1979] 2 LLR 142
34 Provided the Revenue Commissioners serve a notice on the chargeholder - see the Taxes Consolidation Act, 1997 section 1001 which replaced the Finance Act, 1986 section 115 (as amended)
35 See also recommendation in the Diamond Report at para 1.18 and 22.1.9
36 Provided that the Revenue Commissioners serve a notice on the chargeholder, see Henchy J in *Welch v Bowmaker (Ireland) Ltd and the Governor and Company of the Bank of Ireland* [1980] IR 251 at 256
37 See the Supreme Court's decision in re *Keenan Brothers Limited* [1985] IR 401 (applied by the Privy Council in re *Brumark* [2001] 2 BCLC 188)
38 Such as a fixed charge over shares
39 for example Scotland
40 see also the recommendation of the UK's Company Law Review Steering Group's Final Report on Modern Company Law para 12.26
41 see the proposed definition of charge at para 8.2.10 above, the effect of which would be to take out from the categories of what is registerable the delivery of a negotiable instrument as security
42 There was no requirement to file a judgment mortgage with the CRO prior to the Companies Act, 1963. The 1958 Report of the Company Law Reform Committee (chaired by Arthur Cox) recommended the filing of judgment mortgages and concluded at para 154 - "We recommend that a section should be inserted in the new Act requiring every creditor who converts a judgment obtained by him against a company into a judgment mortgage to present a copy of the affidavit by which the judgment mortgage was created to the Companies Registration Office within 21 days after this affidavit has been filed in the

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CHAPTER 9

EU Developments in Company Law

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9.1 Introduction

9.1.1 In assigning a second work programme to the Review Group, the Tanaiste and Minister for Enterprise, Trade and Employment asked the Review Group to have particular regard to developments in company law at European Union level.

9.1.2 The task of the Review Group in this regard is twofold: to work closely with the Department of Enterprise, Trade and Employment to ensure not only process legitimation, i.e. that Ireland responds appropriately to Commission proposals in the company law and related areas, but also to try to deliver on outcome legitimation, that the actions agreed by the EU in this area should take account of the concerns of the Irish government and the Irish business policy community.

9.2 Development of company law in Europe

9.2.1 The main corpus of EU company law was put in place in the period from the late 1960s to the mid 1980s during which upwards of a dozen EU measures were adopted. Over the next ten years, there followed a period of consolidation during which hardly any new activity took place. From the late 1990s, company law emerged again as a high activity area and this trend has continued to date. On existing plans, company law is destined to remain an area of high activity for several years to come.

9.2.2 The main driver of activity over recent years has been the Financial Services Action Plan (FSAP), the primary objective of which is to bring about a single market in financial services in the EU and, more recently, the Lisbon 2000 agenda which is aimed at making the EU the most competitive economy in the world by 2010.

9.2.3 The FSAP consists of a wide range of measures with a target date of 2005 for completion. Some of these measures arise in the company law area; these include updating/modernising existing EU rules in areas such as Prospectuses and Market Abuse (Insider dealing/market manipulation) and measures such as Takeovers, the European Company Statute[1] and initiatives in Accounting, such as standards.

9.2.4 Considerable progress has been made on the company law issues of the FSAP with the adoption of the new Prospectus and Market Abuse Directives, European Company Statute, the Application of International Accounting Standards Regulation, the Fair Value Directive and the Modernisation of Accounts Directives (4th and 7th Directives). Other measures remain under negotiation at Council level. Details of the measures adopted and still under consideration are set out in later sections of this chapter.

9.2.5 Going forward the focus will be on completing outstanding FSAP company law issues, implementing measures that have recently been adopted and developing and negotiating new proposals on the basis of two separate action plans published by the Commission in 2003 and designed to complement the FSAP – these two plans deal with corporate governance/company law on the one hand, and statutory audit on the other.

9.2.6 Chapter 1 of this report focuses on issues concerning the transposition of FSAP initiatives into Irish domestic law and the interaction of FSAP-derived law with the domestic reform and consolidation programme.

9.2.7 The remainder of this chapter consists of three sections as follows:

- the action plans on corporate governance and statutory audit;
- measures under negotiation at Council; and
- measures already adopted and due for implementation into Irish law.

9.3 Company Law Action Plan

9.3.1 The Commission set out its proposals for an action plan in company law in a Communication from the Commission to the Council and the European Parliament on 23 May 2003. This draws on the conclusions of a High Level Group on Company Law set up by the Commission in 2002 to examine a range of issues and is also set in the context of achieving the objectives of the Lisbon Strategy. The Action Plan is entitled Modernising Company Law and Enhancing Corporate Governance in the European Union – a Plan to move forward. The Action Plan does not adopt all of the recommendations of the High Level Group, but it reflects the issues and themes raised the Group's final report.[2]

9.3.2 The Action Plan is based on two core principles: increasing transparency and strengthening the role of independent, non-executive directors. The Commission identifies the strengthening of shareholders' rights (and the protection of third parties) and the fostering of business efficiency and competitiveness as the two main policy objectives to be achieved. For this purpose, the Action Plan proposes a ten-year programme of 24 measures to be undertaken in the short, medium and long term. To achieve this the Action Plan proposes a mix of legislative and non-legislative measures.

9.3.3 The Action Plan covers the themes of corporate governance, capital maintenance and alteration, groups and 'pyramids'[3], corporate restructuring and mobility and new forms of incorporation.

9.3.4 On corporate governance, the Action Plan recalls the work of the OECD, which is in the process of adopting a revised version of its corporate governance principles of 1999, and proposes that any EU common approach should limit itself to requiring that listed companies publish a statement of key elements of corporate governance structure and principles. The Action Plan envisages, as a short-term priority, the presentation of a draft Directive on principles applicable to such a statement. Further measures proposed by the Commission in relation to corporate governance include disclosure by institutional investors of their investment policy, and improvements in shareholder information and in the ability of shareholders to take part in the in the affairs of companies on a cross-border basis. Recommendations are envisaged in relation to minimum standards for audit and remuneration committees, and for disclosure of information relating to the remuneration of directors. It is intended to present a draft Directive in the medium term on measures relating to the responsibilities of directors, including a right of shareholders to require a special investigation into the affairs of a company, and provisions on wrongful trading and on the disqualification of directors.

9.3.5 On capital maintenance, the Action Plan indicates that a priority for the short term will be the formulation of proposals to simplify the 1976 Second Company Law Directive. On groups and 'pyramids', the Action Plan does not envisage any revival of the proposals in the draft Ninth Company Law Directive on group relations, but notes that further study will be needed of the phenomenon of 'abusive pyramids' so as to address the lack of transparency of such arrangements, whilst avoiding any undue restriction of companies' freedom to choose their own forms of organisation.

9.3.6 On corporate restructuring and mobility, the Action Plan draws attention to the need for measures to facilitate cross-border mergers and to permit the seat of a company to be transferred from one Member State to another. The Commission indicates that it will be presenting a revised proposal on cross-border mergers and one to facilitate the transfer of a company's seat. The rights of the majority to buy out minority shareholdings ('squeeze-out rights') and those of the minority to sell ('sell-out rights') in the event of a reconstruction would be matters taken up in the revision of the Second Company Law Directive.

9.3.7 Finally, the Action Plan refers to the intention to carry out studies on the possibility of new forms of incorporation, such as the 'European Private Company', European Association and European Mutual Society.

9.4 Irish Response to Company Law Action Plan

9.4.1 The Irish response to the Action Plan proposals was communicated to the Commission on 5 September 2003 and reflects the strategic perspectives identified by the Review Group. More detailed responses were set out to specific proposals but generally the Irish submission made the following points.

