COMPANY LAW REVIEW GROUP
an grúpa athbhreithnithe dlí cuideachtaí

COMPANY LAW REVIEW GROUP

ANNUAL REPORT 2021

Contents

Annexes

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

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

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

31 March 2022

Dear Tánaiste,

Dear Minister,

It is my pleasure to present the Company Law Review Group's Annual Report for 2021.

The Report outlines the progress during 2021 on the work programme of the CLRG for 2020-2022, set out at section 3.2 on page 13.

Activity during 2021

As well as delivering its Annual Report for 2020 in March 2021, which included its examination of the summary approval procedure, (which later became the Small Company Administration Rescue Process) the Review Group delivered three special reports and one formal submission during the year. It also commenced a consideration of important aspects of corporate governance law and an examination of self-administered company liquidations, each of which is planned to be the subject of a report in the course of 2022.

Review of existing legislative provisions regarding the provision of information to creditors generally and in particular to employees (Annex 1)

In March 2021, the Review Group submitted its 'Report in relation to the review of existing legislative provisions regarding the provision of information to creditors generally and in particular to employees.' This Report informed amendments made to the Companies Act 2014 to enhance the rights of creditors in a liquidation and which were included in the Companies (Rescue Process for Small and Micro Companies) Act 2021 (which was primarily concerned with enacting recommendations of the Review Group in its report of 22 October 2020 on a legal structure for the rescue of small companies). This Report also fed into the development of the Department's 'Plan of Action - Collective Redundancies following Insolvency'[§] which was launched in May 2021.

[§] https://www.gov.ie/en/publication/dd25a-plan-of-action-collective-redundancies-following-insolvency/

This Report dealt with Strand 1 of Item 1 of the Work Programme, on whether the provisions of the Companies Act surrounding collective redundancies and the liquidation of companies effectively protect the rights of workers. The Review Group identified and proposed a number of practical improvements to the Companies Act liquidation process with a view to improving the quality and circulation of information to employees and other creditors and will go to a material extent in protecting their rights. It was not possible to arrive at a full consensus on all points in the Report, in light of dissent to varying degrees on certain of the recommendations made in the Report on the part of the ICTU nominee to the Group.

Review of company law issues arising under Directive (EU) 2017/828 of May 2017 (SRD II), Central Securities Depositories Regulation (EU) 909/2014 (CSDR) and the Companies Act 2014 (Annex 2)

In December 2021, the CLRG submitted its 'Report on Company law issues arising under Directive (EU) 2017/828 of May 2017 (SRD II), Central Securities Depositories Regulation (EU) 909/2014 (CSDR) and the Companies Act 2014'. The CLRG is mandated as part of its work programme, to examine and make recommendations on whether it is necessary or desirable to amend company law in line with recent case law and submissions received regarding the Companies Act 2014. This report recommends a number of discrete amendments to the Companies Act to facilitate and assist the implementation of CSDR for Irish companies. Central Securities Depositories (CSDs) are the systems through which trades in securities are held and settled. It also addresses certain issues arising under Shareholders Rights Directive II (transposed into Irish law in 2020) which aims to enhance the rights of shareholders.

It is noted that responsibility for the matters set out in this Report falls under the remit of the Minister for Finance, and particular policy decisions by the Minister for Finance will require to be made before consequential company law amendments arise. That said, I would highlight one particular recommendation of this report, which has the unanimous approval of representatives of those involved in the equity securities markets, who assisted the Review Group in its consideration of the issues. That is that 1 January 2023 be designated as the effective date for the full operation of Article 3 of CSDR, so as to give effect to dematerialisation of equity securities on trading venues on that date, rather than having a situation where there would be two parallel systems of holding shares dealt on the markets.

Review of the consequences of certain Corporate Liquidations and Restructuring Practices, including splitting of Corporate Operations from Asset Holding Entities in Group Structures (Annex 3)

In December 2021, the CLRG submitted its 'Report on the consequences of certain liquidations and restructuring practices, including splitting of corporate operations from asset-holding entities in group structures.' This Report contains a number of recommendations dealing with transactional avoidance provisions which may be of relevance to employees as corporate stakeholders. This and related issues proved to be complex, requiring extensive discussion and analysis, reflected by the 12 meetings of the Review Group's Corporate Insolvency Committee which considered the issues. It was not possible for there to be unanimity on all issues and accordingly, the Report noted where there was a majority view only.

The general view of members of the Committee was that the incidence of abusive practices, although attracting headlines and a great deal of concern, is low. Overall, the view of the State agency and practitioner representatives on the group was that the abusive examples which informed the work programme item is reflective of only a small number of insolvencies. The Report sought to address in

detail transactional avoidance provisions, often described as 'asset swelling measures' and why in practice, they are rarely used.

Other work of the Review Group

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

Submission from Standing Committee to the Department of Justice's Judicial Planning Working Group (Annex 4)

In July 2021, the Review Group's Standing Committee made a detailed submission to the Department of Justice's Judicial Planning Working Group on the number and type of judges required to ensure the efficient administration of justice.

Covid-19 Pandemic

This is the Review Group's third Annual Report delivered under the cloud of the Covid-19 pandemic. In our March 2020 Annual Report for 2019, we recorded the preliminary work by the Review Group in devising practical solutions to company law issues brought into focus by the pandemic, notably those relating to company meetings generally and in insolvencies. The June 2020 'Report on measures to address company law issues arising by reason of the Covid-19 pandemic' (included in the March 2021 Annual Report for 2020) recommended a suite a company law changes which were brought into the law by the Companies (Miscellaneous Provisions) (Covid-19) Act 2020. Those changes, brought in originally on a temporary basis have proven themselves to be of considerable benefit and convenience to companies large and small, and whether for profit or not-for-profit. The measure easing some of the legal requirements in respect of convening and conducting company general meetings are due to expire on 30 April 2022 and, notwithstanding the apparent improvement in the public health situation, I would urge that consideration be given to extending them further, pending a final consideration as to their incorporation into permanent company law.

Acknowledgements

I would like to record and acknowledge the dedicated and tireless work of the members of the Review Group and of its Committees, to whom I express my sincere thanks. I would like to highlight in particular the work of Corporate Insolvency Committee Chairperson Professor Irene Lynch Fannon and Corporate Governance Committee Chairperson Salvador Nash. I would also like to thank the Department of Enterprise, Trade and Employment for their support and the legal researchers who assisted on the various Reports, namely, David Allen B.L, Matthew Brady B.L and Liam O'Flaherty B.L. I would also like to thank CLRG Secretary Stephen Walsh and Bernard O'Connor from the CLRG Secretariat, in particular for their ongoing support and assistance.

Yours sincerely,

Paul Egan SC
Chairperson
Company Law Review Group

1. Introduction to the Annual Report 2021

1.1 The Company Law Review Group

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

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

1.2 The Role of the CLRG

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

1.3 Policy Development

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

1.4 Contact information

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

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

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

Email: clrg@enterprise.gov.ie

2. The Company Law Review Group Membership

2.1 Membership of the Company Law Review Group

The membership of the Company Law Review Group on 31 December 2021 is set out in this table.

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

Ciara O'Leary	Irish Funds Industry Association CLG (Dechert LLP)
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace LLP)
Maureen O'Sullivan	Ministerial Nominee (Registrar of Companies)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Maura Quinn	The Institute of Directors in Ireland
Eadaoin Rock	Central Bank of Ireland
Doug Smith	Restructuring and Insolvency Ireland (Addleshaw Goddard (Ireland LLP)
Tracey Sullivan	Consultative Committee of Accountancy Bodies-Ireland (CCAB-I) (Grant Thornton Ireland)

The members below also served during 2021.

David Hegarty	Office of the Director of Corporate Enforcement (alternate for Ian Drennan)
Therese Moore	Euronext Dublin (alternate for Gillian Leeson)
Conor O'Mahony	Office of the Director of Corporate Enforcement (alternate for Ian Drennan)
Grace O'Mahony	Central Bank of Ireland (alternate for Eadaoin Rock)

2.2 Committees of the Company Law Review Group

The membership of the Review Group's Committees on 31 December 2021 is set out in the following tables.

(a) Standing Committee

Paul Egan SC	Chairperson
Barry Conway	CLRG member
Richard Curran	CLRG member
Máire Cunningham	CLRG member
Marie Daly	CLRG member
Rosemary Hickey	CLRG member

Tanya Holly	CLRG member
Dr David McFadden	CLRG member
Vincent Madigan	CLRG member
Kathryn Maybury	CLRG member

(b) Corporate Enforcement Committee

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

(c) Corporate Insolvency Committee

Prof. Irene Lynch Fannon	Chairperson
Marie Daly	CLRG member
Michael Halpenny	CLRG member
David Hegarty	Office of the Director of Corporate Enforcement
Rosemary Hickey	CLRG member
Tanya Holly	CLRG member
Tara Keane	Department of Enterprise, Trade and Employment
Neil McDonnell	CLRG member

Vincent Madigan	CLRG member
Conor O'Mahony	Office of the Director of Corporate Enforcement
Paddy Purtill	Revenue Commissioners
Doug Smith	CLRG member
Tracey Sullivan	CLRG member

(d) Corporate Governance Committee

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

(e) Public Company Committee

Paul Egan SC	Chairperson
Andy Callow	Computershare LTD
Barry Conway	CLRG Member
Neil Colgan	CRH PLC
Marie Daly	CLRG Member
James Finn	CLRG Member

David Hegarty	Office of the Director of Corporate Enforcement
Tanya Holly	CLRG member
Alan Kelly	Revenue Commissioners
Gillian Leeson	CLRG Member
Vincent Madigan	CLRG Member
Suzanne McMenamin	Matheson; Alternate of Emma Doherty
Dara McNulty	Central Bank of Ireland
Joe Molony	Computershare LTD
Therese Moore	Euronext Dublin; Alternate of Gillian Leeson
Aidan O'Carroll	J&E Davy
Pat O'Donoghue	Link Registrars LTD
Conor O'Mahony	Office of the Director of Corporate Enforcement
Fiachra Quinlan	Department of Enterprise, Trade and Employment
Maura Quinn	CLRG Member
Niels Watzeels	Euroclear Bank SA/NV

3. The Work Programme

3.1 Introduction to the Work Programme

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

3.2 Company Law Review Group Work Programme 2020-2022

The Company Law Review Group embarked on the following two-year work programme from June 2020.

This work programme includes:

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

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

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

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

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

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

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

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

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

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

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

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

4. Review Group and Committee Activity 2021

4.1 Plenary Meetings of the Company Law Review Group

The CLRG meets in plenary session to discuss the progression of the work programme and to formally adopt its recommendations and publications. Three CLRG Plenary Meetings were held in 2021 on 3 March, 29 June and 15 December.

During the year, the Review Group delivered its Annual Report for 2020, the three Reports set out in Annexes 1 to 3 and the Submission in Annex 4.

4.2 Committees of the Company Law Review Group

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

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

4.3 Standing Committee

The Standing Committee is primarily convened to provide responses to proposed legislative amendments within short time frames. The Committee is chaired by CLRG Chairperson Paul Egan SC and met on one occasion in 2021.

In July 2021 the Review Group's Standing Committee made a submission to the Department of Justice's Judicial Planning Working Group on the number and type of judges required to ensure the efficient administration of justice.

The recommendations in the submission were approved and adopted as recommendations of the Review Group and communicated to the Department of Justice. The submission is set out in Annex 4 to this Report.

4.4 Corporate Insolvency Committee

The Tánaiste wrote to the Chair of the CLRG on 30 July 2020, requesting that Item 1 be considered a priority issue. The Committee divided Item 1 into three different work streams.

In his letter to the Tánaiste in late December 2020, the CLRG Chairperson outlined the CLRG's planned approach to this Work Programme Item. The Committee elected to divide the work into three separate workstreams:

- The first workstream involved a review of existing legislative provisions regarding the provision of information to creditors generally and to employees specifically. The specific question was whether these provisions provide sufficient protection to employees and creditors or whether some of the reforms which have either been suggested earlier by the CLRG in its 2017 Report ought to be implemented and/or whether there are additional measures which ought to be put in place;

- The CLRG Report on Existing Legislative Provisions Regarding the Provision of information to Creditors Generally and in Particular to Employees (March 2021) addressed this issue;

- The second workstream involves a consideration of employees as corporate stakeholders. In particular, the CLRG were specifically asked to consider a concern regarding alleged restructuring and splitting of corporate operations entities within a group from asset holding entities with this occurring in a minority of cases;

- The third workstream addressed:

    - the legal provisions that pertain to any sale to a connected party following insolvency of a company including who can object and allowable grounds of an objection;

    - transactions around insolvency which remove assets from the reach of creditors, including employees, and in particular involve the transfer of assets to connected parties;

Many of the provisions mentioned as being relevant to workstream 2 are also relevant to workstream 3 in that these can be broadly categorised as transactional avoidance provisions, sometimes referred to as 'asset swelling provisions'. The December 2021 'Report on the Consequences of certain corporate liquidations and restructuring practices, including the splitting of corporate operations from asset holding entities in group structures' presents a combined review of the provisions in workstreams 2 and 3.

4.5 Corporate Governance Committee

The Corporate Governance Committee examines certain aspects of the law related to the governance of companies and is chaired by Mr. Salvador Nash. It held 3 meetings during 2021.

The Committee is preparing a detailed Report on certain reform proposals in Corporate Governance Law, and it hopes to submit it to the Tánaiste and Minister of State ahead of publication in early 2022.

4.6 Public Company Committee

The Public Company Committee is concerned with the law applicable to companies to which Part 23 of the Companies Act applies (primarily public limited companies with listed or traded securities). The Committee is chaired by CLRG Chairperson Paul Egan SC, and it held four meetings in 2021.

The Committee prepared the Report on Company Law Issues Arising under Directive (EU) 2017/828 of 17 May 2017 (SRD II) Central Securities Depositories Regulation (EU) 909/2014 (CSDR) and the Companies Act 2014 (Annex 2).

This report examined certain company law issues arising for public companies further to the transposition of Directive (EU) 2017/828 of 17 May 2017 amending the Shareholders Rights Directive (**SRD II**) and the implementation Central Securities Depositories Regulation (EU) 909/2014 (**CSDR**). In addition, certain issues affecting public companies under the Companies Act were considered in this report.

4.7 Corporate Enforcement Committee

The Corporate Governance Committee did not meet during the year, in light of the extensive activity on company law enforcement matters in the Oireachtas and generally.

At each plenary meeting of the Review Group, the Review Group was appraised of that activity, which culminated in the enactment in December 2021 of the Companies (Corporate Enforcement Authority) Act 2021.

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ANNEXES

REPORT OF THE
COMPANY LAW REVIEW GROUP

REVIEW OF EXISTING LEGISLATIVE PROVISIONS REGARDING THE PROVISION OF INFORMATION TO CREDITORS GENERALLY AND IN PARTICULAR TO EMPLOYEES

5 MARCH 2021

Contents

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

Mr Leo Varadkar

Tánaiste and Minister for Enterprise, Trade and Employment

23 Kildare Street

Dublin 2 D02 TD30

5 March 2021

Dear Tánaiste,

I have pleasure in submitting the Company Law Review Group's report on strand 1 of Item 1 of its Work Programme for 2020-2022, on whether the provisions of the Companies Act surrounding collective redundancies and the liquidation of companies effectively protect the rights of workers. The answer to this question is necessarily nuanced given that the Companies Act sits side-by-side with other bodies of law and tangible State supports that contribute to the protection of workers' rights.

The Review Group has identified and now proposes a number of practical improvements to the Companies Act liquidation process which we believe by improving the quality and circulation of information to employees and other creditors, will go to a material extent in protecting their rights.

The Review Group has, since its establishment, sought to arrive at a consensus in its reports. In this case, it has not been possible to arrive at a full consensus on all points, as the ICTU nominee to the Group dissents to varying degrees with the recommendations made, as set out in the minority report set out in Appendix 5.

I would like to acknowledge and thank the members of the CLRG's Corporate Insolvency Committee and in particular Professor Irene Lynch Fannon, Chair of the Committee. Members delivered in-depth submissions and attended 6 comprehensive meetings between October 2020 and February 2021, leading to the Committee's recommendations, which in turn have been adopted and approved by the Review Group.

I would also like to thank the Department of Enterprise Trade and Employment for their support, in particular, the new Secretary to the Group, Mr Stephen Walsh and his predecessor Ms. Tara Keane.

The Review Group will report on the second and third elements of Work Programme item 1 in the coming months.

Yours sincerely,

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Paul Egan SC

Chairperson

Company Law Review Group

1. Introduction

1.1 The Company Law Review Group

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

The CLRG consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and trade unions), regulators (implementation and enforcement bodies) and representatives from government departments including the Department of Enterprise, Trade and Employment ("the Department") and Revenue. The CLRG meets in plenary session to discuss the progression of the work programme and to formally adopt its recommendations and publications. The work of the CLRG is largely progressed by the work of its Committees. The Committees consider not only items determined by the work programme, but issues arising from the administration of the Companies Act 2014 and matters arising such as court judgements in relation to company law and developments at E.U. level. This Report is the product of work by the Corporate Insolvency Committee, chaired by Professor Irene Lynch Fannon. The Secretariat to the CLRG is provided by the Company Law Development Unit of the Department of Enterprise, Trade and Employment.

1.2 The Role of the CLRG

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

1.3 Policy Development

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

1.4 Contact information

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

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

Stephen Walsh
Secretary to the Company Law Review Group
Department of Enterprise, Trade and Employment
Earlsfort Centre
Lower Hatch Street
Dublin 2 D02 PW01 Email: stephen.walsh@enterprise.gov.ie

2. The Company Law Review Group Membership

2.1 Membership of the Company Law Review Group

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

Paul Egan SC	Chairperson (Mason Hayes & Curran LLP)
Alan Carey	The Revenue Commissioners
Barry Conway	Ministerial Nominee (William Fry)
Bernice Evoy	Banking and Payments Federation Ireland CLG
Ciara O'Leary	Irish Funds Industry Association CLG (Maples and Calder LLP)
Dr. David McFadden	Ministerial Nominee (Companies Registration Office)
Doug Smith	Irish Society of Insolvency Practitioners (Eugene F Collins)
Eadaoin Rock	Central Bank of Ireland
Emma Doherty	Ministerial Nominee (Matheson)
Fiona O'Dea	Ministerial Nominee (DETE)
Gillian Leeson	Euronext Dublin (The Irish Stock Exchange PLC)
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace LLP)
Ian Drennan	Director of Corporate Enforcement
Prof. Irene Lynch Fannon	Ministerial Nominee (School of Law, University College Cork)
James Finn	The Courts Service
John Loughlin	Consultative Committee of Accountancy Bodies – Ireland (CCAB-I) (PricewaterhouseCoopers)
Kathryn Maybury	Small Firms Association Ltd (KomSec Limited)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Máire Cunningham	Law Society of Ireland (Beauchamps)
Marie Daly	Irish Business and Employers' Confederation (IBEC)

Maura Quinn	The Institute of Directors in Ireland
Maureen O'Sullivan	Ministerial Nominee (Registrar of Companies)
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Neil McDonnell	Irish Small and Medium Enterprises Association CLG (ISME)
Richard Curran	Ministerial Nominee (LK Shields LLP)
Rosemary Hickey	Office of the Attorney General
Salvador Nash	The Chartered Governance Institute (KPMG)
Shelley Horan	Bar Council of Ireland
Tanya Holly	Ministerial Nominee (DETE)
Vincent Madigan	Ministerial Nominee

3. The Work Programme

3.1 Introduction to the Work Programme

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, in consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items of work to the programme as matters arise. The most recent work programme began in June 2020 and runs until May 2022. The work programme is focused on continuing to refine and modernise Irish company law, with a strong emphasis on the area of insolvency and Brexit-related matters.

3.2 Company Law Review Group Work Programme 2020-2022

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

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

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

This Report is concerned with item 1.1 of the Work Programme.

3.3 Decision-making process of the Company Law Review Group

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

3.4 Committees of the Company Law Review Group

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

4. Background to the Report

4.1 Definitions

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

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

"**CLRG 2017 Report**" means the Report of the Company Law Review Group on the protection of employees and unsecured creditors, whose recommendations are summarised in section 4.3 of this Report: [1]

"**Committee**" means the Corporate Insolvency Committee of the Company Law Review Group;

"**Court liquidation**" means a winding up which is commenced by order of the High Court;

"**CRO**" means the Companies Registration Office;

"**CVL**" or **"creditors' voluntary liquidation**" means a winding up initiated by the directors of a company convening meetings of members and creditors;

"**Department**" means the Department of Enterprise Trade and Employment;

"**Duffy Cahill Report**" means the Expert Examination and Review of Laws on the Protection of Employee Interests when assets are separated from the operating entity of 26th April 2016;[2]

"**EU Insolvency Regulation**" means Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (EIR recast);[3]

"**ICTU**" means the Irish Congress of Trade Unions;

"**liquidation**" **or** "**winding up**" means the process whereby the end is put to the carrying on of the business of a company or other entity, regulated for companies by Part 11 of the 2014 Act;

"**members' voluntary liquidation "** means a liquidation or winding up initiated by the directors of a company in anticipation of all the company's creditors being paid in full within one year;

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

"**provisional liquidator**" means a person appointed as a liquidator to a company by a court before any winding up order is made, usually when the company's assets are in danger.

[1] http://www.clrg.org/publications/clrg%20adhoc%20committee%20report.pdf

[2] https://enterprise.gov.ie/en/Publications/Publication-files/Duffy-Cahill-Report.pdf

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

4.2 Policy Context

Item 1 on the Company Law Review Group's (CLRG) Work Programme 2020-2022 described on page 8 of this Report, arises from commitments contained in the Programme for Government, '*Our Shared Future',*[4] in relation to workers' rights when a company goes into liquidation.

The Tánaiste wrote to the Chair of the CLRG on 30 July 2020, requesting that Item 1 be considered a priority issue:

> '*The first item on the Work Programme deals with commitments from the Programme for Government. Issues surrounding workers' rights when a company goes into liquidation have come to the fore in light of COVID-19, in particular the alleged practice of a minority of trading entities splitting their operations between trading and property with the result being the trading business (including jobs) go into insolvency and assets are taken out of the original business. I ask that the CLRG report to me on this matter by 31st December 2020. It is time that these issues not only be reviewed but also dealt with. Government will be ready to act on the findings and propose legislation where this can achieve results.'*

Item 1 on the Company Law Review Group's Work Programme 2020-2022 raises three distinct questions surrounding:

- first, the legal provisions which serve to protect workers as creditors in corporate liquidations;
- secondly the practice of restructuring corporate entities into trading operations and property holding companies which result in the removal of assets from the trading entity; and
- thirdly, the examination of legal provisions regarding sales to connected parties on insolvency.

4.3 CLRG Report on the Protection of Employees and Unsecured Creditors 2017

Some of these issues were considered by the CLRG in its Report on *The Protection of Employees and Unsecured Creditors 2017,* which entailed a root and branch review of all the provisions of the Companies Act 2014 relevant to the treatment of employees and unsecured creditors in an insolvency. The Review Group considered whether new provisions should be enacted in order to address the issues that were of concern at that time. Some of these issues continue to be relevant to the subject matter of this Report.

The proposals in the CLRG 2017 Report included the following:

- a requirement where it is the intention of a provisional liquidator to cease trading and/or terminate employees' contracts of employment, that the provisional liquidator must seek a specific power to do so from the High Court;[5]

[4] Programme for Government: Our Shared Future (www.gov.ie), 29 October 2020.

[5] CLRG 2017 Report, pp 56-58.

- a legislative change to allow for access to the Social Insurance Fund for employees whose employer has not entered into formal insolvency;[6]

- the imposition of a statutory obligation on company directors to consider the interests of creditors where it appears that a company is, or is likely to be, unable to pay its debts as they fall due;[7]

- the addition to the questionnaire used to compile the section 682 liquidator's report of a question as to the consideration given by the directors of the company to the interests of the company's employees in the period immediately prior to liquidation. [8]

4.4 Duffy Cahill Report

Some of these issues relevant to the position of employees in corporate insolvencies were considered by the Duffy Cahill Report.[9] Its terms of reference recognised what it described as the "the complex interface between company law and employment rights law", noting that the two codes have been devised for very different purposes.[10] Its terms of reference also included a request that consideration be given to changes at this interface between these two codes of law. The Irish Congress of Trade Unions (ICTU) has highlighted that the Duffy Cahill Report's recommendations remain outstanding.

It was confirmed that responsibility for employment rights, redundancy and insolvency recently transferred to the Department from the Department of Social Protection and the recommendations made in the Duffy Cahill Report are currently being revisited.

4.5 Economic Impact of Covid-19

The Review Group is particularly aware that, in addition to the concerns which gave rise to the 2017 CLRG Report, the consequences of the COVID-19 pandemic have revived and added to those concerns. There is a general anticipation of an increase in corporate insolvency figures, particularly in the retail sector. Given this predicted scenario the issue of creditors' rights and protections have come to the fore. Deloitte has identified 2021 as being a challenging year for insolvencies, given the introduction of a further higher level lockdown, which will have an impact on company survival

[6] CLRG 2017 Report, pp 90-92. This will be considered in the second workstream report, as described below. This is also the subject matter of a decision of the Court of Appeal and the Supreme Court where the latter held that Ireland had failed to properly implement the relevant Directive because the applicant could not be paid out of the Employers Insolvency Fund where her employer had not gone into a formal liquidation process. *Glegola v Minister for Social Protection and Ors.* [2018] IESC 65

[7] CLRG 2017 Report, pp 33-39. This involves the codification of existing principles as enunciated by the Supreme Court in *Re Frederick Inns Ltd.* 1994 ILRM 387 and reiterated by a judgement of Clarke J. (as he then was) in *Re Swanpool Ltd. McLoughlin v Lennon & anor*. [2005] IEHC 341

[8] CLRG 2017 Report, p 65.

[9] *Supra* n. 2 https://enterprise.gov.ie/en/Publications/Duffy-Cahill-Report.html

[10] https://enterprise.gov.ie/en/Consultations/Consultations-files/Appendix-1-Terms-of-Reference-for-Expert-Examination.pdf This was recently discussed by the Joint Committee on Enterprise, Trade and Employment on 4 November 2020 https://www.oireachtas.ie/en/debates/debate/joint_committee_on_enterprise_trade_and_employment/2020

rates.[11] While current figures[12] do not show a marked increase in insolvencies, this is likely due to the continued availability of government supports to enterprises, together with banking, trade credit and landlord supports being provided to affected companies.

Notwithstanding such supports it is expected that the continued COVID-19 restrictions during 2021 will result in an increase in the number of businesses going into insolvency processes. If the Government seeks to unwind the level of business supports as the effects of the pandemic subside levels of insolvencies are expected to increase. Some commentators have suggested that this is likely to happen from Q2 onwards in 2021[13].

The economic impact of COVID-19 makes the subject matter of this report a priority. The Central Bank[14] has acknowledged the impact that the significant levels of Government supports have had on the enterprise sector and the broader economy. In reviewing the impact of COVID-19 on SMEs the Central Bank notes that SMEs are likely to be facing considerable financial strain during this time compared with larger corporations and households. The uneven nature of the impact of COVID-19 on different sectors of the economy is already apparent and it is expected that whilst insolvency is likely to occur across various sectors of the economy, a particular impact will be seen in the hospitality (bars, restaurants, hotels) and the retail sectors.[15]

4.6 The Review Group's Approach Work Programme Item 1

In his letter to the Tánaiste in late December, 2020, the CLRG Chairperson outlined the CLRG's planned approach to this Work Programme Item. The Committee has divided the work into three separate workstreams:-

- The first is a review of existing legislative provisions regarding the provision of information to creditors generally and to employees specifically. The specific question is whether these provisions provide sufficient protection to employees and creditors or whether some of the reforms which have either been suggested earlier by the CLRG in its 2017 Report ought to be implemented and/ or whether there are additional measures which ought to be put in place.

  This Report addresses this issue.

- The second workstream involves a consideration of employees as corporate stakeholders, in particular in the context of alleged restructuring and splitting of corporate operations from asset holding entities in a minority of cases. This is a broader matter reflecting complex

[11] Marginal increase for corporate insolvencies in 2020 despite economic challenges - Deloitte Ireland.

[12] Deloitte's insolvency statistics show a marginal increase in corporate insolvencies in Ireland in 2020 (575) compared with 2019 (568), an increase of 1%. Some of the reasons they put forward for this include the broad range of enterprise supports currently provided by the Government to companies throughout the COVID 19 crisis, together with banking, trade credit and landlord supports being provided to affected companies. The continued support being provided by the ODCE to companies entering insolvency during this period is also a factor in terms of having due regard to the impact of the pandemic as it carries out its functions of examining and adjudicating upon liquidators reports

[13] Wave of insolvencies now looms large for bars and restaurants - Independent.ie

[14] https://www.centralbank.ie/news/article/press-release-impact-of-covid-19-on-irish-enterprises-sudden-large-and-uneven-01-october-2020

[15] See Deloitte supra n 12.

policy issues. The Review Group's Corporate Insolvency Committee is setting about refining the issues which can be addressed by the CLRG, conscious that its remit concerns company law only. It is anticipated that this part of the Review Group's work will focus on corporate restructurings and will necessarily revisit some recommendations made by the CLRG in its 2017 Report. These include:

- Section 599 of the 2014 Act, under which a related company may be required to contribute to debts of a company being wound up;

- Section 600 of the 2014 Act, under which the assets of related companies in liquidation may be pooled; and

- a possible addition to the 2014 Act following the structure of section 224 (under which directors must have regard to the interests of employees) in order to impose on directors of companies a statutory obligation to consider the interests of creditors where it appears that a company is, or is likely to be, unable to pay its debts as they fall due. This proposal is reflective of statements in case law and has been the subject matter of a CLRG recommendation in 2017.[16]

- Additional provisions which are potentially relevant to both this and the following workstream include sections 602, 603 604, 605, 608, 609, 610, 612 & 613 of the Companies Act 2014. These provisions can be generally described as provisions which have the effect of ensuring assets are not removed from the reach of creditors.

- The third workstream will address:

  - the legal provisions that pertain to any sale to a connected party following insolvency of a company including who can object and allowable grounds of an objection;

  - transactions around insolvency which remove assets from the reach of creditors and, in particular involve the transfer of assets to connected parties.

Many of the provisions mentioned as being relevant to workstream 2 are also relevant to workstream 3.

[16] See references at n. 8 *supra.* It is noted that Head 9 of the General Scheme of what became the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 originally contained this measure as a proposed section 224 A of the 2014 Act, but it was not included in the Bill as enacted:

(1) The directors of a company who believe, or who have reasonable cause to believe, that a company is unable or likely to be unable to pay its debts as they fall due, shall–

(a) have regard to the interests of the company's creditors; and (b) preserve the company's property.

(2) The duty in subsection (1) shall be owed to the company (and the company alone) and shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors.

(3) Where a director of a company acts in breach of his or her duty under subsection (1) and the company goes into insolvent liquidation then the director shall be liable to indemnify the company for any loss or damage resulting from that breach.

(4) For the purposes of subsection (3), a company shall be taken to have suffered loss or damage where, upon its insolvent liquidation, its creditors do not recover the sums which they would have received had there been no breach of the duty in subsection (1).

Although many of these legal issues are at the interface with employment rights law described in the Duffy Cahill Report terms of reference, the Review Group has been mindful of its own statutory mandate, which is concerned with company law and primarily the Companies Acts. This is consistent with the approach taken for the CLRG 2017 Report, where the Duffy Cahill Report addressed wider issues beyond the Companies Act.

Following on from this work the CLRG proposes to revisit the recommendations of the CLRG 2017 Report in the context of Item 8 on the work programme, namely to review the 2017 recommendation in relation to "self-administered liquidation" and to make further recommendation as to how this might be implemented. This is with a view to devising a “scheme to help directors of insolvent companies who want to wind up their company but cannot afford to pay a liquidator to do so.” The self-administered liquidation would be formulated with a view to facilitating small companies with relatively minor amounts of debt.[17]

[17] CLRG 2017 Report pp 66-67.

5.1 Review of Legislative Provisions

5.1.1 The general legislative framework within which Liquidators operate.

Before looking at areas which have been the subject matter of specific submissions indicating a need for reform, this section highlights existing provisions that are relevant to the conduct of liquidations generally and to the provision of information by liquidators to creditors including employees; and consequently, to the protection of creditors including employees, and provides a useful explanatory context to the Committee's subsequent deliberations.[18] This list is not exhaustive.

A list of provisions relevant to the provision of information by liquidators to creditors generally is provided at Appendix 2.

5.1.2 Commencement of Liquidations.

Section 584 Duty of liquidator to call creditors' meeting if of opinion that company unable to pay its debts

There will be circumstances where a liquidation is commenced by a company as a members' voluntary liquidation where it is thought that the company is solvent. However, where a liquidator in a members' voluntary winding up forms the opinion that the company will not be in a position to discharge its debts within the period stated in the declaration concerned referred to in section 207 or section 580(2) then, under section 584 s/he must summon a meeting of creditors no later than 14 days after forming that opinion. The liquidator must send notices for the meeting 10 days in advance and publish the notice of the meeting in Iris Oifigiúil. During the period before the meeting the liquidator must provide creditors with any information requested by creditors on the affairs of the company, free of charge. From the date on which the creditors' meeting is held under this section, the winding up becomes a creditors' voluntary winding up and any appointment made, or committee established by the creditors' meeting is deemed to have been made or established by that meeting.

At the meeting the liquidator must make out a statement as to the affairs of the company, including a statement on the company's assets and liabilities, outstanding creditors and their claims.

Section 587 Meeting of creditors

In other situations, the liquidation will commence voluntarily but as a creditors' voluntary winding up where the company is already insolvent. This section obliges the company to call a meeting of its creditors at which a resolution for a creditors' voluntary winding up is to be proposed. The company is required to give creditors 10 days' notice in writing of the details of the meeting and attach a list of creditors of the company. Under this section the directors of the company are required to provide a full statement of the position of the company's affairs, together with a list of the creditors of the company and the estimated amount of their claims, which is required to be laid before the creditors meeting.

[18] The Committee also notes that the issue of information provision to creditors on receiverships is considered it its Report on the Regulation of Receivers, 2019.

Section 593 Statement of company's affairs

Generally, where the court has made a winding-up order or appointed a provisional liquidator in relation to a company, a statement on the company's affairs (assets, debts, liabilities and other information) must be made out and filed in court.

This statement must be filed and verified by the director or other person as the court may require within 21 days of appointment of a provisional liquidator, or from the date of a winding up order.

The Review Group notes that it has also addressed the matter of a Statement of Affairs in its *Report Advising on a Legal Structure for the Rescue of Small Companies* (October 2020).[19] In that Report, the CLRG has recommended that additional obligations should be imposed on directors regarding the veracity of this information.[20]

The content of the Statement of Affairs in both court liquidations and creditors' voluntary liquidations is further considered under Section 6 of this Report.

5.1.3 Role of Liquidator during Conduct of Liquidations and Oversight thereof

Section 629 Notice to be given with respect to exercise of powers, restrictions on self-dealing, etc.

This section places an obligation on the liquidator to give notice to a Committee of Inspection or Creditors where certain powers are exercised or where it is intended to dispose of assets to a connected party. The role of Committees of Inspection is considered in more detail in Section 5.2 of this Report.

Section 646 Liquidator's remuneration- procedure for fixing liquidator's entitlement thereto

This section sets out the procedure for fixing a liquidator's entitlement to remuneration. Subsection (2) states that the terms on which a liquidator has an entitlement to remuneration are set by the creditors or the committee of inspection (for court ordered windings-up or creditors' voluntary windings-up) or by members (for members voluntary windings-up). There is a residual power for the court to set remuneration or appoint a person to fix the amount of remuneration if it is not so set. Subsection (4) provides that liquidators must seek to have their entitlement to remuneration set as soon as possible after being appointed. Subsection (5) deals with the terms upon which a liquidator's entitlement to remuneration may be raised and subsection (6) provides that no variation may reduce the entitlement of the liquidator to remuneration for work that may have already been performed, without the liquidator's consent.

[19] http://www.clrg.org/clrg/publications/the-company-law-review-group-s-special-report-on-the-rescue-of-small-business.pdf

[20] See Para 4.5.9 on p. 21 in the context of the proposed summary rescue process that the 'Process Adviser-designate' …."be furnished with a full statement of affairs of the company, prepared under a duty of utmost good faith and sworn by affidavit, by the directors of the company. Considerable emphasis on the duty of utmost good faith being imposed on directors in this context is stressed by the Review Group."

Section 651 Penalty for default of liquidator in making certain accounts and returns

This section provides that where a liquidator is in default in relation to the making or filing of a periodic account, abstract, statement or return in pursuance of any provision of this Act he or she is guilty of a category 4 offence.[21]

Section 652 Enforcement of duty of liquidator to make returns

A court may make an order directing the liquidator to make good any default in relation to filing, delivering, making or giving any notice which a liquidator is required to give within a timeframe as specified by the order.

Any contributory or creditor of the company, the Director of Corporate Enforcement or the Registrar of Companies may make such an application to the court.

Section 653 Director's power to examine books and records

This provision allows the Director of Corporate Enforcement ("**the Director**") to request an appropriate person to produce the books and records for examination on the basis of a complaint by a member, contributory or creditor of the company or on the Director's own motion. It also provides for a category 2 offence[22] where an appropriate person fails to comply with a request from the Director, fails to answer the Director's questions or fails to give the Director assistance or access to facilities. This section was considered by the Review Group in 2017 and was deemed fit for purpose.[23]

Sections 666 to 668 Appointment of committee of inspection in court ordered winding up and creditors' voluntary winding up and the constitution and proceedings of committee of inspection.

These provisions provide for the appointment of a Committee of Inspection in cases of winding up, creditors' voluntary winding up and the constitution of the Committee of Inspection.

Section 666 provides for the Committee of Inspection in a court ordered winding up to be established on the initiative of the liquidator or a minimum proportion in value of the creditors without requiring court sanction.

Section 667 empowers creditors, without recourse to the court, to appoint a Committee of Inspection in the case of a creditors' voluntary winding up.

Section 668 contains provisions relating to the composition and proceedings of Committees of Inspection.

These provisions are considered further in Section 5.2 below.

[21] A person guilty of an offence under the Companies Act that is stated to be a Category 4 offence shall be liable, on summary conviction, to a class A fine, currently a maximum of €5,000.

[22] A person guilty of an offence under the Act that is stated to be a Category 2 offence shall be liable: (a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or (b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

[23] CLRG 2017 Report pp 77-79.

Section 680 Duty of liquidator to call meeting at end of each year

There is an obligation on the liquidator to convene an annual meeting of the company (in the case of a members voluntary winding up) or, (in the case of a court ordered winding up or creditors' voluntary winding up) of the Committee of Inspection or, if there is no Committee, a creditor's meeting and lay before that meeting an account of his/her acts and dealings and of the conduct of the winding up during the preceding year. There is also a requirement to make a return to the Registrar of Companies. Following discussion, views were expressed by a number of members that the information required from a liquidator could be refined leading to a suggestion for improvements in CRO form E3, which is the form providing a template for this reporting obligation. This reporting obligation is related to the reporting obligation described in the following paragraph and both the statutory provisions and the accompanying forms are discussed in more detail in Section 6 of this Report.

Section 681 Information about progress of liquidation

This section applies where the winding up of a company is not concluded within 12 months after the date of its commencement. The Committee examined this in the context of subsection (2) which requires the liquidator to send a statement to the Registrar of Companies, at set intervals, in the prescribed form and containing details of the winding up. A number of members expressed the view that the information required from a liquidator under this subsection could be refined and this led to a discussion on possible improvements to Form E4.

The issue of CRO forms are further discussed at Section 6 of this Report.

Section 706 Final meeting and dissolution in creditors' voluntary winding up

Under this provision there is a requirement to hold a final meeting and make a prescribed CRO form (E5).

As stated above, it became apparent during discussions that the Committee considered a review of relevant forms as an issue for due consideration and its deliberations are detailed at Section 6.