9.4.2 It welcomed the objective of EU coordination of corporate governance and particularly supported the approach of achieving convergence in corporate governance based on the sharing and emulation of best practice and the involvement of market participants.

9.4.3 It fully endorsed the key policy objectives of strengthening shareholders' rights and third-party protection and fostering efficiency and competitiveness.

9.4.4 It asserted that the proposed actions should take account of the principles of flexibility, subsidiarity and proportionality and should not be overly prescriptive. In particular, the pursuit of legislative instruments which would merely replicate (perhaps even at a lower level of protection) existing national legislative provisions should be avoided.

9.4.5 It was noted that the proposed legislative component of the programme is quite heavy: eight legislative measures in the short-term; eight in the medium-term, and one in the long term. In addition the question was raised as to whether all the legislative actions proposed are necessary, having regard to existing protections in national legislation. It was also pointed out that the objective of enacting eight pieces of legislation over the next six years and eight instruments of a non-binding nature (and a further piece of legislation thereafter) seemed overly ambitious and would be difficult to achieve.

9.4.6 Finally, the response pointed out that many of the corporate governance objectives identified for which the action recommended by the Commission is a Directive could perhaps be best pursued by a Recommendation. The greater use of Recommendations would allow for quicker results and would accommodate national flexibility on implementation of the principles involved. Directives, by contrast, require more time for discussion, and for transposition.

9.4.7 It is important to note that EU activity in the field of company law and corporate governance has been mirrored and, indeed, anticipated in Ireland by domestic initiatives. The proposals to establish the Irish Auditing and Accounting Supervisory Authority (IAASA), enacted by the Oireachtas on 23 December 2003, for example, predate the collapse of Enron but will in fact address a number of the main problems of corporate governance, self-regulation and systems failure identified from that collapse. Rather than being a 'traditional' EU area of responsibility, corporate governance has in the past been left to Member States due to the wide variety of business structures and cultures within the EU. It should also be noted that much corporate governance is 'soft law' regulated by codes, operated for example by the Irish Stock Exchange on a 'comply or explain' basis. The Review Group endorses the principle of regulation by disclosure as being both effective and minimally bureaucratic. This illustrates the importance, in the view of the Review Group, that national flexibility should continue to apply on how best to deliver effective corporate governance.

9.4.8 A number of the proposals contained in the Action Plan are simply a restatement of EU commitments which have already been agreed or are under way, for example, proposals on cross-border mergers, change of seat, and pan-European forms of incorporation.

9.4.9 The Review Group is in agreement that the EU review of company law and corporate governance is necessary, both with a view to delivering on the Financial Services Action Plan and as a result of collapses on the scale of Enron and, more recently, Parmalat. It should be noted that the Government has undertaken domestic initiatives which leaves Ireland well placed to respond positively and constructively to the Action Plan, notably the establishment of the ODCE, the very recent establishment of the IAASA, and the ongoing major reform of company law. The Review Group would stress, in particular, the importance of striking the right balance between legislative and non-legislative measures for ensuring compliance with the companies' code.

9.4.10 It is also the view of the Review Group that in considering individual proposals which the Commission brings forward under the Action Plan, the Government should have as its concern that each such proposal does genuinely contribute to one or more of the following: the potential for growth of Irish companies, the international competitiveness of Irish companies, reduced burdens on business; and an improved corporate governance environment.

9.4.11 The Commission has already sent a strong signal on its commitment to implementation of the company law action plan. It has set the following timescales for bringing forward proposals for consideration by Council in respect of its 'short term' programme –

1. Proposal on 10th Directive on cross-border mergers to be adopted by Commission before end 2003 (not, in fact, achieved by target date).
2. Proposal on amendments to the 2nd Directive (capital maintenance/alteration in PLC's) to be adopted by Commission in May or June 2004.
3. Proposal for a Directive on collective responsibility of board members for key financial and non financial statements to be adopted in 3rd Quarter 2004.
4. Proposal on 14th Directive (transfer of company registered office) to be adopted by Commission in 3rd or 4th Quarter 2004.
5. Proposal for a Directive on shareholders' rights to be adopted in 4th Quarter 2004
6. Proposal for a Recommendation on role of independent non-executive directors to be adopted in 4th Quarter 2004
7. Proposal for a Recommendation on directors' remuneration to be adopted in 4th Quarter 2004.
8. Proposal for Directive on increased disclosure of group structure (amendment of 7th Directive) to be adopted in 4th Quarter 2004.

9.5 Action Plan on Statutory Audit

9.5.1 In addition to the action plan on corporate governance and company law the Commission published at the same time a separate action plan, Reinforcing the statutory audit in the EU, setting out ten priorities for improving and harmonising the quality of statutory audit throughout the EU.[4] The objectives are to ensure that investors and other interested parties can rely fully on the accuracy of audited accounts, to prevent conflicts of interest for auditors and to enhance the EU's protection against Enron-type scandals. The plan announces forthcoming proposals for new EU laws to overhaul existing legislation and to extend it. The intention is that, once adopted, these proposals will, for the first time, provide a comprehensive set of EU rules on how audits should be conducted and on the audit infrastructure needed to safeguard audit quality.

9.5.2 The regulation of auditors in the EU has been based upon the 8th Company Law Directive (1984) Directive (84/253/EEC), which deals essentially with the approval of persons to undertake statutory audits in the EU, together with Commission Recommendations on Quality Assurance (2000) and Auditor Independence (2002)

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9.5.3 In the new Communication, the Commission proposes

- A modernisation of the 8th Company Law Directive to provide a comprehensive legal basis for all statutory audits conducted in the EU
- The new Directive would be a shorter, principles-based approach to the conduct of all audits in the EU
- The Directive would apply to the regulation of securities markets, operating on the Lamfalussy principles, i.e. with the adoption of the detailed implementation measures falling to the Commission
- To ensure a uniformly high level of audit quality throughout the EU, the Commission envisages the use of International Standards on Auditing (ISAs) for all EU statutory audits from 2005 onwards. Following further preparatory work, the Commission intends to propose a binding instrument requiring the use of ISAs from 2005

- The Commission's proposals for a new 8th Directive are expected to set out principles in relation to —
- Public Oversight, including scope of oversight, investigation and disciplinary powers, composition of oversight boards, transparency of oversight and funding of oversight;
- Independence of auditors from companies executive directors (appointment, dismissal, remuneration);
- Governance by a company of the audit function;
- Code of Ethics for Auditors, including Auditors' Independence;
- Education and Training of Auditors.

9.5.4 The Commission is expected to issue its proposals for an amended Directive in early 2004. Consideration of the proposals by Council Working Group will commence under the Irish Presidency, with the aim of adoption of the Directive by Council and the European Parliament in 2005.

9.5.5 The priorities on audit complement the Commission's wider action plan on company law and corporate governance, published simultaneously.

9.6 Details of EU Company Law Measures Recently Adopted and for Implementation at National Level

Accounting/Audit Measures

9.6.1 In the fields of accounting and statutory audit, the Commission proposals have been directed towards: improving the quality, comparability and transparency of the financial information provided by companies, ensuring compatibility between the Accounting Directives and International Accounting Standards, and improving the quality of statutory audit throughout the EU and ensuring compatibility with international standards.

9.6.2 As indicated above, the Commission has put forward a significant range of proposals on statutory audit. Alongside these, however, there are a number of policy issues which relate to accounting which have progressed considerably from the proposal stage and are well on course for implementation. These are:
- the Fair Value Directive[5]
- the Application of International Accounting Standards Regulation[111]
- modernisation of Accounts Directive (Modernising 4th and 7th Directives, the Bank Accounts Directive and the Insurance Accounts' Directive)[6].