5.2 Committee Deliberations

This section provides an overview of the Committee's deliberations on specific statutory provisions arising from submissions made by ICTU regarding the position of employees, and recommendations of the Committee following discussions.

5.2.1 Sections 571-572 - Provisions as to applications for winding up and powers of court on hearing petition.

Section 571 provides that an application to the court for the winding up of a company is to be by petition presented by the company, any creditor(s) of the company, any contributor(s) of the company, or by all these parties together or separately. A petitioner can be substituted by the court in the event that they do not proceed with the winding up petition.

Section 572 provides that, upon hearing a winding-up petition, the court may dismiss the petition or adjourn the hearing conditionally or unconditionally or make an interim order or any other order it sees fit. Section 572 was considered by the Review Group in 2017 and was at that time deemed fit for purpose.[24]

The Committee considered the operation of section 571 with regard to the petitioning of the High Court for the liquidation of a company. The Committee was informed by ICTU of reports from trade unions that employees are not put on notice of the intention of the company to petition the court. The Committee was asked to consider a proposal from ICTU to amend section 571 so that the court would not hear a winding up petition unless:

- employee creditors have been put on notice and have the right to be heard; and
- the court has received details of employees, their rights, entitlements and interests including any enhanced redundancy terms.

In this context the differences between official or court liquidations on the one hand and, on the other, voluntary liquidations was emphasised. Within the former category, a second differentiation must also be made between debtor-initiated liquidations (i.e. where the company itself initiates the liquidation) and creditor-initiated liquidations.

In relation to court liquidations, whether debtor or creditor initiated, notice is provided in relation to a presentation of a petition and the impending hearing through a requirement to advertise in two national newspapers and in Iris Oifigiúil. The Committee was informed that in practice employees are made aware of an impending liquidation by the debtor petitioner (i.e. the company) in the case of a petition to wind up the company. This information would be provided in advance of any formal notice requirements. It was thought that it would be an exception rather than the rule that employees are not made aware of such matters. In keeping with the expressed concern regarding unintended impact on employment law provisions, it was noted that there are specific employment law obligations imposed on employers in terms of informing employees in a collective redundancy situation. Nevertheless, the Committee proceeded to consider the specific proposal from ICTU as described above.

[24] CLRG 2017 Report pp 72-73.

Overall, the prevailing view of the Committee did not support an amendment that would restrict the court's ability to proceed to hear a winding up petition and thus did not wish to recommend that a written notice to all employees (whether represented by a collective body or otherwise) would be included as a requirement before the Court could hear a winding up petition. In the latter part of its deliberations, and following further submissions from ICTU, the Committee took the view that generally the notice requirements relying on publication in national newspapers might be outdated. The Committee suggested that the possibility of publication of such notices on corporate websites and through other IT platforms could be explored *in addition* to maintaining these formal requirements. Reference was made to platforms for the provision of information on companies with which members of the committee were familiar.

In relation to the second part of the proposal from ICTU that the court would not hear a petition until it had received details of employees, their rights and entitlements the Committee took the view that again the distinction between a creditor-initiated petition to wind up a company and a debtor-initiated petition was of relevance. The Committee thought it would be impractical to require a creditor petitioner to determine all employment claims prior to a court hearing to order the winding up of a company. In relation to a debtor petitioner it could sometimes be the case that not all of the issues regarding employee entitlements could be resolved by the date of petition. Again, the prevailing view of the Committee was that it was not in favour of constraining a court hearing in these circumstances.

Recommendation

The prevailing view of the Review Group does not support an amendment to Section 571 or Section 572 that would restrict the court's ability to proceed to hear a winding up petition in the circumstances outlined in both parts of the ICTU proposal.

However, the Review Group considers that the notice requirements relying on publication in national newspapers might now be outdated. The Review Group suggests that further information requirements could be explored which rely on dissemination on various website platforms in addition to the current formal requirements.

5.2.2 Section 573 Appointment of provisional liquidator.

Section 573 provides that the court may appoint a liquidator provisionally any time after the presentation of a winding up petition and before the first appointment of a liquidator.

ICTU was expressly concerned with the process of the appointment of provisional liquidators and effects on employees who may not have notice of such appointment.

The Committee noted that under section 573 the appointment of provisional liquidators is exceptional, made on an *ex parte* basis once the petition process has begun and usually made to protect assets of the company. Such applications are rare and the law is clear in that they are only entertained in exceptional circumstances and where assets are at risk. The imposition of additional notice requirements would restrict the ability of the petitioner and the court to act urgently to protect the position of all creditors.

Accordingly, the Committee was not in favour of restricting the court's ability to hear an application for the appointment of a provisional liquidator.

A second issue which was discussed concerned the specific power of a provisional liquidator to terminate the contracts of employees and/ or to cease trading. The Committee noted that generally any powers of a provisional liquidator must be expressly granted by the court. However, it recognised that in the 2017 CLRG Report[25] there was a recommendation that where it is the intention of the provisional liquidator to end contracts of employment and/or cease trading, the provisional liquidator must seek the specific power to terminate the employees' contracts from the court.

Recommendation

The Review Group is not in favour of restricting the court's ability to hear an application for the appointment of a provisional liquidator under Section 573.

The Review Group notes the 2017 CLRG Report recommendation described in the preceding paragraph which has not yet been implemented.

5.2.3. Section 621 - Preferential Payments in a Winding Up

Section 621(2)(b) gives preference to 'all wages or salary' arising during the period of 4 months prior to winding up.

ICTU made a submission to the Committee suggesting that problems have arisen with terms expressly or impliedly incorporated into the employee contract by collective agreement or award by the Labour Court such as enhanced redundancy terms and submitted that these recommendations should also attract preferential status. A proposal was put forward to amend section 621(2)(b) by the addition of the following type of employee claim:

> *"Any award made by the Labour Court pursuant to the Industrial Relations Acts 1946-2015 with regard to entitlements in the employment contract with express or implied by collective agreement or otherwise."*

The Committee expressed caution around amending existing provisions on preferential debts in accordance with this submission. There are four distinct policy matters which impact on this proposal described during the Committee deliberations:-

First, the fact that modern corporate insolvency policy is generally resistant to the extension of the class of preferential creditors on the basis that this reduces the pool of assets available to unsecured creditors who are often small business suppliers. This policy is reflected in the abolition of preferential status for all creditors other than employees in the UK under the Enterprise Act 2002. However, it is recognised that some preference was restored to government tax debts in the UK in early 2020.

[25] CLRG 2017 Report pp.57-58.

Second, a distinction is made in employment law between legally binding decisions of the Labour Court and recommendations of the Labour Court. The Committee were wary of unwittingly according a particular legal status to decisions of agencies operating in the employment law and labour law sphere when such decisions would not otherwise have this status.

Third, this second point ties in with an overarching concern of the Committee during its deliberations, namely the danger of creating unintended consequences for employment law provisions and the administration of the employment law framework.

The Committee was also cognisant of a case[26] currently before the Supreme Court which is considering issues of constitutionality of certain industrial relations/workplace relations matters and expressed concern that recommendations in this area might be premature.

Fourth, and finally, the Committee was cognisant of the fact that employees' claims which do have preferential status are often met from the Employers' Insolvency Fund which then steps into the preferential claim of employees outlined in section 621. Concern was expressed regarding the necessary interference with the operation of that Fund which such a recommendation would have, given the lack of clarity around the status of entitlements described in the proposal. [27]

The prevailing view of the Committee was that this issue involved complex matters that were not amenable to resolution without further detailed debate conducted in the employment law context. It was proposed that such a consideration should be referred to the Workplace Regulation and Economic Migration Division of the Department. The Committee noted that in the 2017 CLRG Report, Section 621 was considered and at that time the provision was considered to be fit for purpose.[28]

Recommendation

The Review Group is wary of unwittingly according a particular legal status to decisions of agencies operating in the employment law and labour law sphere when such decisions would not otherwise have this status.

The prevailing view of the Review Group is that this issue involves complex matters that are not amenable to resolution without reference to further consideration of the employment and labour law enforcement framework which should be referred to the appropriate Division of the Department.

5.2.4 Section 627 - Liquidator's Powers

It was suggested by ICTU that some liquidators considered that they did not have sufficient locus standi to bring or defend actions under the Industrial Relations Acts. Section 627 provides that a liquidator has the power to *"defend any action or legal proceeding in the name and on behalf of the*

[26] *Zalewski v Workplace Relations Commission, Ireland and The Attorney General* [2020 IEHC 178]

[27] See generally Lynch Fannon and Murphy *Corporate Insolvency and Rescue* (2012, Bloomsbury Professional).

[28] CLRG 2017 Report pp 73-77.

company". It was suggested that any uncertainty about the standing of the liquidator in relation to Workplace Relations Commission (WRC) or the Labour Court should be removed. The proposal was to amend section 627(1)(b) to include reference to proceedings and referrals concerning employee disputes and complaints before the WRC and the Labour Court.

Some members of the Committee thought that the current wording was sufficiently clear whilst other members of the Committee thought it might be worth clarifying further. On balance the Committee were not opposed to recommending further clarification in relation to this provision.

Recommendation

The Review Group recommends that further clarification be added to the wording of section 627 regarding the locus standi of a liquidator to bring or defend actions under the Industrial Relations Acts.

5.2.5 Section 666 to section 668 - Appointment of committee of inspection in court ordered winding up and creditors' voluntary winding up and the constitution and proceedings of committee of inspection.

A Committee of Inspection is a committee which represents the interests of all creditors of a company going into liquidation. Section 666 provides a mechanism for appointment of a Committee of Inspection in the case of a court ordered winding up. A similar provision is provided for under section 667 in the case of a Creditors' Voluntary Liquidation (CVL). Section 668 provides for the workings of the Committee of Inspection including the removal and filling of vacancies on committees. In practice, committees of inspection are rarely appointed in court ordered winding ups but are common in the case of CVLs.

The Committee considered a proposal from ICTU that, given the extent of their interest in the company, and the distribution of any available assets, employees should have an explicit entitlement to be represented on any Committee of Inspection. A proposal was made to amend section 666(1) to include a new paragraph (c) which would provide that where a committee is appointed, employees will be entitled to at least one representative should they so wish. Overall, the Committee was not in favour of this proposal. Employees are entitled to be nominated and appointed to the Committee of Inspection and often are. While the total number of persons on a Committee of Inspection is restricted to eight, the Committee's attention was not brought to any particular instances where an employee has been excluded from membership of the Committee of Inspection. Furthermore, it was noted that if membership of a Committee of Inspection was constrained in accordance with this proposal as to representation it might operate generally to the detriment of employees who could have better representation without such a provision.

Generally, the Committee considered that it might be appropriate to provide for a general obligation imposed on liquidators and/ or directors to ensure that creditors are made aware that they have the right to form and participate on a Committee of Inspection.

Recommendation

The Review Group recommends that consideration be given to providing for a general obligation to be imposed on liquidators and directors to ensure that creditors are made aware that they have the right to form and participate on a Committee of Inspection.

5.2.6 Section 682 Liquidator to report on conduct of directors

Section 682 provides that a liquidator must 'within 6 months after the date of his or her appointment and at intervals as required by the Director thereafter, provide to the Director a report in the prescribed form. There is an outstanding recommendation from the 2017 CLRG *Report on the Protections for Employees and Unsecured Creditors*, which proposed a new question on the liquidator's report to address the treatment of employees immediately prior to liquidation.[29]

> *'If the company had employees, can you please confirm if the directors have demonstrated to you that they have had regard to the interests of their employees in accordance with the requirements of section 224 of the Companies Act, 2014?*
>
> *Yes [ ] No [ ]*
>
> *If not, please provide full details on a separate sheet'*

This reform was proposed to ensure that the liquidator must specifically address the consideration given to employees by the directors of the company in the vicinity of insolvency.

The ODCE noted that it already expects liquidators to provide this information in all cases where it was relevant to consideration of the conduct of the directors and that, generally, the information supplied is adequate. This information helps inform the ODCE's decision to relieve or not to relieve the liquidator from bringing restriction proceedings against the directors of the insolvent company. Notwithstanding the position as outlined by the ODCE, it was suggested by ICTU that this reform would be enacted to create an explicit requirement that the liquidator must specifically address the consideration given to employees by the directors of the company in the vicinity of insolvency. The Committee noted that this amendment did not require primary legislation and could be given effect by way of a Statutory Instrument.

Recommendation

There is an outstanding recommendation from the 2017 CLRG Report on the Protections for Employees and Unsecured Creditors, which proposed a new question on the liquidator's report to address the treatment of employees immediately prior to liquidation. The Review Group supports this recommendation.

[29] CLRG 2017 report p 65 and Appendix 6.

5.2.7 Section 819 - Declaration by court restricting director of insolvent company being appointed or acting as director

Section 819 allows for restriction of directors for up to five years. Following submissions by ICTU, the Committee considered whether Section 819(1) should be amended to allow for the court to have the discretion to impose lengthier periods in more egregious cases. Overall, the view of the Committee was that they supported the current restriction regime. Concerns were raised in relation to interfering with the mandatory restriction period of 5 years as provided for in the legislation. The prevailing view of the Committee was that this would have unintended effects on the efficacy of the existing legislation.

The Committee considered a second submission from ICTU that section 819(2)(a) be reviewed with the possible inclusion of the following wording:

> *"The court shall make a declaration under subsection (1) unless it is satisfied that-*
>
> *(a) the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company; and*
>
> *(b) the person concerned has fully complied with their obligations with regard to the rights and interests of employees generally, under employment law, their contract of employment, collective agreements, this Act or generally".*

It should be noted that in fact the current section 819(2) requires that the court shall make a declaration under section 819(1) restricting the director unless it is satisfied of three distinct matters which must be proven cumulatively:-

> *"(a) the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company,*
>
> *(b) he or she has, when requested to do so by the liquidator of the insolvent company, cooperated as far as could reasonably be expected in relation to the conduct of the winding up of the insolvent company, and*
>
> *(c) there is no other reason why it would be just and equitable that he or she should be subject to the restrictions imposed by an order under subsection (1)."*

During the deliberations of the Committee there was some discussion of the relationship between these provisions, the disqualification of director provisions outlined in section 842, the provisions of section 224 which relates to the directors' duty to have regard to the interests of the company's employees and section 225 which relates to the director's compliance statement. The Committee recognised that, in relation to this second part of ICTU's proposal around the restriction provisions, s. 819(2)(a), which requires a director to show the court that 'he or she has acted honestly and

responsibly in relation to the conduct of the affairs of the company' involves the question of whether the director has complied with all obligations under the Companies Acts.[30]

The Committee recognised that there is a specific duty imposed on directors in s. 224 of the Companies Act 2014 to 'have regard in the performance of their functions' to the 'interests of the company's employees in general'. Compliance with this duty is part of the overall consideration of whether an individual director has acted honestly and responsibly in relation to the affairs of the company under s. 819(2)(a). As stated above the ODCE has affirmed that consideration of how the interests of employees are addressed is part of its decision making regarding the restriction process. Similarly, section 842(b) on disqualification allows for disqualification of a director or officer who is in breach of duties owed to the company which includes the duty outlined in s. 224.

Section 819 was also considered by the Committee in 2017. At that time ICTU put forward a similar proposal to increase the periods of restriction of directors. The Review Group (with the exception of ICTU) considered the section was fit for purpose.

Recommendation

The Review Group is not in favour of the proposal to amend Section 819 to provide for a judicial discretion to increase or otherwise alter the mandatory period of restriction.

In relation to the second proposal to include the specific mention of employees the Review Group is not in favour of this proposal noting that Section 224 of the Companies Act 2014 states

> **'The matters to which the directors of a company are to have regard in the performance of their functions shall include the interests of the company's employees in general, as well as the interests of its members.'**

This duty is included in a consideration of whether a director has complied with his or her obligations under the Companies Acts pursuant to section 819(2)(a).

[30] See Shanley J. in *Re La Moiselle Clothing Ltd* [1998] 2ILRM 345 and Clarke J. in *Re Swanpool Ltd. McLaughlin v Lannen* [2006] 2 ILRM 217

6. Administrative Efficiency (Relevant Forms)

6.1 Principles

The Committee discussed the issue of relevant court forms and CRO forms, including the Statement of Affairs which is referred to above. All of these forms interface with provisions considered in Sections 4 and 5 which are relevant to liquidations and the Committee was of the view that these forms required review and update. In relation to court liquidations both practitioners and State agencies observed that the format of the Statement of Affairs as prescribed in the Rules of the Superior Courts led to unnecessary complexity. The Committee agreed that its approach to the issue of the provision of information in the relevant forms would be in the form of principled recommendations rather than a specific in-depth review of these forms, which was not within the purview of the Committee as such. Rather this would be done, following recommendations of the Committee, within the Department.

A number of overarching principles are relevant to this discussion:-

- First, a key determinative concern was that proposed reforms would be aimed at providing all relevant information that the various stakeholders might have a legitimate interest in having in a more transparent and more accessible manner.

- Second, that there would be a standardisation of forms across all types of liquidation where possible.

- Third, that the role of the company director would be emphasised in relation to the provision of information in the Statement of Affairs or otherwise in relation to the financial position of the company.

- Fourth, the cost of compliance ought to be borne in mind and thus duplication of informational requirements could be avoided if possible.

- Fifth, consolidation of reporting obligations to be achieved if possible.

- Sixth, the Committee acknowledged that some information available to liquidators would be of a confidential and/ or commercially sensitive nature.

In this context the Committee reviewed the informational objectives contained in section 680 and section 681 and considered possible consolidation of these information requirements with a view to eliminating duplication and overlapping information.

6.2 Statement of Affairs

A Statement of Affairs is required in both court and voluntary liquidations. The current format of the Statement of Affairs for court liquidations is provided in Appendix 3A of this Report. In addition, a typical template for a Statement of Affairs in a creditors' voluntary liquidation is provided in Appendix 3B.

Section 593 requires that in the case of a court liquidation or in the case of the appointment of a provisional liquidator there is a general requirement that a statement as to the affairs of the

company is made out in the form prescribed in the Rules of the Superior Courts[31] and verified by affidavit by the directors of the company, and in some cases other persons specified in s.593(4). Some of the information required in such a statement includes:

- Details of the company's assets, debts and liabilities,
- The names, residences and occupations of the company's creditors,
- The securities held by those creditors respectively,
- The dates when those securities were respectively given, and
- Such further or other information as may be prescribed or as the court may require.

Similarly section 587 requires a meeting of the creditors of a company to be held following the passing of a resolution to wind up the company in a creditors voluntary winding up. Section 587(7) requires the directors of a company to "provide a full statement of the position of the company's affairs, together with a list of the creditors of the company and the estimated amount of their claims, to be laid before the creditors meeting." There is no prescribed form to comply with these obligations under section 587 unlike the position in an official or court liquidation. However, a Statement of Affairs in this context usually follows a template, similar to that included at Appendix 3B.

In both types of liquidation, the content of a Statement of Affairs is prepared by the directors and should be, as far as is possible, an accurate reflection of the financial position of the company as at the date of preparation, though some components may need to be estimated. Directors complete the Statement of Affairs based on their own knowledge and information of the company. They will generally seek outside assistance, usually their accountant, in the preparation of the Statement.

The Committee considered that the Statement of Affairs is a critical element in the provision of information to creditors generally. The Committee took the view that the adoption of a standardised form Statement of Affairs in the case of both court or official liquidations and creditors' voluntary liquidations would greatly improve the quality of information available to creditors generally and employees specifically, and would reduce the administrative burden on the company and its directors as regards compliance with information requirements.

Accordingly, the Committee recommended that the Department should consider the introduction of a standardised Statement of Affairs template, (with due flexibility allowing for size and turnover of a particular company) which should be standardised around, and reflective of, current practice in creditors' voluntary liquidations. The Committee acknowledged that this would be included in the Rules of the Superior Courts in relation to official or court liquidations and proposed that the Department/ Minister would liaise with the Rules Committee of the Courts in this regard. The Committee proposed that other means of prescribing the form could be utilised in relation to creditors' voluntary liquidations which might include a Regulation made under the Companies Act.

[31]Superior Court Rules, Order 74, Rule 27 specifies that the Statement of Affairs shall be in the Form No. 13, set out in Appendix M to the Rules.

The Committee repeated its recommendations on the Statement of Affairs contained in the October 2020 CLRG *Report on the Rescue of Small Companies* [32] recommendation that this document would be sworn by company directors. Again, the Committee placed particular emphasis on the directors' duty to act in utmost good faith and recommended that this approach should be replicated here.

Recommendation

The Review Group proposes that the Statement of Affairs for both court and creditors' voluntary liquidations be standardised in accordance with the principles outlined in Sections 6.1 and 6.2 of this Report.

It recognises that this would require amendment to the Rules of the Superior Courts in the case of court liquidations and proposes that the Department liaises with the Rules Committee of the Courts in this regard. It further proposes that other means of prescribing the form may be utilised in relation to creditors' voluntary liquidations, including a Regulation under the Companies Act.

The Review Group further proposes that the affirmation of the contents of the Statement of Affairs should take the form of a declaration as described (with the necessary adjustments) in section 202(1)(b) of the Companies Act and that directors should be placed under an obligation of utmost good faith in relation to the preparation of the Statement of Affairs.

6.3 Sections 680 and 681 (Forms E3, E4 and E5)

Section 680 establishes a duty on liquidators to call a meeting of the members in a members' voluntary winding up, a meeting of the Committee of Inspection in a court or creditors' voluntary liquidation, or if no Committee has been established, a meeting of the creditors of the company at the end of each year if a winding up (of any kind) continues for more than 12 months. The section also requires that an account of the liquidator's acts and dealings and of the conduct of the liquidation be laid before all such meetings and that a copy of that account be filed with the CRO (Form E3).

Section 681 establishes a separate requirement for liquidators, of any liquidation that is not concluded within 12 months of commencement, to file a statement with the Registrar of Companies in the prescribed form (Form E4) 12 months after the date of its commencement and every six months thereafter.

The Committee recognised that there is significant overlap between the requirements of both sections (and the related forms) and considered that there was merit in considering a consolidation of the reporting requirements

[32] the-company-law-review-group-s-special-report-on-the-rescue-of-small-business.pdf (clrg.org) Page 20

This would deliver a reduction in the administrative burden on companies and liquidators in relation to these obligations and facilitate accessibility of information and compliance with information requirements.

In examining these sections and the related forms, the Committee suggested that the Department could also consider such issues as:

- ensuring that the details on receipts and payments are itemised in the form on both a periodic and cumulative basis; [This is inter-related with a requirement in Form E5]
- details being provided by the liquidator as to why a liquidation is taking longer to finalise including relevant documentation;
- ensuring that the costs or administrative burdens in completing any new form should be minimised;
- consider whether the information is in place based on a legislative basis or for administrative purposes only, without limiting the information that is currently available to relevant parties including creditors, the ODCE, the CRO and the Revenue Commissioners.

Despite the overlap between the statutory provisions and the underlying forms, the CRO raised concerns that if the forms were merged into one there may be a reduction in reporting by liquidators. The CRO is of the view that it is likely that in the event of the forms merging the reporting will be completed by liquidators on an annual basis rather than on a six month basis

Whilst the CRO acknowledges the considerable overlap between the two forms, it is important to note that they do cover different matters as per the relevant provisions (section 680 and section 681) in the Companies Act described above. Also, if the two forms were merged the CRO expressed concerns that interested parties would find it harder to obtain information that is currently easily available by checking the register for a company in liquidation and fear that such information might become lost in a single form.

Recommendation

The Review Group recommends that the Department should consider the reporting requirements under Sections 680 and 681 together with the structure of the related Forms E3 and E4 in light of the overarching principles outlined in Section 6.1 of this Report, and the views of the CRO and other key stakeholders on this issue.

Appendix 1

Corporate Insolvency Committee Membership

Prof. Irene Lynch Fannon	Chair School of Law, University College Cork
Marie Daly	IBEC (Irish Business and Employers' Confederation)
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
David Hegarty	Office of the Director of Corporate Enforcement
Rosemary Hickey	Office of the Attorney General
Tanya Holly	Department of Enterprise, Trade and Employment
Tara Keane	Department of Enterprise, Trade and Employment
Neil McDonnell	Irish Small and Medium Enterprises Association CLG (ISME)
Dr. David Mc Fadden	Companies Registration Office
Vincent Madigan	Ministerial appointee. Formerly of the Department of Enterprise Trade and Employment
Conor O'Mahony	Office of the Director of Corporate Enforcement
Paddy Purtill	Revenue Commissioners
Doug Smith	Irish Society of Insolvency Practitioners (Eugene F Collins)

Appendix 2

Chart of Provisions in Part 11 of the Companies Act requiring the provision of Information

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
571.	Petition containing grounds for commencing Court liquidation	Petitioner	Court
	Affidavit supporting petition	Petitioner	Court
580.	Declaration of solvency commencing a members' voluntary winding up	Directors	Members 580(2) CRO 580(4)
	Accountant's "non-unreasonable" report	Directors	Members 580(2) CRO 580(4)
581.	Special resolution to wind up	Directors	CRO 581(1)
582.	Court order converting members voluntary winding up to CVL	If appointed, liquidator. If none appointed, directors.	CRO 582(5)
584.	Notice of a creditors' meeting	Liquidator in a members voluntary winding up convening a creditors meeting to convert to a CVL	Creditors 584(1)(b) Two newspapers and Iris Oifigiúil 584(1)(c)
	"Such information concerning the affairs of the company as [the creditors] may reasonably require"	Liquidator in a members voluntary winding up convening a creditors meeting to convert to a CVL	Creditors who ask 584(1)(d)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
	"a statement in the prescribed form as to the affairs of the company, including a statement of the company's assets and liabilities, a list of the outstanding creditors and the estimated amount of their claims"	Liquidator in a members voluntary winding up convening a creditors meeting to convert to a CVL	Creditors at the creditors meeting 584(2)(b)
586.	Resolution of the members to wind up the company	Directors and liquidator	Iris Oifigiúil 586(4)
587.	Notice of a creditors' meeting, identity of proposed liquidator, list of creditors	Directors initiating a CVL	Creditors 587(2), (3)
	Notice of a creditors' meeting	Directors initiating a CVL	Two newspapers 587(6)
	"a full statement of the position of the company's affairs, together with a list of the creditors of the company and the estimated amount of their claims"	Directors initiating a CVL	Creditors at the creditors meeting 587(7)(a)
591.	"such particulars as may be prescribed of the [winding-up] order [by the Court]"	"such officer of the court as may be prescribed or directed by the court"	CRO 591(1)(a) Company 591(1)(b)
	A court order appointing a liquidator (other than a provisional liquidator)	"such officer of the court as may be prescribed or directed by the court"	CRO 591(2)
592.	Appointment of a liquidator in a members' voluntary winding up or a CVL	Liquidator	CRO 592(1)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
	Appointment of a liquidator in a members' voluntary winding up or a CVL	CRO	ODCE 592(1)
593.	Statement of company's affairs[593]	Directors of a company wound up by the court or to which a provisional liquidator is appointed	Court 593(1), (2)
594.	Statement of company's affairs (as per s. 593)	Directors of a company wound up by the court or to which a provisional liquidator is appointed	Liquidator or Provisional liquidator 594(2)
	"such information in relation to the company as the liquidator may reasonably require"	Directors of a company wound up by the court or to which a provisional liquidator is appointed	Liquidator 594(3)(a)
	"such assistance, as they are in a position to give, to the liquidator during the course, and for the purpose, of the liquidator's examining (following his or her receipt of the statement) the company's affairs as [the liquidator] may reasonably require	Directors of a company wound up by the court or to which a provisional liquidator is appointed	Liquidator 594(3)(b)
	Statement of company's affairs (as per s. 593)	[Court office] [Liquidator]	Creditor or contributory who asks 594(9)

[593] Section 593(2) "The statement shall show— (a) particulars of the company's assets, debts and liabilities, (b) the names, residences and occupations of the company's creditors, (c) the securities held by those creditors respectively, (d) the dates when those securities were respectively given, and (e) such further or other information as may be prescribed or as the court may require."

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
595.	Fact of company being in liquidation	Liquidator	All documents on which the company name appears, website
615.	Liquidator's proposal to disclaim onerous property	Liquidator	"to such persons ... as the court thinks just" 615(6)
621.	Advertisement for claims of creditors	Liquidator	2 daily newspapers 621(6)
629.	Exercise of certain powers by liquidator in connection with Legal proceedings, carrying on company's business, etc. and payment of certain creditors, compromise of certain claims, etc.[629]	Liquidator	Committee of inspection or, if none, the creditors. 629(1)(a) Members in members' voluntary winding up. 629(1)(b)

[629] 1. Power to— (a) bring any action or other legal proceeding in the name and on behalf of the company;

(b) defend any action or other legal proceeding in the name and on behalf of the company;

(c) recommence and carry on the business of the company so far as may be necessary for the beneficial winding up thereof, where such business was not continuing at the date of the appointment of the liquidator or had ceased after such appointment;

(d) continue to carry on the business of a company so far as may be necessary for the beneficial winding up thereof, where such business was continuing at the date of the appointment of the liquidator and had not subsequently ceased;

(e) appoint a legal practitioner to assist the liquidator in the performance of his or her duties.

Payment of certain creditors, compromise of certain claims, etc.

2. Power to— (a) pay any classes of creditors in full;

(b) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(c) compromise—

(i) all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company; and

(ii) all questions in any way relating to or affecting the assets or winding up of the company,

on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect of it.

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
	Intention to sell, by private contract, a non-cash asset of the requisite value to a person who is, or who, within 3 years prior to the date of commencement of the winding up, has been, an officer of the company	Liquidator	Creditors 629(3)
631	Order of the court determining any question arising in the winding up of a company (including any question in relation to any exercise or proposed exercise of any of the powers of the liquidator	Company (i.e. Liquidator)	CRO 631(3)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
634.	Vacating of office of liquidator by reason of ceasing to be qualified as required by s.633	Liquidator	CRO 634(6)(a)(i) ODCE 634(6)(a)(ii) Where relevant, IAASA 634(6)(a)(iii) In a Court liquidation: - the Court 634(6)(b)(i) - where there is a committee of inspection, the committee 634(6)(b)(i)(I) -where there is none, the creditors 634(6)(b)(i)(II) In a CVL - where there is a committee of inspection, the committee 634(6)(b)(ii)(I) where there is none, the creditors 634(6)(b)(ii)(II) In a members' voluntary winding up the members 634(6)(b)(iii)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
635.	Vacating of office of liquidator by reason of ceasing to be qualified by reason of s.635(1)	Liquidator	CRO 635(5)(a)(i) ODCE 635(5)(a)(ii) Where relevant, IAASA 635(5)(a)(iii) In a Court liquidation: - the Court 635(5)(b)(i) - where there is a committee of inspection, the committee 635(5)(b)(i)(I) -where there is none, the creditors 635(5)(b)(i)(II) In a CVL - where there is a committee of inspection, the committee 635(5)(b)(ii)(I) where there is none, the creditors 635(5)(b)(ii)(II) In a members' voluntary winding up the members 635(5)(b)(iii)
636.	In a members' voluntary winding up, notice of a general meeting to (a) remove the liquidator, (b) appoint a liquidator to replace or act with the existing liquidator, or (c) appoint a liquidator to fill a vacancy in the office of liquidator.	Members holding 10% of shares or the Liquidator; in (c) any contributory also	Members

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
627.	In a CVL, notice of a general meeting to (a) remove the liquidator, (b) appoint a liquidator to replace or act with the existing liquidator, or (c) appoint a liquidator to fill a vacancy in the office of liquidator.	Creditors holding 10% of debt or the Liquidator	Creditors
639.	Consent to act, prior to appointment	Liquidator	Not specified
641.	Resignation of liquidator	Liquidator	In a Court liquidation: - the Court 641(2)(a) - where there is a committee of inspection, the committee 641(2)(a)(i) -where there is none, the creditors 641(2)(a)(ii) In a CVL - where there is a committee of inspection, the committee 641(2)(b)(i) where there is none, the creditors 641(2)(b)(ii) In a members' voluntary winding up the members 641(2)(c)
643.	Appointment or removal of liquidator	Chairperson of meeting at which it takes place, or if none, signatory (or first signatory) of notice of meeting	Liquidator 643(1)
	Removal of liquidator	Chairperson of meeting at which it takes place	CRO 643(3)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
	(a) Appointment of a liquidator in a winding up other than the initial appointment of a liquidator in a winding up, and (b) a removal of a liquidator that the court orders in any winding up.	Liquidator	CRO 643(5)
	(a) Appointment of a liquidator in a winding up other than the initial appointment of a liquidator in a winding up, and (b) a removal of a liquidator that the court orders in any winding up.	CRO	ODCE 643(6)
	Appointment or removal of a liquidator that the court orders in any winding up.	Applicant for order	Liquidator 643 (7)
	Appointment or removal of a liquidator that the court orders in any winding up.	"such officer of the court as may be prescribed	CRO 643(8)
	Appointment or removal of a liquidator that the court orders in any winding up.	CRO	ODCE 643(9)
646.	Particulars of the terms upon which a liquidator seeks entitlement to remuneration, prior to its being agreed	Liquidator	Committee of inspection 646(3)(a)(i) If none, creditors 646(3)(a)(ii) In members' voluntary winding up, members 646(3)(a)(iii)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
647.	Prescribed particulars of remuneration claimed by the liquidator	Liquidator	Committee of inspection 647(3)(a)(i) If none, creditors 647(3)(a)(ii) In members' voluntary winding up, members 647(3)(a)(iii)
648.	Connection (family, employment) with a proposed liquidator	Connected creditor or Chairperson	The creditors' meeting 649(1), (3)
650.	Whether a director has been made personally responsible for company debts or is disqualified or restricted	Liquidator	Any account, a periodic abstract and a periodic statement made by the liquidator under the 2014 Act 650(2)
653.	(a) Answers to any questions of the Director concerning the content of the books and records of a company (b) answers any questions of the Director concerning the conduct of a particular winding up or all windings up or receiverships conducted by the appropriate person, as the case may be, and (c) such assistance in the matter as the appropriate person is reasonably able to give.	Liquidator Director or other officer Auditor Receiver	ODCE 653(5)
669.	Order of the Court annulling or staying winding up	The company (I.e. the Liquidator) or such other person as the Court orders	CRO 669(6)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
674.	Time or times fixed by the Liquidator within which creditors must prove their debts or claims or to be excluded from the benefit of any distribution made before those debts or claims are proved	Liquidator	Creditors 674(2)
680.	An account of the liquidator's acts and dealings and the conduct of the winding up during the preceding year (Annual report)	Liquidator	In a members' voluntary winding up - the members at an annual meeting 680(2)(b) - CRO 680(3) In a Court liquidation or CVL - the committee of inspection at an annual meeting 680(5)(b) - where there is none , the creditors 680(5)(b) - CRO 680(6)
681.	A statement in the prescribed form and containing the prescribed particulars about the proceedings in, and position of, the winding up (Half-yearly report)	Liquidator	CRO 681(2)
682.	Report in the prescribed form on the conduct of directors (within 6 months of appointment, and at intervals as required by ODCE)	Liquidator	ODCE 682(2)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
	(a) Answers to any question that the ODCE reasonably puts to the liquidator concerning the contents of the conduct report, the affairs of the company or the conduct of any director and (b) assistance to the ODCE for the purpose of the Director's appraisal of the report or its examination of any fact or allegation contained in it or which comes to the ODCE's knowledge by reason of an answer given	Liquidator	ODCE 682(3)
688.	Finding by a disciplinary committee or tribunal of a prescribed professional body (a) that a member of that body who is conducting or has conducted a winding up has not maintained appropriate records in relation to that activity, or (b) has reasonable grounds for believing that such a member has committed a category 1 or 2 offence during the course of conducting a winding up,	Professional body	ODCE 688(1)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
696.	A copy of every resolution of a meeting of creditors, contributories or members held in a winding up	Liquidator	CRO 696(1)
700.	(a) Minutes of any meeting held in a winding up (b) a list of creditors, contributories or members present at the meeting in such form as may be prescribed	Chairperson of the meeting	A book kept for that purpose 700(1)
704.	In a Court liquidation, an order that the company be dissolved	Liquidator	CRO 704(5)
705.	In a members' voluntary winding up, an account of the winding up showing how the winding up has been conducted and the property of the company has been disposed of.	Liquidator	Final meeting of the members 705(2) CRO 705(4)(a)
	Return of the holding of the final meeting and of its date	Liquidator	CRO 705(4)(b)
706.	In a CVL, an account of the winding up showing how the winding up has been conducted and the property of the company has been disposed of.	Liquidator	CRO 706(2)
	Return of the holding of the final meeting and of its date	Liquidator	CRO 706(4)(b)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
709.	After 20 years from dissolution, all documents filed in connection with the company	Registrar	National Archives
711.	(a) Notice of the judgment opening EU Insolvency Regulation proceedings; (b) where appropriate, the decision appointing the liquidator in those proceedings; (c) the name and business address of the liquidator; and (d) the provision (either paragraph 1 or paragraph 2) of Article 3 of the Insolvency Regulation giving jurisdiction to open the proceedings;	Liquidator	Iris Oifigiúil and 2 daily morning newspapers circulating in the State 711(1)
713.	(a) A winding-up order, of a company under the Insolvency Regulation (b) the issue of a certificate by the Master of the High Court under section 712 in relation to the confirmation by the Master of a creditors' voluntary winding up of an Insolvency Regulation company	"the proper officer of the Central Office of the High Court"	Liquidator
723.	Information as to a past or present officer or any member of the company being guilty of an offence	Liquidator	Director of Public Prosecutions

Appendix 3A-

Statement of Affairs Form in Court Liquidations.

No. 13.

O.74, r. 27.

STATEMENT OF AFFAIRS.

_____

[*Title as in Form No. 1*]

[*Name of company*]

Statement of affairs on the ..... day of ..... , 20 ..... , the date of *the winding up order made in this matter*the appointment of a provisional liquidator to the company.
I, ... of ..... make oath and say that the statement of affairs attached hereto, upon each page of which I have signed my name, and the several lists thereunto annexed, upon each of which said lists I have signed my name, are to the best of my knowledge and belief a full true and complete statement of the affairs of the above-named company on the said ..... day of ..... , 20 ..... and that immediately prior to the said order the company carried on the following businesses ..... at the following addresses
Sworn, &c.

STATEMENT OF AFFAIRS OF (*INSERT FULL NAME OF COMPANY*).

I. ASSETS.	Estimated realisable value
(1) ASSETS SPECIFICALLY CHARGED (as per List "A")	..
Freehold property	
Leasehold property	
Other property, viz. ... ...`	
TOTAL.... ...	€
(2) ASSETS NOT SPECIFICALLY CHARGED (as per List "B")	
Balance at bank	
Cash in hand	
Marketable securities	
Bills receivable	
Trade debtors	
Loans and advances	
Unpaid calls	
Stock in trade	

Work in progress	
Freehold property	
Leasehold property	
Lorries and motor vehicles	
Other plant and machinery	
Furniture, fittings, utensils, &c.	
Patents and trade marks	
Investments other than marketable securities ...	
Other property, viz.	
TOTAL	...
	==========
(3) GROSS ASSETS:	
specifically charged (as at (1) above)	€
not specifically charged (as at (2) above)	€ _____
TOTAL	€
	==========
II. LIABILITIES.	
(1) CREDITORS SECURED by assets specifically charged (as per List "A"):	
(Amounts claimed to be due: € .....):	
Extent to which claims are estimated to be covered by assets specifically charged	€
(2) PREFERENTIAL CREDITORS (as per List "C"):	
Amounts for which preference is claimed	€
(3) DEBENTURE HOLDERS secured by floating charge (as per List "D"):	
Amounts claimed to be due after deducting any sums estimated (at (1) above) to be covered by assets specifically charged	€
(4) UNSECURED CREDITORS (as per List "E"):	

Amounts claimed to be due including unsecured balance of claims of creditors secured by assets specifically charged	€_____
GROSS LIABILITIES	€==========
(Signed)	
III. SUMMARY OF ASSETS ESTIMATED TO BE AVAILABLE TO MEET CREDITOR'S CLAIMS	
GROSS ASSETS— Total (as at I (3) above) ..	€
deduct amounts due to SECURED CREDITORS to extent to which claims are estimated (at II (1) above) to be covered by assets specifically charged	€_____
Balance available for preferential creditors ..	€
deduct amounts claimed to be due to PREFERENTIAL CREDITORS (as at II (2) above)	€_____
Balance available for debenture holders secured by a floating charge	€
deduct amounts due to such DEBENTURE HOLDERS (as at II (3) above)	€_____
Balance available for unsecured creditors ..	€
deduct amounts claimed to be due to UNSECURED CREDITORS (as at II (4) above)	€_____
ESTIMATED SURPLUS/DEFICIENCY	€==========

(i) The foregoing estimates are subject to the costs of winding up and to any surplus or deficiency on trading pending realisation of the assets.
(ii) There is no unpaid capital liable to be called up *or* The nominal amount of unpaid capital liable to be called up is € ..... estimated to produce € ..... , which is/is not charged in favour of debenture holders.
(Signed)

_____

LIST "A"—ASSETS SPECIFICALLY CHARGED AND CREDITORS FULLY OR PARTLY SECURED (NOT INCLUDING DEBENTURE HOLDERS SECURED BY A FLOATING CHARGE).