9.6.3 Within each of these Directives there is scope for Member States to avail of a number of options as set out below. In each case the choice of options is reflected in the this Report at Chapter 8, Accounting and Audit Issues and will also be reflected in the draft Heads of the new Companies Bill (see Part A6 of the General Scheme of the Bill, Accounts, Audit and Annual Return).

Fair Value Directive

9.6.4 This Directive amends the valuation rules for the annual and consolidated accounts of certain types of company as well as of banks and other financial institutions. The Fair Value Directive is designed to enable companies to account for some of their financial instruments at fair value,[7] in line with accounting practices in International Accounting Standard (IAS) 39.

9.6.5 Where financial instruments[8] are valued at fair value, changes in value are recorded in the profit and loss account, other than in certain limited circumstances. The Fair Value Directive also enables the valuation of assets and liabilities that qualify as hedged items under a fair value hedge accounting system at the specific amount required by that system.

9.6.6 After 2005, companies that comply with the IAS Regulation will not be subject to the accounting provisions of the Fair Value Directive, as they will follow IAS directly.

9.6.7 Currently, the valuation of financial instruments in most company accounts is on a historical cost basis (i.e. original cost or purchase price) or alternatively at previous valuations or at current cost. The use of fair value will result in regular changes in values, which will be dealt with in the profit and loss account (or in reserves in some cases). This will make financial statements more transparent but may also lead to the balance sheets and reported profits of some companies being more volatile than at present.

9.6.8 The Fair Value Directive imposed certain disclosure requirements on companies that use financial instruments and on companies that have derivative financial instruments even if they do not use fair value accounting. Within the requirement to apply the Fair Value Directive Member States have a number of options. These are:

- to permit or require the valuation of financial instruments at fair values;
- to extend permission or requirement for disclosure to all companies or restrict the application of disclosure to any class of companies;
- to restrict fair value accounting to consolidated accounts or permit/require it for individual accounts also;
- to permit valuation of assets and liabilities which qualify as hedged items under a fair value hedge accounting system at the specific amount required by that system; and

- to exempt small companies from certain disclosure requirements relating to financial instruments.

The Fair Value Directive must be implemented in Irish law by 2004 although there is an impediment to achieving this in that the relevant International Accounting Standard (IAS) has not yet been agreed by the Commission.

International Accounting Standards Regulation

9.6.9 Regulation (EC)1606/2002 on the application of International Accounting Standards introduces important changes which will directly affect the way in which certain companies across the EU prepare their financial statements. At a minimum, it will require companies governed by the law of a Member State, whose securities are admitted to trading on a regulated market in any Member State in the EU ('publicly traded companies'), to prepare their consolidated accounts on the basis of accounting standards issued by the International Accounting Standards Board (IASB) that are adopted by the European Commission.

9.6.10 On 29 September 2003 the Commission adopted a Regulation endorsing International Accounting Standards, including related interpretations (SICs), and therefore confirming the requirement for their compulsory use from 2005 under the terms of the general IAS Regulation adopted by the European Parliament and the Council in 2002. The Regulation includes all existing IAS and SICs, except for IAS 32 and 39 and related SICs 5, 16 and 17. IAS 32 and 39, which deal with the accounting and disclosure of financial instruments. These are not included because they are currently in the process of being revised by the IASB, in co-operation with European accounting experts.

9.6.11 Member States have the option to extend the application of the Regulation. They may permit or require:

1. Publicly traded companies to prepare their individual accounts in accordance with adopted IAS;
2. Some or all non-traded public companies and private companies to prepare their consolidated and/or individual accounts in accordance with adopted IAS.

The Regulation will apply to financial years commencing on or after 1 January 2005.

Modernisation of Accounting Directive

9.6.12 The Modernisation Directive was adopted on 6 May 2003. This amends the 4th and 7th Directives, the Bank Accounts Directive and the Insurance Accounts Directive.

9.6.13 The purpose of the Directive is to:
- remove all existing conflicts between the Accounting Directives and IASB standards; and
- ensure that all optional accounting treatments currently available under IASB standards are available to EU companies which continue to have the Accounting Directives as the basis of their accounting legislation (i.e. those companies which will not prepare their accounts in accordance with the IAS Regulation).

Member State Option

9.6.14 Certain categories of preference share can be presented as liabilities rather than as share capital, where that is their underlying substance.

9.7 Other Measures

Market Abuse Directive

9.7.1 The Market Abuse Directive[10] has the objectives of:

- reinforcing market integrity;
- contributing to the harmonisation of the rules for market abuse throughout Europe;
- establishes a strong commitment to transparency and equal treatment of market participants;
- requires closer co-operation and a higher degree of exchange of information between national authorities, thus ensuring the same framework for enforcement throughout the EU and reducing potential inconsistencies, confusion and loopholes.

9.7.2 The Directive covers both insider dealing and market manipulation. The same framework applies to both categories of market abuse. This will simplify administration and reduce the number of different rules and standards across the European Union. The Directive covers all financial instruments admitted to trading on at least one regulated market in the European Union, including primary markets.

9.7.3 The Directive applies to all transactions concerning those instruments, whether those transactions are undertaken on regulated markets or elsewhere. This is to avoid unregulated markets, Alternative Trading Systems and others being used for abusive purposes concerning those financial instruments.

9.7.4 The Directive requires each Member State to designate a single administrative regulatory and supervisory authority with a common minimum set of responsibilities to tackle insider trading and market manipulation.

9.7.5 The Directive guarantees the freedom of expression and the freedom of the press. Only journalists who deliberately or negligently pass on false information and then profit financially or otherwise from having done so will be covered by the Directive.

9.7.6 The Directive also establishes transparency standards requiring that people who recommend investment strategies to the public or to distribution channels disclose their own relevant interests. In practice, this provision will in particular apply to financial analysts, and to one specific sub-category of financial journalists - those recommending investments to the public. 9.7.7 The Market Abuse Directive is a framework Directive as foreseen under the European Council's March 2001 Stockholm Resolution on securities legislation (on the basis of a report from a group of Wise Men chaired by Alexandre Lamfalussy). The framework was agreed with the European Parliament in February 2002. The Directive lays down the essential principles. The technical details will be treated apart, through 'implementing measures' to be taken by the Commission under the scrutiny of the European Securities Committee (ESC)[11] and of the European Parliament. In particular, for the first time, the ESC will act as a regulatory committee when examining the Commission's draft implementing measures.

9.7.8 For drafting the implementing measures, the Commission will consider the technical advice delivered by the Committee of European Securities Regulators (CESR).

On 22 December, 2003, the European Commission adopted three implementing measures related to the Directive on insider dealing and market manipulation (market abuse – 2003/6/EC). These implementing measures cover among other things detailed criteria for determining what constitutes inside information, which non exhaustive factors have to be examined when assessing possible market manipulation as well as provisions on how and when issuers must disclose inside information. They also set out standards for the fair presentation of investment recommendations (including the disclosure of conflicts of interest). Finally, they set out conditions for benefiting from exemptions from the prohibitions of market abuse in the case of share buy-back programmes and price stabilisation of financial instruments. These implementing measures are the first to be drawn up under the new procedure for deciding and applying securities legislation agreed by the European Council in March 2001 and endorsed by the European Parliament in February 2002.

The three implementing measures comprise two Commission Directives and one Commission Regulation

- Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation.
- Commission Directive 2003/125/ECof 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest.
- Commission Regulation (EC)2273/2003of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments.

The Prospectus Directive

9.7.9 The directive on the prospectus[117] to be published when securities are offered to the public or admitted to trading was adopted on 15 July 2003. The Directive was published in the Official Journal of the European Communities on 31 December 2003 and requires to be transposed into Irish law by 1 July 2005. As with the Market Abuse Directive, this is a framework Directive, laying down essential provisions. The implementing provisions for this Directive will be determined by the Commission, which will take into account the technical advice provided by the Committee of European Securities Regulators. The implementation measures for the Prospectus Directive are currently being finalised.