Statement of affairs List "A"		The names of the secured creditors are to be shown against the assets on which their claims are secured, numbered consecutively, and arranged in alphabetical order as far as possible.								
Particulars of assets specifically charged	Date when security given	Estimated value of security	No.	Name of creditor	Address	Amount of debt	Date when contracted	Consideration	Balance of debt unsecured carried to List "E" or List "D"	Estimated surplus from security
...	...	...	...	...	...	...	...	...	...	...

LIST "B"—ASSETS NOT SPECIFICALLY CHARGED.

Statement of affairs List "B"	Full particulars of every description of property not specifically charged and not included in any other list are to be set forth in this list.		
	Full statement and nature of property	Book value €	Estimated to produce €
State name of bankers	Balance at Bank	...	...
	Cash in hand	...	...
	Marketable securities, viz.	...	...
	Bills receivable	...	...
	Trade debtors (as per Schedule hereto)	...	...
	Loans and advances, viz.	...	...
	Unpaid calls	...	...
		...	...
State nature	Stock in trade	...	...
State nature	Work in progress	...	...
	Freehold property, viz.	...	...
	Leasehold property, viz.	...	...
	Lorries and motor cars, viz.	...	...
	Other plant and machinery	...	...
	Furniture, fittings, utensils, &c.	...	...
	Patents and trade marks	...	...
	Investments other than marketable securities, viz.	...	...
	Other property and assets	...	...

(Signed)

_____

SCHEDULE OF TRADE DEBTORS.

Statement of affairs— Schedule I to List "B".	The names to be arranged in alphabetical order and numbered consecutively. NOTE:—If the debtor to the company is also a creditor but for a less amount than his indebtedness, the gross amount due to the company and the amount of the contra account should be shown in the third column and the balance only be inserted under the heading "Amount of debt" thus: Due to company .. .. € Less: Contra account .. .. .. No such claim should be included in List "E".

No.	Name	Address	Amount of debt			Folio of ledger or other book where particulars to be found	When contracted month and year	Estimated to produce	Particulars of any securities
			Good	Doubtful	Bad				
...	...	...	€ .	€ .	€ .	...	...	...	...

(Signed)

_____

LIST "C"—PREFERENTIAL CREDITORS FOR RATES, TAXES, SALARIES, WAGES, WORKMEN'S COMPENSATION, DAMAGES AND OTHERWISE.

Statement of affairs List "C".		The names to be arranged in alphabetical order and numbered consecutively. When the amount of the claim is unascertained write unascertained in column headed "Amount of claim".				
No.	Name of creditor	Address	Nature of claim	Amount of claim	Amount payable in full	Balance not preferential carried to List "E"
...	...	...	...	...	...	...

(Signed)

_____

LIST "D"—DEBENTURE HOLDERS SECURED BY A FLOATING CHARGE,

Statement of affairs List "D"		The names to be arranged in alphabetical order and numbered consecutively. Separate lists should be furnished of holders of each issue of debentures, if more than one issue has been made.			
No.	Name of holder	Address	Amount		Description of assets over which security extends
...	...	...	€	....	...

(Signed)

LIST "E"—UNSECURED CREDITORS.

<table>
<tr><td colspan="2">Statement of affairs
List "E"</td><td colspan="4">The names to be arranged in alphabetical order and numbered consecutively.

NOTE:—When there is a contra account against the creditor less than his claim against the company, the amount of the creditors claim and the amount of the contra account should be shown in the third column and the balance only inserted under the heading "Amount of debt", thus:—

Total amount of claim .. .. € .....
Less: Contra account .. .. ..

No such set off should be included in the Schedule to trade debtors attached to List "B".</td></tr>
<tr><td>No.</td><td>Name</td><td>Address</td><td>Amount of debt</td><td>Date when contracted</td><td>Consideration</td></tr>
<tr><td>...</td><td>...</td><td>...</td><td>...</td><td>...</td><td>...</td></tr>
<tr><td></td><td colspan="2">Unsecured balance of creditors partly secured—brought from List "A"

Balance not preferential of preferential creditors—brought from List "C".</td><td>...</td><td>...</td><td>...</td></tr>
<tr><td>...</td><td>...</td><td>...</td><td>...</td><td>...</td><td>...</td></tr>
</table>

(Signed)

Substituted by SI 255 of 2015*, effective 1 July 2015.*

Appendix 3B

Statement of Affairs Template commonly used in Creditors' Voluntary Liquidations.

Statement of Affairs

Name of Company Limited

Estimated Statement of Affairs as at *Date, Month, Year*

	Book value	Estimated to realise
	€	€
Assets		
Debtors		
Prepayments		
Stocks and work in progress		
Cash		
Fixed assets - Plant and equipment - IT/Office equipment - Motor vehicles		
Less leasing obligations		
Surplus applicable to preferential creditors	a	a
Preferential creditors		
Employees		
Rates		
Revenue Commissioners - VAT - PAYE/PRSI - Corporation tax		
Total preferential creditors		b
Surplus after preferential creditors		c
Secured creditors		
Bank overdraft		
Bank loan		

Total secured creditors	d
Surplus after secured creditors	e
Unsecured creditors	
Total trade creditors (see attached listing)	z
Deficit applicable unsecured creditors	

Notes

1 The Statement of Affairs is a statement of the directors of the company as to the estimated financial position of the company as at *Date, Month, Year.*

2 The Statement of Affairs does not take into account liquidation fees, costs and expenses.

3 The aforementioned creditors balances are based on available information and are subject to agreement and verification with the Liquidator.

4 Some of the company's stock may, pending verification with the Liquidator, be subject to Retention of Title claims.

5 Arrears of employee wages will be paid by the Department of Social Protection from their Insolvency Fund and reclaimed by the Department as a preferential creditor.

Signed: _____
Director

Dated:

Unsecured Creditors

Name of Company Limited

Estimated Statement of Affairs as at *Date, Month, Year*

Schedule of unsecured creditors

Name	**Amount €**
Total	z

Appendix 4-

Forms E3, E4 and E5

AN OIFIG UM CHLÁRÚ CUIDEACHTAÍ
COMPANIES REGISTRATION OFFICE

E3

Liquidator's account of his/her acts and dealings

Section 680 Companies Act 2014

CRO receipt date stamp & barcode

Company number

Please complete using black typescript or BOLD CAPITALS, referring to explanatory notes

Company name
in full

Liquidator's name

Liquidator's address

Liquidator's statement
note one

I/We refer to the statement of account hereunto and I/we say that the particulars therein contained were laid before a meeting of the ☐ members ☐ creditors, of the above named company on Day Month Year
note two

Period Covered
note three

from Day Month Year to Day Month Year

Certification
note four

I/We hereby certify that the particulars contained in this form are correct and have been given in accordance with the Notes on Completion of Form E3.

Signature
Liquidator
Name *in block letters or typescript*
This _____ day of _____ 20 ___

Signature
Liquidator
Name *in block letters or typescript*
This _____ day of _____ 20 ___

Presenter details
note five

Name
Address
Telephone number
Fax number
Email
Contact Person
DX number/Exchange
Reference number

Nature of Proceedings

note one

☐ Members' Voluntary Winding Up

☐ Creditors' Voluntary Winding Up

☐ Court Winding Up

Disclosure Section 650 Companies Act 2014

note one

☐ At the date of this return, **no past or present director or other officer or any member of the company, is a person** in respect of whom a declaration has been made under any provision of the Companies Act that he or she should be personally liable for all or any part of the debts of a company or who is deemed to be subject to a disqualification order under Part 14 of the Companies Act 2014 or a declaration of restriction under Chapter 3 of Part 14 Companies Act 2014.

☐ I have provided below details of, **a past or present director or other officer, or any member of the company that is a person** in respect of whom a declaration has been made under any provision of the Companies Act that he or she should be personally liable for all or any part of the debts of a company or who is deemed to be subject to a disqualification order under Part 14 of the Companies Act 2014 or a declaration of restriction under Chapter 3 of Part 14 Companies Act 2014.

Details of person(s) referenced:

note six

NAME	*ADDRESS*	*SECTION OF ACT*

Report of the Liquidator

Report of the acts & dealings of the Liquidator in the Winding Up.

Nature of Proceedings

note one

☐ Members' Voluntary Winding Up

☐ Creditors' Voluntary Winding Up

☐ Court Winding Up

Realisations

Date	From Whom received	Nature of assets realised	Amount
		Brought forward from last statement	€
		Carried Forward	

Disbursements

Date	To whom paid	Nature of assets disbursed	Amount
		Brought forward from last statement	€
		Carried Forward	

NOTES ON COMPLETION OF FORM E3

These notes should be read in conjunction with the relevant legislation.

General This form must be completed correctly, in full and in accordance with the following notes. Every section of the form must be completed. Where the space provided on Form E3 is considered inadequate, the information should be presented on a continuation sheet in the same format as the relevant section in the form. The use of a continuation sheet must be so indicated in the relevant section and also noted on the relevant continuation sheet.

note one Tick the relevant box(es).

note two The date of the meeting(s) must be entered.

note three Form E3 covers twelve month periods from the date of the resolution to wind up. Form E3 covers an exact period of twelve months only, any lesser period need not be covered. (Court liquidations using the creditors voluntary winding up procedure should start twelve months from the date of petition to wind up (s.589 Companies Act 2014)).

note four This form **must** be certified by the liquidator of the company or by each liquidator if more than one is appointed.

note five This section must be completed by the person who is presenting Form E3 to the CRO. This may be either the applicant or a person on his/her behalf.

note six Include details of any person(s) referenced under the disclosure requirement of section 650 Companies Act 2014

Further information

CRO address When you have completed and signed the form, please file with the CRO. The Public Office is at Bloom House, Gloucester Place Lower, Dublin 1.

If submitting by post, please send with the prescribed fee to the Registrar of Companies at

The Companies Registration Office, O'Brien Road, Carlow

DX number: 271004 DX Exchange: Carlow 2.

Payment If paying by cheque, postal order or bank draft, please make the fee payable to the Companies Registration Office. Cheques or bank drafts must be drawn on a bank in the Republic of Ireland.

FURTHER INFORMATION ON THE COMPLETION OF FORM E3, INCLUDING THE PRESCRIBED FEE, IS AVAILABLE FROM WWW.CRO.IE OR BY EMAIL AT INFO@CRO.IE

AN OIFIG UM CHLÁRÚ CUIDEACHTAÍ
COMPANIES REGISTRATION OFFICE

E4

Liquidator's Statement of Proceedings and Position of Winding Up

Section 681(2) Companies Act 2014

CRO receipt date stamp & barcode

Company number

Please complete using black typescript or BOLD CAPITALS, referring to explanatory notes

Company name
in full

Liquidator's name

Liquidator's address

Liquidator's statement

I refer to the statement of account hereunto "Part A" and I say that the particulars therein contained about the proceedings in and position of the liquidation of the said company are true and correct to the best of my knowledge and belief.

The said statement of account (including the trading account annexed, if any) contains a true and full account of all moneys received and payments made by me in the winding up of the said company, inclusive

note one

note two from Day Month Year to Day Month Year

note three ☐ and I have not, nor has any other person by my order or for my use, during that period received or paid any moneys for or on account of the said company other than as disclosed in the said statement.

note three ☐ and I have not, nor has any other person by my order or for my use, received or paid any moneys whatsoever for or on account of the said company.

And I make this declaration conscientiously believing the same to be true.

note four _____ This _____ day of _____ 20 ___
Signature of Liquidator

_____ This _____ day of _____ 20 ___
note four Signature of Liquidator

Presenter details
note five

Name		
Address		
Telephone number		Fax number
Email		Contact Person
DX number/Exchange		Reference number

Declared before me *name of witness in capitals*

☐ Commissioner for oaths ☐ Peace commissioner ☐ Notary public

☐ Person authorised by statutory declarations _____ to take and receive

insert authorising statutory provision

Practising solicitors are authorised under section 72 Solicitors (Amendment) Act 1994 to take declarations

BY *Declarants name in bold capitals or typescript*

☐ **who is/are personally known to me**

or

☐ **who is/are identified to me by** _____

who is personally known to me

NOTE: **ANY IDENTIFICATION INFORMATION SUPPLIED BY DECLARANT FOR THE PURPOSES OF MAKING THIS DECLARATION WILL BECOME A MATTER OF PUBLIC RECORD ON ITS RECEIPT IN THE CRO PURSUANT TO SECTION 891 OF THE COMPANIES ACT 2014.**

or

whose identity has been established to me before the taking of this Declaration by the production to me of:

☐ Passport no. _____ issued on _____

by the authorities of _____

which is an authority recognised by the Irish Government

or ☐ National identity card no. _____ issued on _____

by the authorities of _____

which is an EU Member State, the Swiss Confederation or a Contracting Party to the EEA Agreement

or ☐ Aliens Passport no. _____ issued on _____

(document equivalent to a passport)

by the authorities of _____

which is an authority recognised by the Irish Government

or ☐ Refugee travel document no. _____

issued on _____ by the Minister for Justice and Equality

or ☐ Travel document *(other than refugee travel document)* _____

issued on _____ by the Minister for Justice and Equality

At _____

This_____ day of_____20 _____

Signature of witness

_____

Part "A"

Nature of proceedings

note three

☐ Members' Voluntary Winding Up ☐ Creditors' Voluntary Winding Up ☐ Winding Up by Court

Date of commencement of winding up — Day ☐☐ Month ☐☐ Year ☐☐☐☐

Date to which last statement (if any) was brought down — Day ☐☐ Month ☐☐ Year ☐☐☐☐

Date to which this statement is brought down — Day ☐☐ Month ☐☐ Year ☐☐☐☐

General statement of account

note six

note seven

Realisations

Date	From whom received	Nature of assets realised	Amount
		Brought forward from last statement	€
		Carried Forward	

Disbursements

note six

Date	To whom paid	Nature of assets disbursed	Amount
		Brought forward from last statement	€
		Carried Forward	

Analysis of balance

note eight & nine

		€
Total Realisations		
Total Disbursements		
Balance		

The balance is made up as follows:-

	€	
1. Cash in hands of Liquidator		
2. Total payments into bank including balance at date of commencement of winding up (as per bank sheets)		
Total withdrawals from bank		
Balance at bank:		
note ten 3. Amounts invested by Liquidator		
Less amount realised from same		
Balance		
Total balance as shown above		

NOTE: The Liquidator should also state:-

(1) The amount of the estimated assets and liabilities at the date of the commencement of the winding up.	Assets (after deducting amounts charged to secured creditors & debenture holders).	
	Liabilities	
	Secured creditors	
	Debenture holders	
	Unsecured creditors	
(2) The total amount of capital paid up at the date of the commencement of the winding up.	Paid up in cash	
	Issued as paid otherwise than for cash	
(3) The general description and estimated value of outstanding assets (if any).		
(4) The causes which delay the termination of the winding up.		
(5) The period within which the winding up may probably be completed.		

_____ This _____ day of _____ 20 ___

Signature of Liquidator

Trading account

note one

I, _____

being the Liquidator of _____

_____

From Day Month Year To Day Month Year

Receipts

Date		€	
	Total		

Payments

Date		€	
	Total		

Disclosure Section 650 Companies Act 2014

note three

☐ At the date of this return, **no past or present director or other officer or any member of the company, is a person** in respect of whom a declaration has been made under any provision of the Companies Act that he or she should be personally liable for all or any part of the debts of a company or who is deemed to be subject to a disqualification order under Part 14 of the Companies Act 2014 or a declaration of restriction under Chapter 3 of Part 14 Companies Act 2014.

☐ I have provided below details of, **a past or present director or other officer, or any member of the company that is a person** in respect of whom a declaration has been made under any provision of the Companies Act that he or she should be personally liable for all or any part of the debts of a company or who is deemed to be subject to a disqualification order under Part 14 of the Companies Act 2014 or a declaration of restriction under Chapter 3 of Part 14 Companies Act 2014.

Details of person(s) referenced:

note eleven

NAME	*ADDRESS*	*SECTION OF ACT*

NOTES ON COMPLETION OF FORM E4

These notes should be read in conjunction with the relevant legislation.

General This form must be completed correctly, in full and in accordance with the following notes. Every section of the form must be completed. Where the space provided on Form E4 is considered inadequate, the information should be presented on a continuation sheet in the same format as the relevant section in the form. The use of a continuation sheet must be so indicated in the relevant section and also noted on the relevant continuation sheet.

note one The Trading account should be completed when the Liquidator carries on a business and should be forwarded as a distinct account.

note two In a voluntary winding up, the initial Form E4 is completed to cover the first twelve month period of the liquidation. Subsequent Forms E4 cover six-month periods, or any greater period as may be prescibed, following on from that first anniversary. Dependent on the court instruction, the end date of a court liquidation is either the date of the final creditors meeting, the date of the final court order to dissolve the company or if specified in the order, the date of the final Examiners Certificate.

note three Tick the relevant box(es).

note four This form **must** be certified by the liquidator of the company or by each liquidator if more than one is appointed. This form is a sworn declaration of compliance with all the legal requirements relating to a liquidator's account under section 681 of the Companies Act 2014. It is a criminal offence pursuant to section 876 of the Companies Act 2014 for a person to knowingly or recklessly deliver a document to the CRO which is false in a material particular.

note five This section must be completed by the person who is presenting Form E4 to the CRO. This may be either the applicant or a person on his/her behalf.

note six No balance should be shown on this account but the total realisations and disbursements only, which should be carried forward to the next account. These figures are also the amounts used on the Analysis of Balance page.

note seven The totals of receipts and payments on the trading account should alone be set out in the general statement of account.

The Statement should contain a detailed account of all the Liquidator's realisations and disbursements in respect of the Company. The statement of realisations should contain a record of all receipts derived from assets existing at the date of the winding up order or realisation and subsequently realised, including balance in bank, book debts and calls collected, property sold etc. and the account of disbursements should contain all payments for costs and charges to creditors or contributories. Where property has been realised, the gross proceeds of sale should be entered under realisations, and the necessary payments incidental to sales should be entered as disbursements. These accounts should not contain payments into or out of bank or temporary investments by the Liquidator or the proceeds of such investments when realised which should be shown separately by a separate detailed statement of monies invested by the Liquidator and investments realised. Interest allowed or charged by the bank, bank charges and commission, and profit or loss upon the realisation or temporary investments, should, however, be inserted in the accounts of realisations or disbursements, as the case may be. Each receipt and payment should be entered in the account in such a manner as to sufficiently to explain its nature. The receipts and payments should severally be added up at the foot of each sheet **and the totals carried forward from one account to another without any intermediate balance,** so that the gross totals represent the total amounts received and paid by the Liquidator respectively.

When dividends or instalments of compositions are paid to creditors, or a return of surplus assets is made to contributories, the total amount of each dividend, or instalment of composition or return to contributories actually paid, should be entered in the statement of disbursements as one sum; and the Liquidator should forward separate accounts showing in lists the amounts of the claim of each creditor, and the amount of dividend or composition payable to each creditor, and of surplus assets payable to each contributory, distinguishing in each list the dividends or instalments of composition and shares of surplus assets actually paid and those remaining unclaimed. Each list should be on sheets 13 inches by 8 inches.