9.7.10 This Directive is intended to make it easier and cheaper for companies to raise capital throughout the EU on the basis of approval from a regulatory authority ('home competent authority') in one Member State. It will reinforce protection for investors by guaranteeing that all prospectuses, wherever in the EU they are issued, provide them with the clear and comprehensive information they need to make investment decisions.

9.7.11 The Directive will introduce a new 'single passport for issuers' making securities available to investors either through a public offer procedure or by admitting their shares to trading. This means that once approved by the authority in one Member State, a prospectus will then have to be accepted everywhere else in the EU. In order to ensure investor protection, that approval will only be granted if prospectuses meet common EU standards for what information must be disclosed and how.

9.7.12 The Directive only concerns initial disclosure requirements. Conditions for admission to listing remain subject to existing European and national requirements.

European Company Statute (ECS)

9.7.13 This statute provides for a new corporate form, the European Company, the primary objective of which is to make it easier for businesses to operate on a pan-European basis. The ECS, which was adopted on 8 October 2001, contains two pieces of legislation, namely a Regulation relating to company law aspects and a Directive dealing with worker involvement aspects.

9.7.14 The ECS comes into effect in all member states on 8 October 2004. Work is currently ongoing on the transposition process into Irish law within the Department of Enterprise, Trade and Employment.

9.7.15 ***Amendment of First Company Law Directive***

A Directive to amend the First Company Law Directive[13] was formally adopted on 15 July 2003. The modifications are designed to make company information more easily and rapidly available to the public while at the same time simplifying the disclosure formalities required from companies. It will allow full advantage to be taken of modern technology. Companies will be able to file their documents and particulars by either paper or electronic means. Interested parties will be able to obtain copies by either means. Companies will continue to file their documents and particulars in the language(s) of their home Member State but will have the option of voluntarily filing the same information in other EU languages, in order to improve cross-border access. The Directive must be transposed into domestic legislation by 31 December 2006.

9.8 Company Law Measures Currently Under Negotiation

Draft Transparency Directive

9.8.1 The European Commission has presented a proposal for a Directive introducing minimum transparency requirements for information which must be provided by companies whose securities are traded on a regulated market, such as a stock exchange. The proposal, a key part of the Financial Services Action Plan, aims to enhance investor protection, attract investors to the European market place and improve the efficiency, openness and integrity of European capital markets. It would also remove certain national barriers linked to transparency requirements, which may discourage issuers from having their securities admitted to trading on more than one regulated market in the EU. In order to achieve these aims, the proposed Directive would upgrade the current level and frequency of the mandatory financial information that issuers have to provide to the market throughout the financial year. It would also simplify the requirements which issuers must meet on the use of languages and on the way information is disseminated. The proposal will be submitted to the European Parliament and the EU's Council of Ministers for adoption under the co-decision procedure.

9.8.2 The Commission's proposal, which follows extensive two-year consultations with the markets, regulators and other interested parties, is part of a comprehensive strategy aiming to improve the clarity, reliability and comparability of the information provided to investors.

9.8.3 The ECOFIN Council, at its meeting on 25 November 2003, agreed on a general approach to the proposed Directive and recommended adoption by April 2004.

Proposal for Directive on Takeover bids

9.8.4 On 2 October 2002, the European Commission presented its revised proposal for a Directive laying down common rules for takeover bids. This framework proposal would provide for a minimum level of harmonisation relating to the supervision and regulation of takeovers in the EU.

9.8.5 The proposed Directive is a follow-up to an earlier proposal, which was rejected by the European Parliament in July 2001. The new proposal seeks to respond comprehensively to the European Parliament's concerns with the earlier proposal without compromising the basic principles approved unanimously in the Council's common position concerning the previous proposal. In response to the view of the European Parliament that a level playing field does not exist for European companies facing a takeover bid, the proposal stipulates that restrictions on transfers of securities and voting rights are rendered unenforceable against the offeror or cease to have effect once a bid has been made public.

9.8.6 This level playing field issue emerged as the key sticking point of this directive at the Council negotiations. However, agreement was reached on a compromise text at the Competitiveness Council on 27 November 2003. The Text was subsequently accepted by the European Parliament on 16 December 2003. The dossier is now with the Jurist Linguists for examination. It is expected that this exercise will be completed in March 2004, following which the Directive can be adopted at a subsequent Council meeting.

9.9 Recommendations

In Chapter 9 the Review Group considered the optimum way to address the implementation and consolidation in Ireland of 'company' law which has emerged and will continue to emerge from EU initiatives set in train under the FSAP and makes the following recommendations:

- The consolidation Bill should incorporate as much of stable company law as it can.
- That part of companies legislation dealing with investment companies (Part XIII of the 1990 Act) will be decoupled from company law proper and provided for in a separate contemporaneous enactment, ideally

a separate contemporaneous enactment, ideally encompassing law relating to UCITSs and other forms of collective investment funds.

- Certain FSAP provisions should be decoupled from the company law Consolidation Bill.

Endnotes

[1] The European Company Statute is a new legal instrument based on European Community law that gives companies the option of forming a European Company – known formally by its Latin name of 'Societas Europeae' (SE). An SE will be able to operate on a European-wide basis and be governed by Community law directly applicable in all Member States.

[2] The final report of the High Level Group is available at http://europa.eu.int/comm/internal_market/en/company/company/modern/consult/report_en.pdf

[3] Defined by the High Level Group as chains of holding companies with ultimate control based on a small total investment and achieved by extensive use of minority shareholdings.

[4] Communication from the Commission to the Council and the European Parliament - Reinforcing the statutory audit in the EU (COM/2003/286).

[5] Directive 2001/65/EC amending Directives 78/660/EEC, 83/349/EEC and 86/635/EEC as regards the valuation rules for the annual and consolidated accounts of certain types of companies as well as of banks and other financial institutions.

[6] Regulation (EC)1606/2002 on the application of international accounting standards.

[7] Directive 2003/51/EC amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings.

[8] IAS 39 defines "fair value" as "the amount for which an asset could be exchanged, or a liability settled, between knowledgeable, willing parties in an arm's length transaction."

[9] "Financial instrument" includes cash, receivables, payables, equity and debt securities as well as financial derivatives such as futures, options and swaps.

[10] Directive 2003/6/EC on insider dealing and market manipulation (market abuse).

[11] In June 2001 the European Commission adopted two Decisions to create a European Securities Committee (ESC) and a Committee of European Securities Regulators (CESR). It is intended that the two advisory Committees will play a crucial role in assisting the Commission in its task of implementing the Financial Services Action Plan and speeding up the legislative process. The ESC is composed of high-level representatives of the Member States. It advises the Commission on issues relating to securities policy. It will also act as a regulatory committee. The CESR is set up as an independent advisory body

10

CHAPTER 10

Accounting and Audit Issues

ten

10.1 Introduction

10.1.1 The main objective of the Review Group in approaching reform in this area was to reform, by consolidating the existing statutes, the accessibility of the provisions of the Companies Acts relating to:

- the preparation of a company's annual financial statements and associated requirements;
- the filing of such statements with the CRO;
- disclosure requirements as regards company accounts;
- particular provisions related to small- and medium-sized companies and to group accounts; and
- issues related to the obligations on auditors and the practice of the external audit function.