When unclaimed dividends, instalments of composition or returns of surplus assets are paid into the Account prescribed under section 623(1) of the Companies Act 2014, the total amount so paid in should be entered in the statement of disbursements as one sum.

Credit should not be taken in the statement of disbursements for any amount in respect of the Liquidator's remuneration unless it has been duly allowed by resolution of the committee of inspection or of the creditors or of the Company in general meeting or by order of Court as the case may require.

note eight The figures for Total Realisations and Total Disbursements are the figures carried forward on the General Statement of Account.

note nine Full details of stocks purchased for investment and realisation thereof should be given in a separate statement.

note ten The investment of deposit of money by the Liquidator does not withdraw it from the operation of Section 623 Companies Act 2014.

note eleven Include details of any person(s) referenced under the disclosure requirement of section 650 Companies Act 2014

Further information

CRO address When you have completed and signed the form, please file with the CRO. The Public Office is at Bloom House, Gloucester Place Lower, Dublin 1.

If submitting by post, please send with the prescribed fee to the Registrar of Companies at

The Companies Registration Office, O'Brien Road, Carlow
DX number: 271004 DX Exchange: Carlow 2.

Payment If paying by cheque, postal order or bank draft, please make the fee payable to the Companies Registration Office. Cheques or bank drafts must be drawn on a bank in the Republic of Ireland.

FURTHER INFORMATION ON THE COMPLETION OF FORM E4, INCLUDING THE PRESCRIBED FEE, IS AVAILABLE FROM WWW.CRO.IE OR BY EMAIL AT INFO@CRO.IE

AN OIFIG UM CHLÁRÚ CUIDEACHTAÍ
COMPANIES REGISTRATION OFFICE

E5

Liquidator's final statement of account

Section 705(4)(a)/706(4)(a) Companies Act 2014

CRO receipt date stamp & barcode

Company number

Please complete using black typescript or BOLD CAPITALS, referring to explanatory notes

Company name *in full*

Liquidator's name

Liquidator's address

This statement shows how the winding up has been conducted and how the property of the company has been disposed of, from:

Commencement of winding up — Day / Month / Year

Close of winding up — Day / Month / Year

Disclosure Section 650 Companies Act 2014 *note one*

☐ At the date of this return, **no past or present director or other officer or any member of the company, is a person** in respect of whom a declaration has been made under any provision of the Companies Act that he or she should be personally liable for all or any part of the debts of a company or who is deemed to be subject to a disqualification order under Part 14 of the Companies Act 2014 or a declaration of restriction under Chapter 3 of Part 14 Companies Act 2014.

☐ I have provided below details of, **a past or present director or other officer, or any member of the company that is a person** in respect of whom a declaration has been made under any provision of the Companies Act that he or she should be personally liable for all or any part of the debts of a company or who is deemed to be subject to a disqualification order under Part 14 of the Companies Act 2014 or a declaration of restriction under Chapter 3 of Part 14 Companies Act 2014.

Details of person(s) referenced:

note two

NAME	*ADDRESS*	*SECTION OF ACT*

Presenter details

note three

Name		
Address		
Telephone number		Fax number
Email		Contact Person
DX number/Exchange		Reference number

Nature of Proceedings

Liquidator's final statement of account

Statement showing how the winding up has been conducted and the property of the company has been disposed of

	Statement of assets and liabilities	Receipts
	€	€
Receipts		
Cash at bank		
Cash in hand		
Marketable securities		
Sundry debtors		
Stock in trade		
Work in progress		
Freehold property		
Leasehold property		
Motor cars and lorries		
Plant and machinery		
Furniture fittings and utensils		
Patents and trade marks		
Investments other than marketable securities		
Surplus from securities		
Unpaid calls at commencement of winding up		
Amounts received from calls on contributions		
made in the winding up		
Receipts per trading account		
Other property, viz		
Less:		
Payment to redeem securities		
Cost of execution		
Payments per trading account		
Net realisations		

Unrealisable assets

Assets including _____ shown in the statement of assets and liabilities and estimated to be of the values of € _____ have proved to be unrealisable.

Amount paid into the Account prescribed under section 623(1) of the Companies Act 2014 in respect of:

unclaimed dividends payable to creditors in the winding up € _____

other unclaimed distributions in the winding up € _____

other unclaimed balances € _____

Nature of Proceedings

note four

Liquidator's final statement of account

Statement showing how the winding up has been conducted and the property of the company has been disposed of

		Payments
	€	€
Costs of solicitor to Liquidator		
Other law costs		
Liquidator's remuneration		
% on € realised		
% on € distributed		
By whom fixed		
Auctioneers and valuers charges		
Cost of possession and maintenance of estate		
Cost of notices in Iris Oifigiúil and newspapers		
Incidental outlay		
Total cost and charges		
Debenture holders		
Payment of €		
Per € debenture		
Payment of €		
Per € debenture		
Creditors		
Preferential		
Unsecured		
Dividend(s) of cent per €		
On €		
(The estimate of amount expected to rank for dividend was €)		
Return to contributories		
cent per € share		
cent per € share		
note four	Balance	

Liquidator's remarks (if any)

Certification

note five

I hereby certify that the particulars contained in this form are correct and have been given in accordance with the Notes on Completion of Form E5.

Signature

☐ Liquidator

Name *in block letters or typescript*

Date

☐ Liquidator

Date

NOTES ON COMPLETION OF FORM E5

These notes should be read in conjunction with the relevant legislation.

General This form must be completed correctly, in full and in accordance with the following notes. Every section of the form must be completed. Where the space provided on Form E5 is considered inadequate, the information should be presented on a continuation sheet in the same format as the relevant section in the form. The use of a continuation sheet must be so indicated in the relevant section and also noted on the relevant continuation sheet.

note one Tick the relevant box(es).

note two Include details of any person(s) referenced under the disclosure requirement of section 650 Companies Act 2014

note three This section must be completed by the person who is presenting Form E5 to the CRO. This may be either the applicant or a person on his/her behalf.

note four The balance should be a nil balance. If funds were not distributed the unrealisable assets section should be completed.

note five This form **must** be certified by the liquidator of the company or by each liquidator if more than one is appointed.

Further information

CRO address When you have completed and signed the form, please file with the CRO. The Public Office is at Bloom House, Gloucester Place Lower, Dublin 1.

If submitting by post, please send with the prescribed fee to the Registrar of Companies at

The Companies Registration Office, O'Brien Road, Carlow, R93 E920

DX number: 271004 DX Exchange: Carlow 2.

Payment If paying by cheque, postal order or bank draft, please make the fee payable to the Companies Registration Office. Cheques or bank drafts must be drawn on a bank in the Republic of Ireland.

FURTHER INFORMATION ON THE COMPLETION OF FORM E5, INCLUDING THE PRESCRIBED FEE, IS AVAILABLE FROM WWW.CRO.IE OR BY EMAIL AT INFO@CRO.IE

Appendix 5

Irish Congress of Trade Unions (ICTU)

Minority Report

ICTU MINORITY REPORT: Review of existing legislative provisions regarding the provision of information to employees specifically and creditors generally

INTRODUCTION

(a) The following constitutes the "Minority Report" of ICTU, given that it has not been possible to make substantial progress on the proposals listed below which generated most of the agenda of Workstream 1 and the consequent deliberations of the CLRG Insolvency Sub Committee.(for the original Congress submission of October 2020, please link to the ICTU website as follows:

https://www.ictu.ie/publications/fulllist/ictu-proposals-for-protection-for-employees-in-ins/

(b) Notwithstanding that I want to acknowledge the work of the committee, in particular the sub-committee chair and the CLRG chair as well as the secretariat in the many meetings over which the following was discussed

(c) In this connection it is important to recognise that the position of workers is always adversely affected in an insolvent liquidation and their rights, such as they currently are, and their interests, are sometimes not always respected. It is also important to also bear in mind that the 2016 Duffy/Cahill and 2017 parallel CLRG reports which propose measures to address protections for workers (and unsecured creditors) remain to be implemented. The responsibility for that state of affairs lies elsewhere and certainly not with the CLRG or Duffy/Cahill and this minority report by ICTU is formulated not only to assist in enhancing the protections for employees in insolvent liquidations but to highlight the failure to date to implement the two outstanding reports cited above.

(d) The approach taken by this paper is to answer the question posed with regard to the adequacy of existing protections for employees in insolvent liquidations, recognising also that under section 224 of the Companies Act 2014 there is a particular duty to have regard to the interests of employees. Our report is also directed to formalising what are said to be some existing practices.

(e) Finally, for ease of the reader, we have cited below the original under each relevant heading of the majority report the original Congress proposal discussed by the CLRG , followed by the enumerated reasons why ICTU dissents or agrees.

(A) RECOMMENDATIONS ON WHICH ICTU DISSENTS

5.1. S 571- Petition for winding up and appointment of provisional liquidator and the powers of the court (S572 and S573 also discussed)

ICTU Proposal

Amend S 571 as follows:

The court shall not give a hearing to a winding up petition unless:

(i) Prima facie case for winding up has been established to the satisfaction of the court

(ii) Employee creditors have been put on notice of such a petition and have the opportunity to be heard by the court in respect of such a petition

(iii) The court has received full details with regard to the employees and their rights, entitlements and interests including any enhanced redundancy terms.

While a number of arguments have been advanced against our proposal in this regard, we would like the following to be considered:

(a) If, as is asserted, employees are generally made aware in advance of an application to wind up by a debtor applicant ,there should be no difficulty whatsoever in formalising the practice into an obligation in law which is clearly, on the basis of above assertion, capable of being complied with.

(b) With regard to the current requirement to give notice in two national newspapers and Iris Oifigiúil, we have argued that there is an air of complete unreality in expecting workers and especially, vulnerable low paid workers, to be avid readers of Iris Oifigiúil in a society where ,young people in particular, get their news from a multiplicity of alternative sources on social media rather than national dailies. However, while we appreciate the recommendation of the majority of the sub-committee to look at updating notice requirements, it doesn't go far enough and is no substitute for direct notice to employee creditors.

(c) A second argument has been advanced that employment law places obligations on employers regarding informing employees in a collective redundancy situation. In 2016 the Workplace Relations Commission awarded Clery's workers for the breach by the company of its obligations under EU law to consult at least 30 days in advance of termination by reason of redundancy. Some commentators noted an incompatibility between Irish insolvency law, practice and procedure and EU law in this respect

(d) While is accepted that creditor applicants may not have full details of all employees, it still does not necessarily mean that they are not in a positon to notify employees in general in such circumstances.

(e) In any event the ICTU proposal does not require claims to be determined or resolved if those terms are used in the sense of claims being satisfied Rather, it is by way of information to the

court .Further, even were there difficulty in determining all employee claims, this still does not negate the other parts of the Congress proposal dealing with the issue of notice and the right of attendance at the initial application, particularly when application is being made for the appointment of a Provisional Liquidator..(section 573 refers)

(f) In this connection the argument that employees have a right to be heard anyway falls down completely when it is acknowledged that application for appointment of a Provisional Liquidator is "ex parte" and that the right to attend arises after the appointment at the next stage and after the horse has bolted.

(g) Further, it has been admitted that liquidators sometimes put "major creditors" on notice of such applications, which means that substantial organisations can be put on notice, while such applications remain ex parte for employees, many of whom may have invested their life's work in the company-, all of whom depend on the company for their livelihood and all that goes with it.

(h) It is accepted that Provisional Liquidator applications are infrequent, but they are not by any means exceptional. For example, in 2020 alone it was reported that Provisional Liquidators were appointed at the rate of at least one a month for Laura Ashley, Debenhams, Spicers Ireland, Monsoon Acessorize, Caritas Home, St Monicas Home, Wirecard and Arcadia..

While they may often be in situations where assets need to be protected, equally they can be sometimes viewed as controversial, not least in the appointment of a Provisional Liquidator to Clery's in 2015.

The court can only go on what's before and if there is no contradictor present, the options for the court can be very narrow and the outcome for employees possibly more detrimental than it might otherwise be.

(i) If the real purpose is to protect assets, then any such application should be confined solely to assets and no order should be made regarding the termination of employment contracts which should rather be the subject of a separate application, which is what we understood one of the CLRG recommendations in its 2017 Report was intended to address.

(j) In summary the Congress proposal is not intended to undermine bona fide moves to protect assets against possible predators but rather to balance up the rights of workers and to give the court as much information about the employees as possible when considering applications.

5.2 S621- Preferential Payments in a Winding Up

ICTU Proposal

Amend S 621(2) (b) by the addition of a new sub, sub section as follows:

(h) Any award made by the Labour Court pursuant to the Industrial Relations Acts 1946-2015 with regard to entitlements in the employment contract whether express or implied by collective agreement or otherwise.

(a) The recommendation of the majority report is that because the matters concerned here are complex and not amenable to resolution without further detailed debate conducted in the employment law context, such consideration be referred to the relevant Division in the Department. While this is no doubt intended to be helpful it goes nowhere near enough nor does it convey the requisite sense of urgency required, particularly when there are apparently pressures on the Department which militate against it being given the priority status it deserves. This is particularly so given the assessment, for example of Deloitte as to the likely pace of insolvent liquidations commencing Q2. We are also mindful of the fact that recommendations of the Duffy/Cahill 2016 Report and the CLRG Report 2017 remain to be implemented 5 and 4 years on. It will no doubt be pointed out that this stands in stark contrast to the speed with which the Department has moved to a Public Consultation on the CLRG report on Rescue for Small Business

(b) The purpose of the Congress proposal is to provide for contractual entitlements express or implied by collective agreement or otherwise. An example already given is enhanced redundancy terms ,which , to be frank, has been at the core of a number of high profile liquidation disputes, the rationale for which rests on collective agreements and the benefits of which in enhanced redundancy terms are held by the workers to be implied in to their contracts of employment.

(c) Accordingly if there is some concern as to how this would be applied in practice it should be possible to circumscribe the application of the Congress amendment to specified benefits, including enhanced redundancy terms.

(d) Concern has also been expressed regarding the legal standing of Labour Court recommendations generally. The proposal should not disturb the existing voluntarist jurisdiction of the Labour Court under the Industrial Relations Act. Equally, it has no bearing on the Court's legal jurisdiction under statute. Rather ,what would come into play would be the fact that the terms agreed by the parties by virtue of the Recommendation would be expressed or implied into the individual employment contract and it is this which would trigger the preferential treatment.

(e) Finally, concern was expressed that importing mention of the Labour Court into the Companies Act would, in the broad sense, impact on its constitutionality.

However,

(i)The enactments of the Labour Court in its "legal" jurisdiction are already captured by S 621 (3). ("any other enactments")

(ii)S678 makes specific mention of the WRC (and impliedly the Labour Court) , in that case ,in providing there shall be no stay on proceedings before them.

5.4 S666/S667/S668 – Committee of Inspection

ICTU Proposal

Section 666(1) should be amended by the inclusion of a new sub section as follows:

(c) provided always that where a committee of inspection is appointed it shall include not less than one employee creditor member to represent employee creditors, should they so elect.

(a) While again the recommendation of the majority is undoubtedly intended to be helpful in providing for a general obligation to inform creditors in general of their rights to establish/participate in a committee if inspection , it does not go far enough and does not engage specifically with the position of employees who are often the most adversely affected.

(b) While it is argued that employees as creditors are entitled to be nominated and approved to sit on the Committee of Inspection , there is no express right for them to do so.

(c) Employees may not be aware (particularly if non-union) and having an express right will ensure their awareness and encourage involvement. In this connection it should be noted that the majority of private companies are non-union and SME's

(d) With regard to employee representation there are analogous provisions in employment law, for example with regard to consultation, with could provide templates for the fair representation of employees or employee groups.

(e) If , as has been argued, that there is no known difficulty in employee creditors sitting on the committee, then there shouldn't be a problem to formalise this, particularly in the context of examining the rights and protections of workers in a liquidation setting. A seat as of right, should workers so decide, should assist in enhancing protection.

(f) Employees having a seat of right on the Committee of Inspection does not in any way dilute the flow of information generally ,any more or less than any other aspect of representative democracy in the workplace . Nor should it dilute in any way the obligations of liquidators or others with a responsibility to inform.

(g) Finally, this proposal is not intended to nor should disturb normal bilateral relationships between liquidators and workers organised by trade unions or excepted bodies recognised in law.

5.4 S819 – Declaration by court restricting director of insolvent company being appointed or acting as director

ICTU Proposal:

Amend section 819 (1) as follows (underlined)

(1) On the application of a person referred to in section 820(1) and subject to subsection (2), the court shall declare that a person who was director of an insolvent company shall not, for a period of 5 years, or such further period as the court decides as just and equitable in the circumstances….

Amend section 819 (2) (a) as follows (underlined)

The court shall make a declaration under subsection (1) unless it is satisfied that-

(a) The person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company.

(b) And the person concerned has fully complied with their obligations with regard to the rights and interests of employees generally, under employment law, their contracts of employment , collective agreements , this Act or generally.

(a) With regard to the first limb of the ICTU proposal , the majority declined to make a recommendation because of concern as to unintended consequences on the efficacy of the legislation

(b) We acknowledge that concern and respectfully disagree on the grounds that it is clear that this would apply in only the more egregious cases and that the court can be relied upon to use its discretion in penalising and or dissuading such corporate misbehaviour.

(c) The Congress further proposal under the second limb of this proposal is to amend S819 (2) to include in the grounds for restriction, consideration of a director's full compliance "with their obligations with regard to the rights and interests of employees generally, under employment law, their contract of employment, collective agreements, this Act or generally".

(d) The thrust of this is to assist in ensuring that directors comply with their obligations in law towards employees , including their obligations in S 224 of the Act of 2014 to have regard to the interests of employees (as noted by the majority report)

(e) However , while the majority report recognises that the obligations of directors under S224 is part of the overall consideration of directors' general compliance , there is no express reference in the Act ,despite the terms of section 224 or other obligations in law towards employees.

(f) We respectfully believe that directors' duties in this regard require to be underpinned further in line with our proposal .While we acknowledge the undoubted bona fides of ODCE in taking treatment of employees into account in decision making on the question of restriction, more express reference such as in our proposal would not only assist workers but would support their work in this regard.

(B) RECOMMENDATIONS ON WHICH ICTU DOES NOT DISSENT LARGELY OR AT ALL

S 627 – Powers of the Liquidator

(a) Our proposal under this heading is designed to ensure absolute clarity that the obligation of the liquidator to defend any action legal proceeding in the name and on behalf of the company includes any referrals and complaints to the WRC/Labour Court. This is particularly so since S 678 provides there shall be no stay against proceedings in the WRC.

(b) We note that on balance the committee is not opposed to seeking further clarification.

S682 – Liquidator to report on conduct of directors

(a) Our proposal under this heading merely sought to amplify the 2017 recommendation to include compliance with S244 and S225, including any amendment thereto under these discussions (see our proposals in this regard). With regard to the statutory vehicle, it just needs to be demonstrated that even if enacted by SI that it carries the same legislative force as if by primary legislation.

(b) One observation on the earlier draft of a suggested compliance form: it should not only be about non-compliance, but should also seek explanation of how and where company/directors complied with their obligations to the interests of their employees under S224.

S 593 Statement of the company's affairs

(a) We propose in addition that any revised form for CVL or otherwise should provide information re employees, remuneration, claims, unpaid awards and any unresolved disputes/proceedings.

(b) We also agree that the statement of affairs should be sworn by affidavit and be prepared under a duty of utmost good faith by the directors of the company.

Michael Halpenny, ICTU Nominee to CLRG , March 2021

COMPANY LAW REVIEW GROUP
an grúpa athbhreithnithe dlí cuideachtaí

COMPANY LAW REVIEW GROUP

REPORT ON COMPANY LAW ISSUES ARISING UNDER DIRECTIVE (EU) 2017/828 OF 17 MAY 2017 (SRD II), CENTRAL SECURITIES DEPOSITORIES REGULATION (EU) 909/2014 (CSDR) AND THE COMPANIES ACT 2014

DECEMBER 2021

Contents

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

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

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

21 December 2021

Dear Tánaiste,

Dear Minister,

I am pleased to present to you a Report of the Company Law Review Group (**CLRG**) on certain company law issues arising for public companies further to the transposition of Directive (EU) 2017/828 of 17 May 2017 amending the Shareholders Rights Directive (**SRD II**) and the implementation Central Securities Depositories Regulation (EU) 909/2014 (**CSDR**). In addition, certain issues affecting public companies under the Companies Act are considered in this report.