10.1.2 All of these requirements are spelt out in the companies code. The difficulty of accessibility, certainly from the perspective of the average company director, arises because accounting and audit requirements are set out in a number of legal instruments within the Companies code. Some of this material is set out in secondary legislation, i.e. in the form of statutory instruments rather than Acts of the Oireachtas. The process of cumulative amendment and, very often, of amendment of already-amended provisions suggests that forensic as much as legal skills would be useful attributes for any person seeking to get to grips with the obligations arising. A further level of complexity is added by the fact that obligations arising in this area are drawn from two distinct legal bases. Enactments driven by domestic reform agendas address shortcomings in the law or perceived areas of wrongdoing by reform of the 1963 Act. But obligations for reform of the same imperfect legislative vehicle also come about through Ireland's membership of the European Union. Although the 4th and 7th EU Company Law Directives, for example, apply to all companies the main focus of EU company law, both as regards enactments to date and as regards proposals in the Company Law Action Plan, has been and remains on public companies (PLCs).

10.1.3 The main areas of existing legislation which require to be consolidated and which are addressed in this Chapter and the related Part A6 of the Heads of the Consolidated Companies Bill are:

- Sections 147-164 (Accounts and Audit) of the 1963 Act;
- Schedule 6 (Accounts) of the 1963 Act;
- Sections 125-129 (Annual Return) of the 1963 Act;
- Companies (Amendment) Act 1986;
- Schedule to the Companies (Amendment) Act 1986;
- Part X (Sections 182-205, Accounts and Audit) and Sections 41-46 (Disclosure of transactions involving directors and other officers) of the Companies Act 1990;
- European Communities (Companies: Group Accounts) Regulations 1992 (Statutory Instrument No. 201 of 1992);
- Companies Act, 1990 (Auditors) Regulations, 1992 (Statutory Instrument No. 259 of 1992);
- European Communities (Accounts) Regulations 1993 (Statutory Instrument No. 396 of 1993);
- Part III (Sections 31-39, Exemption from requirement to have accounts audited) of the Companies (Amendment) No. 2 Act 1999;
- Part 6 (Sections 59-66, Measures to Improve Compliance with Filing Requirements), Part 8 (Sections 72-74, Auditors), and Section 90 of the Company Law Enforcement Act 2001;
- Part 3 (Sections 34-47, Other Measures to Strengthen the Regulation of Auditors), Companies (Auditing and Accounting) Act 2003.

Some of the above provisions do not in fact apply to the CLS. As appropriate, these cases will be addressed in Group of Parts B of the Consolidated Companies Bill

10.1.4 The requirements in relation to the preparation of the accounts of Credit Institutions and Insurance Companies are not covered by company law but are separately legislated for by the Minister for Finance.

10.2 EU Developments in Financial Reporting and Accounting

10.2.1 The EU accounting requirements are based primarily on the 4th and 7th Directive on the annual and consolidated accounts of companies. These requirements have been transposed into Irish Law via the Companies (Amendment) Act, 1986 and the 1992 Group Accounts Regulations (S.I. 201 of 1992).

10.2.2 The European Union's declared policy has been to keep the European Accounting Directives in line with International Accounting Standards. This policy has become ever more relevant with the adoption of EC 1606/2002 (its IAS Regulation) on the application of International Accounting Standards for the consolidated accounts of all listed companies within the EU. For financial periods beginning on or after 1 January 2005, the consolidated accounts of all the listed companies must be prepared in accordance with IAS. The Regulations also contain a number of options for Member States to extend this regime to the International Accounts of certain or all classes of company.

10.3 Fair Value Directive

10.3.1 The Fair Value Directive (2001/65/EC) was the first significant amendment to the 4th & 7th Accounting Directives. It was adopted by the EU Council on 31 May 2001 with an implementation deadline for Member

States of 31 December 2003. The Directive contains a number of options allowing EU Member States to permit or require the use of fair value methods to account for certain classes of financial instruments in companies annual financial statements.

10.3.2 The Fair Value Directive was based on existing IAS on the use of Fair Value Accounting (IAS 39) for financial instruments and similar items. Its purpose is to enable companies to prepare financial statements in accordance with the latest international developments. Companies will also be required to provide additional information in the notes to the accounts on items that have been valued using 'fair value' techniques.

10.3.3 A complication has arisen, however, due to the fact that the original IAS 39, on which the Directive was based, has now been superseded by a revised version. Further issues have also arisen due to the fact that this revised version of IAS 39 has not yet been endorsed formally by the European Union. This has caused difficulties in a number of EU States, including Ireland, who have yet to implement the Directive. It is likely, however, that the Directive's requirements will be implemented during 2004, therefore requiring secondary legislation, although the intention is subsequently to incorporate the Statutory Instrument into the Consolidated Companies Bill.

10.3.4 Draft Part A6 of the General Scheme of the Consolidation Bill has been prepared using the most flexible approach allowed under the Directive.

10.4 International Accounting Standards Regulation

10.4.1 Regulation (EC)1606/2002 on the application of International Accounting Standards will, as a minimum, require companies governed by the law of a Member State, whose securities are admitted to trading on a regulated market in any Member State in the EU ('publicly traded companies'), to prepare their consolidated accounts on the basis of accounting standards issued by the International Accounting Standards Board (IASB) that are adopted by the European Commission.

10.4.2 On 29 September 2003 the Commission adopted a Regulation endorsing to a certain extent the IAS, including related interpretations (SICs), and therefore confirming the requirement for their compulsory use from 2005 under the terms of the general IAS Regulation adopted by the European Parliament and the Council in 2002.[1]

10.4.3 Member States have the option to extend the application of the Regulation. They may permit or require:

1. Publicly traded companies to prepare their individual accounts in accordance with adopted IAS;
2. Some or all non-traded public companies and private companies to prepare their consolidated and/or individual accounts in accordance with adopted IAS.

10.4.4 The Regulation will apply to financial years commencing on or after 1 January 2005. The significant feature of a Regulation is that it has direct effect without requiring enactment in domestic legislation. Thus all IAS approved by the EU Commission will have the force of law in Ireland as in all other Member States.

10.5 Modernisation of Accounting Directive

10.5.1 The Modernisation Directive was adopted on 6 May 2003. This amends the 4th and 7th Company Law Directives, the Bank Accounts Directive and the Insurance Accounts' Directive. It contains a number of enabling provisions to allow companies to comply with International Accounting Standards while still complying with the Directive.

10.5.2 The purpose of the Directive is to:

- Remove all existing conflicts between the Accounting Directives and IASB standards; and
- Ensure that all optional accounting treatments currently available under IASB standards are available to EU companies which continue to have the Accounting Directives as the basis of their accounting legislation (i.e. those companies which will not prepare their accounts in accordance with the IAS Regulation).

10.5.3 The Directive also includes new requirements in respect of disclosures to be made in the directors' report and prescribes headings to be used in auditors' reports.

10.6 Changes in the Regulation of Accounting and Auditing 1998-2003

10.6.1 As already stated, the focus in this Chapter is on the consolidation rather than reform of the company law provisions governing accounting and auditing. There is a sound basis for this for the simple reason that at present ten interlinked legal instruments apply in this area. In addition the domestic legal provisions in the area of accounting and particularly the audit function within accounting have been the focus of considerable substantive reform over the five year period 1998-2003. As a whole over the period in this area there has been a move away from self-regulation to a greater and more active government role in regulation, both in the form of the establishment and strengthening of dedicated regulators and in the form of primary law. This has been accompanied by a review of professional standards of governance within the accountancy bodies.

10.6.2 That the main focus of the State in regulating the accountancy profession should be on the auditing function is understandable when one takes account of the respective objectives of accounting and auditing. However, it should be noted that the duties placed on the new regulator, the IAASA, include reviewing the quality of information made available by companies. As noted in Chapter 6, an important element of corporate governance consists of accountability – the process whereby directors make available relevant information concerning their conduct of a company's affairs.Accounting is concerned with the process of identifying, measuring and communicating financial and related information to permit informed judgements and decisions. The primary vehicle for the provision of this information is a company's annual financial statements. The preparation of annual financial statements are a primary responsibility of company directors. Company law requires the directors to prepare financial statements for each financial year which give a true and fair view of the state of affairs of the company and of the profit or loss of the company for that period. These provide an account of the stewardship role exercised by directors and are a key component of the corporate governance process. In preparing those financial statements, the directors are required to

- select suitable accounting policies and then apply them consistently;
- make judgments and estimates that are reasonable and prudent; and
- prepare the financial statements on the going concern basis unless it is inappropriate to presume that the company will continue in business.