The successful migration of Irish public companies to the intermediated system of share holding and dealing in March 2021 has left a number of issues to be addressed, some of which are alluded to in the CLRG's Annual Report for 2020. In that Report we noted that the CLRG's consideration of issues under CSDR and SRD II continued. This report should therefore be considered to be reflective of that continuance. This Report recommends a number of discrete amendments to the Companies Act, which will facilitate and assist the implementation of CSDR for Irish companies as well as addressing certain issues arising under SRD II. Some of these amendments necessarily address provisions in the companies Act primarily within the policy responsibility of the Minister for Finance.

I would like to extend my sincere thanks to the members of the CLRG's Public Company Committee for their engagement and input in examining these issues, including in particular the members of the Committee from outside the Review Group who gave generously of their time and expertise.

I would also like to thank the Department of Enterprise, Trade and Employment for their support, in particular, Secretary to the Group, Mr Stephen Walsh.

Yours sincerely,

_____

Paul Egan SC
Chairperson
Company Law Review Group

1. Introduction to the Report

1.1 The Company Law Review Group

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

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

1.2 The Role of the CLRG

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

1.3 Policy Development

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

1.4 Contact information

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

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

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

Email: stephen.walsh@enterprise.gov.ie

2. The Company Law Review Group Membership

2.1 Membership of the Company Law Review Group

The membership of the Company Law Review Group at [date] is set out in this table.

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

Ciara O'Leary	Irish Funds Industry Association CLG (Maples and Calder LLP)
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace LLP)
Maureen O'Sullivan	Ministerial Nominee (Registrar of Companies)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Maura Quinn	The Institute of Directors in Ireland
Eadaoin Rock	Central Bank of Ireland
Doug Smith	Restructuring and Insolvency Ireland (Eugene F Collins)
Tracey Sullivan	Consultative Committee of Accountancy Bodies – Ireland (CCAB-I)

2.2 Membership of the CLRG Public Company Committee

The membership of the Review Group's Public Company Committee at [date] is set out in this table.

Paul Egan SC	Chairperson
Andy Callow	Computershare LTD
Barry Conway	CLRG member
Neil Colgan	CRH PLC
Marie Daly	CLRG member
James Finn	CLRG member
David Hegarty	Office of the Director of Corporate Enforcement
Tanya Holly	CLRG member
Alan Kelly	Revenue Commissioners
Gillian Leeson	CLRG member
Vincent Madigan	CLRG member
Suzanne McMenamin	Matheson; Alternate of Emma Doherty
Dara McNulty	Central Bank of Ireland
Joe Molony	Computershare LTD

Therese Moore	Euronext Dublin; Alternate of Gillian Leeson
Aidan O'Caroll	J&E Davy
Pat O'Donoghue	Link Registrars LTD
Conor O'Mahony	Office of the Director of Corporate Enforcement
Fiachra Quinlan	Department of Enterprise Trade and Employment
Maura Quinn	CLRG member
Niels Watzeels	Euroclear Bank SA / NV

3. The Work Programme

3.1 Introduction to the Work Programme

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, in consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items of work to the programme as matters arise. The work for this report commenced under the work programme which began in June 2018 and ran until the end of May 2020. The work programme for June 2020 to May 2022 was adopted by the Review Group at its meeting on 24 June 2020. The statutory mandate of the CLRG to monitor, report and advise the Minister on matters concerning company law remains current at all times.

3.2 Company Law Review Group Work Programme 2020-2022

The Review Group's Work Programme during the currency of which this Report was prepared included the mandate to "[e]xamine and make recommendations on whether it will be necessary or desirable to amend company law in line with recent case law and submissions received regarding the Companies Act 2014." This Report is delivered in fulfilment of the Review Group's mandate under this heading.

3.3 Specific questions referred to the Review Group

On 19 March 2021, the Department referred three specific issues to the Review Group:

1. What recommendations can the CLRG make around defining the term 'shareholder' in Irish company law bearing in mind:
    - The requirement under CSDR that all newly issued securities of quoted companies admitted to trading in the EU hold all shares through a CSD from 1 January 2023 and all existing transferrable securities quoted companies admitted to trading in the EU must be represented in book entry from 1 January 2025;
    - An anticipated proposal from the Commission for a harmonised definition of shareholder in mid-2023;
    - In light of the context outlined above, particularly where UK and Ireland sought and secured clarity in the recital that *"the Directive does not affect the rights of beneficial owners who are not shareholders under national law"*.
2. If the CLRG concludes that it might be better to await the outcome of the European Commission's examination of the issue, what if any amendments to the Companies Act would it recommend in order to facilitate the exercise of rights by beneficial holders or by the participants in the Euroclear SA/NV intermediated shareholding structure, while minimising the impact on other areas of the Companies Act?
3. What are the CLRG's views on the draft proposed amendments inserting a new section 1110Q drafted by the migration project lawyers group and the potential wider implications of such amendments for the Companies Act, which generally operates on the basis of registered member?

3.4 Decision-making process of the Company Law Review Group

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

3.5 Committees of the Company Law Review Group

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

In view of the interests of a wider group of stakeholders in the issues considered in this report, invitations to join the Committee were extended to:

- Euroclear Bank SA/NV, the central securities depository for the Irish equity market;
- Link Registrars Limited and Computershare Ltd, the registrars to most of the Irish registered public companies with equity securities listed in Dublin or London;
- the representative of the stockbroking firms on the Market Implementation Group, which inputted into the project to migrate the Irish equity market to the Euroclear CSD system;
- the representatives of listed issuers on the Market Implementation Group.

The Committee met on 6 occasions during 2021.

4. Introduction

4.1 Defined terms

In this Report:

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

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

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

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

"**Committee**" means the Review Group's Public Company Committee, the membership of which is set out in Section 2.2 of this Report;

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

"**CSD**" means a central securities depository;

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

"**Department**" or "**DETE**" means the Department of Enterprise, Trade and Employment;

"**MiFID II**" means Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments;

"**MTF**" means a multilateral trading facility;

"**OTF**" means an organised trading facility;

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

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

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

4.2 Issues considered in this report

The issues considered in this report fall under three headings:

4.2.1 SRD II

The SRD issues considered are these:

- the definition of "shareholder";
- possible amendments to company law to deal with issues arising from the transposition of SRD II; and
- a submission by the public companies' lawyers' drafting group, (solicitors advising issuers in relation to the migration of PLCs to the Euroclear Bank CSD system) to allow beneficial owners to exercise certain Companies Act rights of members.

4.2.2 CSDR

The CSDR issues considered are these:

- the implementation date for existing issuers under article 3 of CSDR;
- the methodology of amending the implementation date.

4.2.3 Companies Act

The Companies Act issues considered are these:

- the computation of time for the purposes of designating the record date for voting and the latest time for delivery of forms of proxy before a general meeting;
- the appropriate record date for adjourned meetings;
- the prescribed form of proxy for Irish PLCs admitted to USA securities markets;
- the "special majority" in a scheme of arrangement among PLC shareholders.

4.3 Context

The law specifically applying to PLCs is found in Parts 17 and 23 of the Companies Act[1] and in EU Regulations such as the Market Abuse Regulation (EU) 596/2014 and Prospectus Regulation (EU) 2017/1129. As a result, this means that the law is at the intersection of separate policy and enforcement regimes. The law applicable to governance of a PLC is within the policy remit of the Minister for Enterprise Trade and Employment and its primary enforcement agencies are the Director of Corporate Enforcement and Registrar of Companies. The law relating to the securities markets activity of PLCs, such as the issue and trading of shares and other securities, is within the policy remit of the Minister for Finance, with the Central Bank of Ireland as the primary enforcement agency. However, significant areas of relevant law – authority to issue securities, the Ministerial power to disapply the requirement for share transfers in writing – remain in parts of the Companies Act within the competence of the Minister for Enterprise Trade and Employment.

The Review Group notes that there is a DETE exercise under way in order to map out the respective responsibilities of the Ministers and enforcement agencies in these related and intersecting areas of law.

[1] In addition, the law affecting PLCs operating as collective investment schemes organized as authorized investment companies is set out in Part 24 of the Companies Act and in European Union (Undertakings for Collective Investment in Transferable Securities) Regulations (S.I. No. 352 of 2011).

5. Company law issues arising from the implementation of Directive (EU) 2017/828 of 17 May 2017 on shareholder rights (SRD II)

5.1 Introduction

5.1.1 Transposition of SRD II

SRD II came into full effect on 3 September 2020, having been transposed by the European Union (Shareholders' Rights) Regulations 2020 (S.I. No. 81/2020), which inserted four new chapters into Part 17 of the Companies Act:

- Chapter 8A: Rights of Shareholders

  This covers the identification of underlying shareholders and information flows between underlying shareholders and companies

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

  This introduced new transparency obligations for these sectors with the objective of encouraging shareholder engagement and the development of long-term investment strategies;

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

  This introduced requirements for shareholder approval of directors' remuneration and related party transactions

- Chapter 8D: Offences and Penalties.

SRD and SRD II aim to enhance the rights of shareholders by inter alia imposing certain minimum standards on the exercise of rights attaching to shares in companies. The aim is to ensure that an investor is empowered to exercise these rights by placing obligations on intermediaries to facilitate the exercise of these rights.

5.1.2 Definition of "Shareholder"

The definition of 'shareholder' under SRD and SRD II is "the natural or legal person that is recognised as shareholder under the applicable law". (The definition of 'shareholder' in SRD was not amended by SRD II.) The question has arisen as to whether "shareholder" should mean registered member or beneficial owner in national law.

The term "member" was used in Ireland's transposition of SRD in 2009[2] whereas the 2020 Regulations use the term 'shareholder'. Although the term is not defined in the 2020 Regulations or in the Companies Act, the expression "shareholder" and "member" are, in companies with a share capital, used interchangeably. Whereas there is no definition of "shareholder" in the Companies Act, there is a definition of "member" in Part 4, Chapter 5 of the Act. The meaning of 'shareholder' in the transposition of SRD II (i.e., registered member or beneficial owner) determines the extent to which SRD II rights apply for holders of shares/securities through the chain of intermediation in the market and the related compliance burden on market intermediaries.

[2] S.I. No. 316/2009 - Shareholders' Rights (Directive 2007/36/EC) Regulations 2009.

The UK-based CREST depositary system allows for direct holding of shares by beneficial owners. The Euroclear Bank (EB) depositary system in Belgium to which the Irish market migrated on 15 March 2021, does not allow for direct holding of shares.

Euroclear Bank's position is that SRD II as transposed in Irish law refers to registered member (as defined under the Companies Act). It however provides shareholder (i.e., beneficial holder) facilitation as part of its service offering to issuers, but not pursuant to, or at the level of, the obligations under SRD II i.e., Euroclear Bank SA/NV provides SRD II shareholder facilitation rights only as far as the Euroclear nominee and a lower level of facilitation to issuers / beneficial owners as part of their service offering.

5.1.3 EU context and background

An objective of SRD II is to facilitate long-term shareholder engagement. It aims to ensure that the investor is empowered to exercise rights by placing obligations on intermediaries to facilitate the exercise of these rights. As noted, this could be taken to imply engagement with the beneficial owner. However, as part of the negotiations on SRD II in 2014-15 at Council level, the UK with support from Ireland, sought and secured clarity in the recital of the Directive that "shareholder" was a term to be defined in national law. Accordingly, Recital (13) in SRD II states:

> "This Directive is without prejudice to national law regulating the holding and ownership of securities and arrangements maintaining the integrity of securities and does not affect the beneficial owners or other persons who are not shareholders under the applicable national law."

While the course of the negotiations of the text of SRD II and the text of Recital (13) do not change the legal effects of SRD II, it does provide a clear basis for a Member State approach to transposition that defines shareholder as registered member. This was the approach Ireland took in transposing SRD I and supports the definition of "shareholder" as "member".

Following the report and recommendations of the High-Level Forum on Capital Markets Union on 10 June 2020 - in which the Commission (DG FISMA) was heavily involved - a proposal from the Commission for a harmonised definition of shareholder can be anticipated mid-2023. The timing for such a proposal is clearly aligned with art. 3(f) of SRD II that Member States should inform the Commission and the Commission should report by June 2023 on "difficulties in practical application and enforcement while taking into account relevant market developments at Union and international level". This will be a centrally relevant process for Ireland to engage with and take account of as part of assessing SRD II and possible further harmonisation.

5.1.4 Law Commission's Scoping Paper on intermediated securities

This Scoping Paper, published by the Law Commission of England and Wales in November 2020,[3] suggests that while complex, the intermediated system of share holding and settlement provides many benefits, including efficiency and convenience, to investors. However, the Paper also acknowledges that the system has been the subject of criticism over issues of corporate governance and transparency. In particular, the Law Commission identifies two broad themes encompassing issues with intermediated securities:

- The effect on investors' rights and corporate governance
- Issues which affect legal certainty.

[3] *Intermediated Securities: who owns your shares? A Scoping Paper.* Law Commission, 11 November 2020.

The Law Commission's preferred approach would be to retain the current system, with further work into certain targeted changes which could alleviate some of the problems caused by intermediation while retaining its benefits. It sees this as a proportionate response to the issues identified.

This paper has aided the Committee's consideration of issues arising from the migration of the Irish equity market to the Euroclear CSD model.

5.1.5 Questions remitted to CLRG

In the light of the above, the Department referred three questions to the Review Group, which in summary are these:

1. What recommendations can the CLRG make around defining the term 'shareholder' in Irish company law?
2. If the CLRG concludes that it might be better to await the outcome of the European Commission's examination of the issue, what if any amendments to the Companies Act would it recommend in the interim?
3. What are the CLRG's views on amending the Companies Act by giving recognition to beneficial owners in particular contexts?

These questions are analysed in the following sections.

5.2 Should the term "shareholder" be defined?

5.2.1 Department's question

What recommendations can the CLRG make around defining the term 'shareholder' in Irish company law bearing in mind:

- the requirement under CSDR that all newly issued securities of quoted companies admitted to trading in the EU hold all shares through a CSD from 1 January 2023 and all existing transferrable securities quoted companies admitted to trading in the EU must be represented in book entry format from 1 January 2025;
- an anticipated proposal from the Commission for a harmonised definition of shareholder in mid-2023;
- in light of the context outlined above, particularly where UK and Ireland sought and secured clarity in the recital that "the Directive does not affect the rights of beneficial owners who are not shareholders under national law".

5.2.2 Committee analysis

The Committee noted its analysis of this issue in the Review Group's Report of 25 June 2020 (set out in Annex 2 of the 2020 Annual Report). The Committee noted in particular that the lack of uniformity in the definition of "shareholder" as recognised in the Final Report of the High-Level Forum on the Capital Markets Union published in June 2020,[4] led the Forum to recommend a change to the law:

4 https://ec.europa.eu/info/sites/default/files/business_economy_euro/growth_and_investment/documents/200610-cmu-high-level-forum-final-report_en.pdf

> "The Commission is invited to … put forward a proposal for a Shareholder Rights Regulation to provide a harmonised definition of a "shareholder' at EU level in order to improve the conditions for shareholder engagement."[5]

It justified this recommendation as follows:

> "'SRD2 relies on Member States' definitions of "shareholder", meaning that the entity entitled to receive and exercise the rights associated with a security will depend on the country of issuance (as defined in national laws). The lack of an EU definition of "shareholder" makes it more complex, risky and thus costly for issuers and intermediaries to identify who has to be informed and who is entitled to exercise the rights associated with the ownership of a security. As a result, shareholders continue to face significant difficulties in exercising their rights, especially in a cross-border context, making it a strong case for an EU harmonised definition of shareholder.'[6]

The Committee concluded that a change in the definition of "shareholder" in the short term under the Companies Act was not justified. The focus of the EU definition is likely to be confined to the elements of SRD II where the traditional interchangeability of the terms "member" and "shareholder" do not deliver the degree of transparency of beneficial ownership that might have been expected from SRD II. It would be more productive to await the outcome of the EU exercise and instead to focus on any discrete issues that ought to be addressed immediately.

5.2.3 Recommendation

The Review Group does not recommend the insertion in the Companies Act of a definition of "shareholder", pending the review at EU level.

5.3 What, if any, amendments to the Companies Act are merited in the interim?

5.3.1 Department's question

If the CLRG concludes that it might be better to await the outcome of the European Commission's examination of the issue, what if any amendments to the Companies Act would it recommend in order to facilitate the exercise of rights by beneficial holders or by the participants in the Euroclear SA/NV intermediated shareholding structure, while minimising the impact on other areas of the Companies Act?

5.3.2 Committee analysis

The Committee analysed the rights of shareholders under these headings:

- rights to information;
- rights pursuant to SRD and SRD II;
- rights pursuant to the Companies Act;

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5 https://ec.europa.eu/info/sites/default/files/business_economy_euro/growth_and_investment/documents/200610-cmu-high-level-forum-final-report_en.pdf, p 79.

6 https://ec.europa.eu/info/sites/default/files/business_economy_euro/growth_and_investment/documents/200610-cmu-high-level-forum-final-report_en.pdf, p 79.

- rights to make applications to court pursuant to the Companies Act.

The appendix to the above-mentioned Report of 25 June 2020 went some way to examine these and Appendix 2 to that Report identified in particular rights arising under the Companies Act. There was a general recognition that these rights continue to be available, notwithstanding the migration to the CSD system of share holding and settlement. For Companies Act rights, it does mean that the beneficial owner seeking to exercise the rights must have its shares transferred into its name and be entered as a member of the company. Whilst this is undeniably a burden on the shareholder, it can be characterised as an extra procedural step in what in many cases will involve many other procedural steps. The Committee was cognisant of the reality that any addition to the tasks to be undertaken by Euroclear Bank SA / NV would be very likely to increase costs.

5.3.3 Shareholder identification

The Committee did however focus on one area which the transposition of SRD has not improved – that of shareholder identification. It is in the interests of quoted companies, their shareholders and general legal compliance and transparency that there be full disclosure of the beneficial owners of their shares. The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019[7] transposes the Fourth Money Laundering Directive,[8] which *inter alia* requires companies to obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held.[9] This information must also be placed in a central register, which is operated by the Registrar of Companies.[10] The 2019 Regulations provide an exemption for listed companies subject to standards which ensure adequate transparency of ownership information.[11] That presupposes that those standards do ensure that transparency.

The combined effect of Chapter 4 of Part 17 of the Companies Act, the Transparency (Directive 2004/109/EC) Regulations 2007[12] and Part 2 of the Central Bank (Investment Market Conduct) Rules 2019[13] requires the beneficial owners of voting shares in all PLCs to make known the extent of their interest in those shares to the PLC.

Where a PLC wishes to ascertain those with an interest in its voting shares, it has three options:

- It can initiate an investigation using provisions in its constitution. Typically, these will enable the company to serve a notice on a registered shareholder, seeking information as to the person for whom the registered member holds the shares, with the right of the company to serve a notice on persons identified. Where the registered member or person or persons identified fails to respond within a period of time, typically 7 to 14 days, then the rights attached to those shares are restricted, with their voting and dividend rights suspended.

[7] S.I. No. 366/2019110/2019.

[8] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L141, 5 June 2015, pp 73–117.

[9] Directive (EU) 2015/849, art 30(1).

[10] Directive (EU) 2015/849, art 30(3).

[11] S.I. No. 110/2019, reg 4(2), transposing Directive (EU) 2015/849, art 3(6)(a)(i).

[12] S.I. No. 277/2007

[13] S.I. No. 366/2019.