The directors are responsible for keeping proper accounting records which disclose with reasonable accuracy at any time the financial position of the company and to enable them to ensure that the financial statements comply with the Companies Acts. They are also responsible for safeguarding the assets of the company and hence for taking reasonable steps for the prevention and detection of fraud and other irregularities.

10.6.3 The objective of an audit is to enable the auditor to form and express an 'opinion' on the financial statements. The audit of the financial statements does not relieve the directors of any of their responsibilities. The auditors' role is to report whether the financial statements give a 'true and fair' view, and the audit is designed to provide a reasonable assurance that the financial statements are free of material misstatements. The auditors' role is not to prepare the financial statements, nor to provide absolute assurance that the figures in the financial statements are correct, nor to provide a guarantee that the company will continue in existence.

10.6.4 An auditor's primary responsibility is to the shareholders of a company. In undertaking a statutory audit of financial statements, auditors should:

- Carry out procedures designed to obtain sufficient appropriate audit evidence, in accordance with Auditing Standards, to determine with reasonable confidence, whether the financial statements are free from material misstatement;
- Evaluate the overall presentation of the financial statements, in order to ascertain whether they have been prepared in accordance with relevant legislation and accounting standards; and
- Issue a report with a clear expression of their opinion on the financial statements.

10.6.5 Auditors may also perform other 'assurance type' and other engagements involving other financial information, or non-financial information such as:

- reviewing internal control systems;
- reviewing compliance with statutory, regulatory, or contractual requirements;
- economy, efficiency, and effectiveness in the use of resources;
- environmental practices.

10.6.6 Statutory audit is only one of the cornerstones of corporate governance. However, increasingly, auditors are now subject to a wide range of statutory reporting obligations, many of which fall outside the scope of an audit of the financial statements. Auditors are required to report to regulatory and other authorities on specific shortcomings and inconsistencies identified during the course of auditing financial statements. With this tendency for other agencies to seek to rely on the statutory auditor for purposes other than those of the statutory audit, it should be important not to lose sight that those with prime responsibility for corporate governance issues are company directors and shareholders; prime responsibility for the regulation of corporate behaviour rests with the State.

10.7 Company Law Enforcement Act 2001

10.7.1 The Report of the Working Group on Company Law Compliance and Enforcement (1998) in due course led to enactment of the Company Law Enforcement Act 2001 and the establishment of the ODCE in November 2001. Under the Act, the Director of Corporate Enforcement, is legally responsible for:

- encouraging compliance with company law and

- investigating and enforcing suspected breaches of the legislation.

10.7.2 The 2001 Act introduced at Section 74 a highly significant change in the regulation of the audit function by providing that auditors should be required to report to the Director instances of the suspected commission of indictable offences under the Companies Acts by a company, its officers or agents. The duties of auditors in this regard were subsequently set out in detail in a Decision notice of the ODCE.[120] This Decision notice was produced in close collaboration with the accounting bodies and the Auditing Practices Board (APB) which is the standard setter for auditors in Ireland and the UK. It is important to recall that the duties of the auditor are primarily towards the shareholders of a company, to report to them on whether or not the financial statements of the company give a true and fair view of its state of affairs. While there was an existing relatively limited duty on auditors to report wrongdoing to the supervisory authority,[121] section 74 of the 2001 Act adds new obligations on the auditor to report instances of suspected indictable offences under the Companies Acts where they form the opinion during the course of their audit that such breaches have occurred. The auditor has thus become an important agent of regulation, supplying evidence to the regulator, the ODCE, on the basis of which that Office will decide to make investigations and, in some cases, to prosecute.

10.7.3 The 2001 Act also introduced at Part 6 (sections 59-66, Measures to Improve Compliance with Filing Requirements) a number of provisions whose net effect will allow the Registrar to monitor compliance with annual return filing requirements. These include, notably, at section 60, the concept of an annual return date, being a specific date in each year within 28 days of which a company must file its return.

10.8 Companies (Auditing and Accounting) Act 2003

10.8.1 The recommendations in the Report of the Review Group on Auditing (July 2000) were given effect in the Companies (Auditing and Accounting) Act, enacted in December 2003. The 'Oversight Board' to supervise the regulation of accounting and auditing recommended by the RGA was actually constituted as the Irish Auditing and Accounting Supervisory Authority (IAASA). Section 8(1) of the 2003 Act sets out the principal objects of IAASA, which are:

- To supervise how the prescribed accountancy bodies regulate and monitor their members;
- To promote adherence to high professional standards in the auditing and accounting professions;
- To monitor whether the accounts of certain classes of companies and other undertakings comply with the Companies Acts; and
- To act as a specialist source of advice to the Minister (for Enterprise, Trade and Employment) on auditing and accounting matters.
- IAASA is specifically charged with responsibility for monitoring the effectiveness of provisions of the Companies Acts relating to the independence of auditors [section 9(2)(i)]. Section 44 requires the disclosure of remuneration received by the audit firm for audit, audit-related and non-audit work, as specified.

10.8.3 Section 45 sets out the requirement for the directors of each public company, and each private company with a balance sheet total above €7,618,428 and turnover in excess of €15,236,856,[122] to produce an annual statement of compliance with

- The Companies Acts;
- Tax law, and
- Any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements.

10.8.4 Section 45 further imposes an obligation on the auditor of the company to review the annual directors' compliance statement,

10.8.5 to determine whether, in the auditor's opinion, each statement is fair and reasonable having regard to information obtained by the auditor --- in the course of and by virtue of having carried out audit work, audit-related work or non-audit work for the company.

10.8.6 There is an important provision at section 53 of the Act which raises the audit exemption limit applying to Irish companies from companies with an annual turnover of €317,000 to companies with an annual turnover of €1.5m. The balance sheet limit of €1.9m remains the same.[123] Under the audit exemption provision "the directors of a small private company may elect to dispense with the requirement to appoint an auditor or to produce audited accounts in the following financial year.[124]

10.8.7 At first sight this might seem to be contrary both to the general principles of regulation otherwise applied in the 2003 Act and to other instruments for the better regulation of the auditing function. However, there is an underlying economic logic to this provision in that firstly, no matter what goods or services are being supplied far more competitive pressures come from new entrants than from existing players in the market so it is good for the economy generally to stimulate new incorporations and the enhanced business activity they give rise to. Secondly, a core principle of good regulation is also illustrated: to encourage innovation new services should be more lightly regulated than existing services.

10.8.8 As a corporate governance reform distinct from statutory external audit, section 42 of the 2003 Act sets out the requirement for each plc and large private company[125] to establish an Audit Committee (or to explain in the annual financial statement why an Audit Committee has not been established) drawn from among its directors and lists the tasks and objectives of such Committee. The Audit Committee may not be chaired by the Chairman of the company.

10.9 Should accounting standards be incorporated directly into primary legislation?

10.9.1 Irish company law currently contains detailed accounting principles and prescriptive financial reporting requirements. It specifies content and format of financial statements (profit and loss account, balance sheet, and certain related notes). There are, simultaneously, in existence apart from the legislation various accounting standards (GAAP and IAS) which organisations and practitioners must or will in future be required to comply with.

10.9.2 The recent establishment of the IAASA has given rise to a statutory body charged with the role of creating accounting standards, together with some level of enforceability of those standards by professional bodies and IAASA. Accounting standards are constantly evolving, adapting to meet new issues or deal more efficiently with existing ones.

10.9.3 For this reason the Review Group considered an alternative to the current approach of adopting changes to company accounting standards directly into the legislation, such as that applying in Australian law. This approach would involve a transfer of all principles/methods/document formats into standards determined by the accounting standards board. The Australian Accounting Standards Board (AASB) is a statutory body empowered to approve accounting standards. The Australian Corporations Act 2001 requires companies to comply with standards passed by the AASB. The standards themselves state which undertakings they apply to (eg. small proprietary companies). The Australian Act also empowers standards to specify whether certain additional reports must be provided by certain undertakings at AGMs. The Australian standards do not currently specify content or format for auditors' or directors' reports.[126]

10.9.4 To adopt this approach in Ireland the provisions currently contained in the company legislation which are statements of accounting principles or acceptable accounting methods would be transferred into a draft standard – while retaining primary obligations regarding disclosure, record keeping etc in the primary legislation. The appropriate standards for different types of company could be set and reviewed on an ongoing basis by IAASA.

10.9.5 The Review Group considered if this approach was appropriate for Irish company law. What would have been involved in pursuit of this option was firstly the enactment of legal provisions to give the Minister for Enterprise, Trade and Employment powers to establish domestic accounting standards by regulation (Statutory Instrument), a power already enjoyed by the Minister with regard to EU-derived standards. However, such an approach would also have required significantly more resourcing for IAASA. There will, in any event, on foot of the coming into force of the IAS Regulation, be a shift away from domestic to international (specifically EU) standard setting. Thus, it would not seem timely or appropriate to develop a national standard setting body at this juncture.

10.10 EU Action Plan on Statutory Audit

10.10.1 Another reason against establishing a national standard setting body is that in May 2003 the Commission published an action plan, Reinforcing the statutory audit in the EU, setting out ten priorities for improving and harmonising the quality of statutory audit throughout the EU.[127]

10.10.2 The regulation of auditors in the EU has been based upon the 8th Company Law Directive (84/253/EEC), which deals essentially with the approval of persons to undertake statutory audits in the EU, together with Commission Recommendations on Quality Assurance (2000) and Auditor Independence (2002). In the new Communication, the Commission proposes —

10.10.3 A modernisation of the 8th Company Law Directive to provide a comprehensive legal basis for all statutory audits conducted in the EU

10.10.4 To ensure a uniformly high level of audit quality throughout the EU, the Commission envisages the use of International Standards on Auditing (ISAs) for all EU statutory audits from 2005 onwards. Following further preparatory work, the Commission intends to propose a binding instrument requiring the use of ISAs from 2005.

10.10.5 The Commission's proposals for a new 8th Directive are expected to set out principles in relation to —

- Public Oversight;
- Independence of auditors from company executive directors;
- Governance by a company of the audit function;

- Code of Ethics for Auditors, including Auditor Independence; and
- Education and Training of Auditors.

10.10.6 The Commission is expected to issue its proposals for an amended Directive in 2004.

10.10.7 Thus, in a context where IAS are likely to become normative throughout the EU and where a major overhaul of the 8th Company Law Directive is imminent, the Review Group came to the conclusion that the initiation of any major structural change in the legal regulation of accountants and auditors, such as adopting a delegated approach to standard setting similar to that applying in Australian law should only be undertaken in the new context.

10.11 Summary Financial Statements

10.11.1 The first report of the CLRG recommended that companies be entitled to deliver abbreviated financial information to members subject to the right of the member to request, at any time, delivery to him of full accounts on an occasional or permanent basis.[128] This issue is addressed in Part A6 of the Companies Consolidation Bill.

10.12 Revision of size criteria for SMEs

10.12.1 In the Companies Acts 1963-2003, a number of exemptions apply to the documents which small and medium-sized companies must deliver to the Registrar of Companies. Small companies need not deliver to the Registrar the profit and loss account or the directors' report prepared for the members and may instead deliver only the balance sheet and accompanying notes. Exemptions also apply to the material which needs to be included in the balance sheet. The exemptions applying to medium-sized companies are much less extensive than those for small companies. Medium-sized companies must deliver to the Registrar a balance sheet, abbreviated profit and loss account, directors' report and a special auditor's report.

10.12.2 The exemption provisions for small and medium-sized companies were introduced by the 1986 Act (s 8) which gave effect to the Fourth EC company law directive dealing with the content and publication of the annual accounts of public and private limited companies. The ceilings on qualification for exemption were last revised in Ireland by the European Communities (Accounts) Regulations 1993 and were set as follows:

Irish Limits	Balance sheet total	Turnover
Small Company	£1.5m	£3.0m
Medium-sized company	£6.0m	£12.0m

Since then the permissible EU maxima for qualification for exemption have been revised periodically. The maxima currently applying are:

EU Limits	Balance sheet total	Turnover
Small Company	€3.65m	€7.3m
Medium-sized company	€14.6m	€29.2m

10.12.3 Clearly, it is appropriate to consider increasing the limits in Irish law too. One approach would be to increase the domestic limits to the current EU maxima. There is certainly a case to be made for this approach on the basis of Irish competitiveness with other EU member states. However, there are other issues to take into account when proposing change in this area. Paramount among these is that even with the existing limits, a very large proportion of Irish registered companies file small-company accounts only. The extent of permitted abridgment is such that these accounts offer a very limited insight into the true state of the company's financial affairs. Even the competitiveness argument is open to question. There is no evidence either way to suggest that companies which would otherwise have been expected to incorporate in Ireland are tending to incorporate elsewhere in the European Union by reason of a perception that less disclosure is required in those jurisdictions. The case against raising the limit can also be founded on the basis that one of the consequences of abridgment is that small creditors of small and medium-sized companies are disadvantaged vis-à-vis larger creditors. The rationale for this is that larger creditors, e.g. banks and the Revenue Commissioners, have a de facto ability to gain access to the information which has been omitted from the published abridged accounts. Smaller creditors do not. On the basis of weighing up the case for and against, the Review Group concluded that it would, on balance, be wise to use the increase in the level of inflation since December 1993 as a guideline for increasing the limits. According to the Central Statistics Office inflation in Ireland in the period from December 1993 to January 2004 has been approximately 34.5%. Rounding the figures upwards somewhat this would give the following as the proposed new limits which the Review Group recommends:

Proposed Irish Limits	Balance sheet total	Turnover
Small Company	€2.50m	€5.00m
Medium-sized company	€10.00m	€20.00m

10.12.4 These limits are accordingly set out in the proposed Heads of Part A6 of the Companies Consolidation Bill.

10.12.5 A related point arises regarding the access by the ODCE to the unabridged accounts from which the above-mentioned abridged accounts of small and medium-sized companies have been distilled.

10.12.6 The Companies Acts currently require that unabridged accounts be circulated to shareholders. Accordingly, the compliance burden of this measure ought to amount to nothing more than the cost of photocopying documents which are already in existence. However the compliance benefits of such an amendment would be significant because they would enable ODCE to gain a significantly better insight into the financial affairs of companies in relation to which members of the public have complained or in relation to which ODCE has any other cause for concern. At present ODCE's entitlement to require production of unabridged accounts arises only where the rather high-level circumstances specified in Section 19(2) of the 1990 Act apply, ie, in circumstances of suspected fraud or illegality.

10.12.7 A second basis on which there is a case for an amendment along these lines is to provide an effective means of ensuring that exemptions from filing obligations are availed of only by those companies which are properly entitled to do so. As the law stands it is not always easy to verify that this is indeed the case.

10.12.8 On consideration of this proposal the Review Group concluded that the balance of the public interest would benefit from this proposal and accordingly recommends it. Disclosure by a company to the ODCE of its unabridged financial statements would be protected by the usual regime of confidentiality (provided for in the 2001 Act) which governs all other disclosures to ODCE.

10.13 Table A Analysis and recommendations

The analysis of one provision of Table A, which deals with the keeping of books of account, is included in this chapter.

Accounts

125.	The directors shall cause proper books of account to be kept relating to - (a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure take place; and (b) all sales and purchases of goods by the company; and (c) the assets and liabilities of the company.	Repeal – this law is already stated in 1990 Act ss202 et seq. This is reflected in Part A6 of the Consolidation Bill Heads.

10.14 Summary of Recommendations

- It is neither timely nor appropriate to develop a national accounting standard setting body at this juncture. (10.9.5)

- The criteria for SMEs should be revised using the rate of inflation since 1993 as an approximate guideline for increasing limits. The result of this is a balance sheet total of €2.5m and a turnover of €5m for a small company and a balance sheet total of €5m and a turnover of €10m for a medium-size company. (10.12.3)

- The ODCE should be accorded the power to require production upon request of a company's unabridged accounts as circulated to its shareholders. (10.12.8)

Endnotes

[1] The Regulation includes all existing IAS and SICs, except for IAS 32 and 39 and related SICs 5, 16 and 17. IAS 32 and 39, which deal with the accounting and disclosure of financial instruments, are not included because they are currently in the process of being revised by the IASB, in co-operation with European accounting experts.

[2] Office of the Director of Corporate Enforcement, Decision Notice D/2002/2.

[3] Section 194 of the Companies Act 1990, which sets out the duty of auditors to report to the Registrar where they formed the opinion that proper books of account were not being kept by a company and its directors.

[4] A private company falling below these EU-derived limits qualifies as a medium-sized company and on that basis is allowed to file abridged annual accounts with the Companies Registration Office.

[5] For comparison, the respective EU limits applying (with effect from May, 2003) are annual turnover of €7.3m and annual balance sheet total of €3.65m.

[6] Source: Courtney, 'The Law of Private Companies', (end ed; 2002) p. 795.

[7] A large private company is defined in the Act as a company whose balance sheet exceeds €25m and whose turnover exceeds €50m in both the most recent financial year and the immediately preceding financial year.

[8] However, the recent Australian CLERP 9 (Corporate Law Economic Reform Program No. 9) reform proposals have suggested that their Auditing and Assurance Standard Board (AuASB) be given a role in setting binding Auditing Standards.

[9] COM/2003/286.

[10] Para. 6.5.9 of First Report.

Appendix I

APPENDIX I

Part 7,
Company Law Enforcement Act, 2001

APP. I

Company Law Review Group

Section 67 Establishment of Company Law Review Group

There is hereby established a body to be known as the Company Law Review Group.

Section 68 Functions of the Review Group

(1) The Review Group shall monitor, review and advise the Minister on matters concerning—
- (a) The implementation of the Companies Acts,
- (b) The amendment of the Companies Acts,
- (c) The consolidation of the Companies Acts,
- (d) The introduction of new legislation relating to the operation of companies and commercial practices in Ireland,
- (e) The Rules of the Superior Courts and case law judgements insofar as they relate to the Companies Acts,
- (f) The approach to issues arising from the State's membership of the European Union, insofar as they affect the operation of the Companies Acts,
- (g) International developments in company law, insofar as they may provide lessons for improved State practice, and
- (h) Other related matters or issues, including issues submitted by the Minister to the Review Group for consideration.

(2) In advising the Minister the Review Group shall seek to promote enterprise, facilitate commerce, simplify the operation of the Companies Acts, enhance corporate governance and encourage commercial probity.

Section 69 Membership of Review Group

(1) The Review Group shall consist of such and so many persons as the Minister from time to time appoints to be members of the Review Group

(2) The Minister shall from time to time appoint a member of the Review Group to be its chairperson.

(3) Members of the Review Group shall be paid such remuneration and allowances for expenses as the Minister, with the consent of the Minister for Finance, may from time to time determine.

(4) A member of the Review Group may at any time resign his or her membership of the Review Group by letter addressed to the Minister.

(5) The Minister may at any time, for stated reasons, terminate a person's membership of the Review Group.

Section 70 Meetings and business of Review Group

(1) The Minister shall, at least once in every 2 years, after consultation with the Review Group, determine the programme of work to be undertaken by the Review Group over the ensuing specified period.

(2) Notwithstanding subsection (1), the Minister may, from time to time, amend the Review Group's work programme, including the period to which it relates.

(3) The Review Group shall hold such and so many meetings as may be necessary for the performance of its functions and the achievement of its work programme and may make such arrangements for the conduct of its meetings and business (including by the establishment of sub-committees and the fixing of a quorum for a meeting) as it considers appropriate.

(4) In the absence of the chairperson from a meeting of the Review Group, the members present shall elect one of their numbers to be chairperson for that meeting.

(5) A member of the Review Group, other than the chairperson, who is unable to attend a meeting of the Review Group, may nominate a deputy to attend in his or her place.

Section 71 Annual Report and provision of information to Minister

(1) No later than 3 months after the end of each calendar year, the Review Group shall make a report to the Minister on its activities during that year and the Minister shall cause copies of the report to be laid before each House of the Oireachtas within a period of 2 months from the receipt of the report.

(2) A report under subsection (1) shall include information in such form and regarding such matters as the Minister may direct.

(3) The Review Group shall, if so requested by the Minister, provide a report to the Minister on any matter—
- (a) Concerning the functions or activities of the Review Group, or
- (b) Referred by the Minister to the Review Group for its advice.

Appendix 2

APPENDIX 2

Submissions received by Company Law Review Group 2002 - 2003

APP. 2

Allied Irish Bank plc	Adelaide Road, Dublin 2.
BDM Chartered Accountants	Church Avenue,Mullingar, Co. Westmeath.
Burns & Shanahan, Chartered Accountants	Redmond Square, Selskar, Wexford.
Butler & Co., Insolvency Practitioners	Carrick House, 49 Fitzwilliam Square, Dublin 2.
Casey McGrath & Associates	14 Upper Fitzwilliam Street, Dublin 2
Eircom	St. Stephens Green West, Dublin 2.
Institute of Directors in Ireland	89 James's Street, Dublin 8.
IBEC	84-86 Lower Baggot Street, Dublin 2.
ICAI	CA House, 87-89 Pembroke Road, Dublin 4.
Institute of Chartered Secretaries and Administrators	P.O. Box 7568, Foxrock, Dublin 18.
ICMSA	Dublin Road, Castletroy, Limerick
John Lee & Co., Accountants	1 Newbridge Drive, Sandymount, Dublin 4.
John Mulderrig, Accountants Chartered Accountants & Registered Auditors.	Kevin G. Moynihan & Co., Rushbrooke House, Lewis Road, Killarney, Co. Kerry.
The Law Reform Commission	IPC House, 35-39 Shelbourne Road, Ballsbridge Dublin 4.
The Law Society of Ireland, (Business Law Committee).	Blackhall Place, Dublin 7.
Liam Molloy, Chartered Accountants	2 Rose Inn Street, Kilkenny.
Mason, Hayes and Curran Solicitors.	6 Fitzwilliam Square, Dublin 2.
Meehan & Associates, Solicitors.	Lynwood House, Ballinteer Road, Dublin 16.
Monique Walsh	"Shop 4", 22 Castlecourt, Killiney Hill Road, Killiney, Co. Dublin.
Muintir na Tire, (Cork County Federation).	8 Sydney Place, Wellington Road, Cork City.
Paul Russell	Drogheda, Co. Louth.
Udaras na Gaeltachta	Na Forbacha, Co. na Gaillimhe.