- It can initiate an investigation under s 1062 of the Companies Act into the ownership of its voting shares.[14] The PLC must do so if required to do so by holders of 10 per cent or more of those shares.[15] The PLC initiates the procedure by serving a notice on any person that 'the PLC knows or has reasonable cause to believe to be, or at any time during the 3 years immediately preceding the date on which the notice is issued, to have been, interested in [the PLC's voting] shares' to confirm whether that person has or had such an interest.[16] That notice may require the person to provide further information, including the interests of other persons in the shares.[17] No time limit is specified for production of the information: it must be furnished 'within such reasonable time as may be specified in the notice'.[18]

  Where a person does not provide the information, the company can apply to court for an order freezing all rights on the shares: in such event, any transfer of the shares will be void, no voting rights will be exercisable, no distributions can be paid or made and no new shares can be issued in respect of the frozen shares, whether by bonus or right of pre-emption.[19] A person that has failed to provide the information is also liable to a fine of up to €5,000 and imprisonment for up to six months.[20]

- In the case of a PLC admitted to trading on a regulated market (a "traded PLC") it can use the procedure in SRD II, as transposed. It is here however that the limitations of the law arise.

5.3.4 SRD II's provisions as to shareholder identification

SRD II in its recital (4) notes that shares of listed companies are held through complex chains of intermediaries. It states that "Companies are often unable to identify their shareholders. The identification of shareholders is a prerequisite to direct communication between the shareholders and the company and therefore essential to facilitating the exercise of shareholder rights and shareholder engagement … Listed companies should therefore have the right to identify their shareholders in order to be able to communicate with them directly. Intermediaries should be required, upon the request of the company, to communicate to the company the information regarding shareholder identity."

The mechanism for companies to ascertain the identity of beneficial owners is set out in Article 3a of SRD, (inserted by SRD II) and which is now set out in section 1110B of the Companies Act, inserted by S.I. No. 81/2020, the full text of which is set out in Appendix 1. Commission Implementing Regulation (EU) 2018/1212[21] sets out minimum requirements as regards the format of the request to disclose shareholder identity and of the response to such a request.[22] It also sets out deadlines to be complied with by issuers and intermediaries in shareholder identification processes. Article 9 of

[14] Companies Act 2014, s 1062.

[15] Companies Act 2014, s 1064.

[16] Companies Act 2014, s 1062(1).

[17] Companies Act 2014, s 1062(2), (3).

[18] Companies Act 2014, s 1062(4).

[19] Companies Act 2014, ss 768, 1066(1).

[20] Companies Act 2014, s 1066(3); Fines Act 2010, s 3.

[21] Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights, OJ L223, 4 September 2018, pp 1–18. See para [7.41].

[22] Regulation (EU) 2018/1212, art 3, Annex.

that Regulation is set out in Appendix 2. The information to be provided should be as set out in the Annex to that Commission Regulation, included in this Report as Appendix 3.

These SRD and related provisions are ineffective as the sole legal obligation of an intermediary is to identify the "shareholder" which in the case of shares held in the Euroclear Bank CSD system is its nominee, Euroclear Nominees Ltd. As described in the Review Group's report of 25 June 2020, Euroclear Bank's service description does provide for the provision of information as intended to be provided by SRD II but on the basis that it is being provided by contract rather than in compliance with a legal obligation.

> "[F]ollowing the Shareholders Rights Directive II (SRD II) process - pursuant to existing Irish corporate law and the implementation of SRD II into Irish law, Euroclear Bank's Nominee, as the person recorded in the register of members, is the 'shareholder' for the purposes of SRD II- in-scope Irish corporate securities held by Euroclear Bank Participants. However, we offer the service to issuers of Irish corporate securities, upon their request, to disclose the underlying Euroclear Bank Participants following the SRD II shareholder identification processing principles."[23]

Whilst the SRD legal architecture – the 2020 Regulations and Commission Regulation (EU) 2018/1212 – provide the basis for swift disclosure of beneficial ownership, their provisions (in particular those in Regulation (EU) 2018/1212) presume and rely upon all persons in an ownership chain having records and IT systems that are compatible with what is required.

The Committee concluded, pending further developments at EU level that what was desirable in the short term was clarity that information sought by an issuer or its agent under the Companies Act's provisions should, as a matter of law, be made available within a defined timetable, which is not provided for at present. The Committee did not decide on what a suitable timetable should be but a period of two working days was mentioned as being reasonable and practicable.

5.3.5 Recommendation

The Review Group recommends that section 1062 of the Companies Act be amended so as:

- **to require the recipient of a s 1062 notice to provide the information within a reasonable time, not to exceed a specified time, which may be set at a number of business days;**
- **to clarify that any person in a chain of ownership must respond to any request for s 1062 information from (i) the issuer (ii) any agent of the issuer and (iii) any other person in the chain.**

5.4 What are the CLRG's views on amending the Companies Act by giving recognition to beneficial owners in particular contexts?

5.4.1 Background to Department's question

The public companies' lawyers drafting group, composed of solicitors advising issuers in relation to the migration of PLCs to the Euroclear Bank CSD system, made a submission seeking the insertion of a new section in the Companies Act, a draft of which, with notes, is set out in Appendix 4.

The essence of the proposed insertion is as follows:

(1) Rights of shareholders could be exercised by a holder of an ownership interest in shares, intermediated by a CSD, where the holder swears an affidavit to the court to the effect that:

[23] CLRG Report of 25 June 2020, quoting from Euroclear Bank SA/NV service description, version 3.

- the holder/holders is/are and will remain the exclusive beneficiary/beneficiaries of the ownership interest in shares of the issuer and the shares are not subject to any encumbrance that prevents the owner from exercising such right;
- any stamp duty payable on the acquisition of such ownership interest by the holder has been discharged in full; and
- where applicable, such ownership interest was notified to the issuer within the required timeframe under the Companies Act 2014.

(2) For a number of substantive rights exercisable against the company which cannot be accommodated within the Euroclear Bank CSD system such rights could be exercised by a holder of an ownership interest in shares, intermediated by a CSD, where the holder swears an affidavit to the court in the same terms as in (1).

(3) For other primarily information related rights exercisable against the company, such as the right to receive documents or attend (but not vote) at general meetings etc., such rights could be exercised by a holder of an ownership interest in shares, intermediated by a CSD, where the holder notifies the relevant company of its ownership interest in shares of the issuer accompanied by such other evidence as the directors may reasonably require to confirm ownership of the relevant shares.

5.4.2 Department's question

What are the CLRG's views on the draft proposed amendments inserting a new section 1110Q drafted by the migration project lawyers group and the potential wider implications of such amendments for the Companies Act, which generally operates on the basis of registered member?

5.4.3 Committee analysis

The Committee noted that there were several aspects to what was proposed.

As to meetings, it is within the competence of PLCs to decide who can attend. The CSD system operates in practice so that beneficial owners of shares can be appointed proxy by Euroclear Bank to attend and vote at general meetings in respect of their shares. Rights of shareholders under SRD1 relevant to general meetings are similarly facilitated by Euroclear Bank. Participants in the CSD system make arrangements with their clients (i.e., the beneficial owners) to facilitate attendance at general meetings. The Committee did not come to any conclusions at this stage and noted that market practice was evolving.

The Committee also considered that the rights arising under the Companies Act to bring matters to Court which require that a shareholder be a member are, in the main, concerned with serious matters of concern and the extra step of requiring that the owner of the shares be registered as member would be just one extra procedural step in what was certain to be a considerably more complex process.

5.4.4 Recommendation

The Review Group decided to keep the matter under consideration but for now does not recommend the inclusion of a section as suggested by the lawyers' group.

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

6.1 Background

The Review Group is cognisant of the fact that much of the law concerning securities law matters in the Companies Act is within the competence of the Minister for Finance whereas the Review Group reports and provides recommendations to the Minister for Enterprise Trade and Employment. It is therefore acknowledged that certain policy decisions in these securities law matters are primarily a matter for the Minister for Finance, although those policy decisions of course have consequences in areas of company law beyond those matters.

6.1.1 Shareholders in public companies

The 2019 Act was introduced in order to deal with the conjunction of Brexit, the consequent expiry of the authorisation of Euroclear UK and Ireland Ltd as operator of the CREST system, which operated under the 1996 Regulations and the provisions of CSDR as to settlement discipline. Under that Act, all Irish PLCs with shares admitted to the Dublin and London markets have migrated their shares that were previously held through the CREST system into the intermediated system of shareholding and settlement operated by Euroclear Bank SA / NV.

Although a majority, in most cases over 90% by value, of shares in those PLCs are held through the intermediated system, all PLCs continue to have significant numbers of shareholders holding their shares in certificated form, i.e., they are entered as a member in the PLC's register of members, and they hold certificates in respect of their shareholdings. The registrars who contributed to the Committee's deliberations estimated that there were up to 500,000 individual shareholders holding shares registered in their names in Irish publicly quoted companies.

6.1.2 Holders of listed and traded debt securities

Separate and distinct from the companies with listed shares are issuers with debt securities. A small number of issuers have debt securities admitted to the main market (Official List) of Euronext Dublin. However, the vast majority of debt securities listed in Dublin are admitted to the Global Exchange Market (GEM) of Euronext Dublin. GEM is an MTF but facilitates listing within the meaning of Consolidated Admissions and Reporting Directive 2001/34/EC (CARD) as transposed by the European Communities (Admissions to Listing and Miscellaneous Provisions) Regulations 2007[24] . This means that the debt securities on GEM are "listed" but it is not necessary for a prospectus to be prepared in respect of the admission; instead, the issuers must comply with the admission requirements laid down by Euronext Dublin for GEM.

Whilst GEM is a trading facility – an MTF – not all the debt securities admitted to GEM are in fact traded on any sense of the expression. They have been admitted to GEM so as to obtain the listing, which makes the debt securities eligible for purchase by particular investors whose investment criteria require that securities they acquire are "listed". Rather than being settled through CSDs such as Euroclear or Clearstream, they are in certificated form, with transactions being settled privately.

6.1.3 Dematerialisation

Article 3 of CSDR provides:

[24] Si No 286/2007.

"1. Without prejudice to paragraph 2, any issuer established in the Union that issues or has issued transferable securities which are admitted to trading or traded on trading venues, shall arrange for such securities to be represented in book-entry form as immobilisation or subsequent to a direct issuance in dematerialised form.

2. Where a transaction in transferable securities takes place on a trading venue the relevant securities shall be recorded in book-entry form in a CSD on or before the intended settlement date, unless they have already been so recorded.

Where transferable securities are transferred following a financial collateral arrangement as defined in point (a) of Article 2(1) of Directive 2002/47/EC, those securities shall be recorded in book-entry form in a CSD on or before the intended settlement date, unless they have already been so recorded."

Article 76(2) of CSDR provides that art.3(1) shall apply from 1 January 2023 to transferable securities issued after that date and from 1 January 2025 to all transferable securities.

By "book-entry form" is an electronic record of ownership such as an entry in an electronic register, without any further or other document. By "immobilisation" is meant "the act of concentrating the location of physical securities in a CSD in a way that enables subsequent transfers to be made by book entry".

6.1.4 Obligations imposed by CSDR

These provisions of CSDR therefore mean the following:

A On and from 1 January 2023, all new issues of securities – whether shares, debt securities or units in collective investment schemes – on a regulated market, MTF or OTF must be either:

(i) an issue of a physical document such as a global certificate to a CSD, with the securities comprised in it being subsequently represented in book-entry form with that CSD; or

(ii) an issue of the securities directly to the holder without any document.

B On and from 1 January 2025, all then existing securities admitted to any such market or facility must be either

(i) held by a CSD, with those securities being subsequently represented in book-entry form with that CSD; or

(ii) registered in the name of the holder without the requirement for there being any document.

6.1.5 Different perspectives of issuers of equity securities and debt securities

Since the migration of shares in March 2021, shares of quoted Irish PLCs are held in one of two ways:

- registered in the name of the nominee of Euroclear Bank SA / NV and represented in book-entry form – i.e., as in A(i) and B(i) in paragraph 6.1.4;
- registered in the PLC's register of members in the name of the holder, with a share certificate issued.

Accordingly, Article 3(1) of CSDR has already been implemented in relation to shares held through a CSD. What remains is to facilitate its implementation in relation to the shares outside the CSD registered in the name of the holder.

In the case of debt securities admitted to GEM, there are different methods of holding and settlement. Some debt issues are held in certificated form outside a CSD. Some are held inside a CSD.

6.2 Documented securities

There are two types of documented holdings of shares under the Companies Act, bearer shares and registered certificated shares.

6.2.1 Bearer shares and debt securities

The Companies Act has prohibited the issuance of any bearer instrument in respect of shares.[25] An exception is made by section 1019 for certain renounceable letters of allotment issued by a PLC. [26] Bearer shares in existence on 1 June 2015, the commencement date of the Companies Act, were permitted to be transferred by delivery only until 9 November 2016.[27] Companies with bearer shares in issue were required to enter the name of a holder no later than 30 November 2016, in default of which the Minister for Finance was to be entered as holder, who then became the beneficial owner of the shares comprised in the bearer instrument.[28]

The PLC's "permissible letter of allotment" is

> "a letter of allotment by a PLC to a member of it of—
>
> (a) bonus shares of the PLC, credited as fully paid;
>
> (b) shares of the PLC, in lieu of a dividend, credited as fully paid; or
>
> (c) shares of the PLC allotted provisionally, on which no amount has been paid or which are shares partly paid up, where the shares are allotted in connection with a rights issue or open offer in favour of members and the shares are issued proportionately (or as nearly as may be) to the respective number of shares held by the members of the PLC, there being disregarded for this purpose any exceptions to such proportionality, or arrangements for a deviation from such proportionality, as the directors of the PLC may deem necessary or expedient to make for the purposes of dealing with—
>
> (i) fractional entitlements; or
>
> (ii) problems of a legal or practical nature arising under the laws of any territory or requirements imposed by any recognised regulatory body in any territory,
>
> which letter is expressed to be transferable by delivery during a period expiring on its expiry date."[29]

The expiry date cannot be more than 30 days after the issue of the letter of allotment.[30]

[25] Companies Act 2014 ss 66(8)–(10).

[26] Companies Act 2014, s 1019.

[27] Companies Act 2014, s 1019(8).

[28] Companies Act 2014, s 1019(7)(b).

[29] Companies Act 2014, s 1019(2).

[30] Companies Act 2014, s 1019(2).

The Companies prohibition on bearer instruments in respect of shares does not apply to debt securities.

6.2.2 Certificated shares and debt securities

Section 99(2) of the Companies Act provides:

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

Section 11(3)(b) of the 2019 Act provided that no share certificate would be required in respect of the shares from time to time in the name of a CSD or its nominee:

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

Section 11(4) of the 2019 Act added:

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

6.2.3 Mode of transfer of shares and debt securities

For completeness we note s 94(1), (2) and (4) which provide the default that transfers of shares and debt securities must be in writing:

> (1) Subject to any restrictions in the company's constitution and this section, a member may transfer all or any of his or her shares in the company by instrument in writing in any usual or common form or any other form which the directors of the company may approve.
>
> (2) The instrument of transfer of any share shall be executed by or on behalf of the transferor, save that if the share concerned (or one or more of the shares concerned) is not fully paid, the instrument shall be executed by or on behalf of the transferor and the transferee.
>
> (4) A company shall not register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company.

This is disapplied by the amendments to the Companies Act made by the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020, which inserted sections

1097A-1087G into the Companies Act in respect of "relevant issuers" i.e., PLCs whose shares are represented in a CSD's securities settlement system:

> "Notwithstanding section 94(4), section 2(1) of the Stock Transfer Act 1963 or any other enactment, a written instrument of transfer shall not be necessary to transfer title (which transfer may occur more than once) to—
>
> (a) relevant securities from a central securities depository (or, as the case may be, a body nominated by that depository) to any holder of the rights or interests in those securities,
>
> (b) relevant securities from one central securities depository (or, as the case may be, a body nominated by that depository) to another central securities depository (or, as the case may be, a body nominated by that depository), or
>
> (c) securities in the relevant issuer to the central securities depository (or, as the case may be, a body nominated by that depository) from any holder of the rights or interests in those securities."

6.3 Consequential points to be addressed

CSDR is directly applicable in Ireland and, to the extent that it conflicts with the Companies Act (or any other legislation) it will prevail. However, it will be necessary to address the following points:

- the different dates for implementation of CSDR as between new issues of securities and existing securities, in light of many existing listed PLCs routinely issuing new shares under company share option plans and similar schemes;
- provisions in the Companies Act which require the issue of share certificates and certificates in respect of debt securities;
- the methodology of implementing a rights issue without a "permissible letter of allotment".

6.3.1 Date for implementation of Article 3 of CSDR

Article 3 of CSDR distinguishes between existing issuances of securities and those that will be made in the future. For existing issuers, they can wait until 1 January 2025 before dematerialising their securities whereas issuers of new securities taking place from 1 January 2023 must be in dematerialised form.

6.3.2 Committee analysis

The Committee noted that a different approach required to be taken between PLCs with shares admitted to the Dublin or other EU markets on the one hand and on the other, debt securities, given that there were different considerations involved.

In the case of PLCs with shares admitted to the market, the unanimous analysis and conclusion of the Committee was that it was unworkable for there to be two separate dates. A significant proportion of PLCs with traded equity securities issue shares on an ongoing basis, whether under employee share schemes or similar plans or under scrip dividend arrangements. Moreover, the coexistence of two separate methods of share holding in the market would bring confusion and extra cost. For example if a PLC planned to make a new issue of shares in mid-2023 by way of rights issue or open offer, the new shares issued would be required to be in dematerialised form (without share certificates) while the pre-existing shares held outside the Euroclear system would continue to require share certificates. When shares would come to be dealt, they would be required to be

transferred into the Euroclear system, then requiring all those concerned with such a process to enter into a due diligence exercise so as to ascertain whether a share certificate was required to be presented or could be dispensed with.

The 2019 Act has given an example of quoted companies working together to a single, unified, timetable. To proceed with separate timetables would add cost. From a project management perspective, a piecemeal exercise has the potential to add uncertainty; addressing it as a single exercise optimises the likelihood of a successful outcome.

The Committee considered whether there was any legal reason for anticipating the implementation date ahead of the date set in the Regulation. It concluded that there was no EU law requiring the continuance of a certificated system until the stated implementation date and that Ireland was in a position to regulate the manner of documentation of shareholdings as it saw fit, subject to implementation of CSDR no later than the dates specified in CSDR.

The Committee noted also that there was precedent in EU law where the transposition date for Directives or the implementation date for Regulations was extended. On this account, although it concluded that a single date should be chosen, some latitude to allow the Minister to fix the date should be provided for, in order to deal with such an eventuality.

In the case of debt securities, the Committee concluded that a move to coerce debt issuers to dematerialise their debt securities and / or migrate their existing issues of debt securities into a CSD ahead of the 1 January 2025 date would be disruptive to procedures in the debt markets. If an issuer with debt securities wished to do so, that was a matter between it and the holders of the securities. The Committee decided to make no recommendation as to change of the respective dematerialisation dates with respect to debt securities.

6.3.3 Recommendation

The Review Group recommends that an amendment to the Companies Act be made so as to enable the Minister for Finance to designate 1 January 2023 as the dematerialisation implementation date for not only new issues of traded shares but also for existing issues of traded shares.

Consideration might be given to enable the Minister to amend this date by order if there were a deferral of the date of 1 January 2023 at EU level.

The Review Group observed that the methodology for giving effect to this proposal may be possible by Regulations under the European Communities Act 1972 or under the Companies Act, as well as by a straightforward amendment by primary legislation.

However, what was most urgent was that the Minister for Finance should in early course to signal to the market that such a change in the law would be effected, similar to how the 2019 Act's provisions were signalled by a series of Ministerial speeches and statements.

6.3.4 Companies Act provisions referring to share certificates and certificates as to debt securities

The Companies Act has provisions referring to share certificates in the following sections:

- Section 67(4): Where new shares are issued and do not within a 12 months, rank pari passu for all purposes with all the existing shares (or the existing shares of a particular class) "the share certificates of the new shares if not numbered, be appropriately worded or enfaced".

- Section 99, referred to above. As well as requiring the issue of share certificates, the section requires the issue of a certificate in relation to the issue of debt securities, (in each case unless the conditions of issue provide otherwise). It also entitles a member to request and to receive "one or more certificates for one or more shares held by the member upon payment, in respect of each certificate, of €10.00 or such lesser sum as the directors of the company think fit."

- Section 1017: This provides for a PLC to have an official seal (commonly called a securities seal" for sealing:

  "(a) securities issued by the company, and

  (b) documents creating or evidencing securities so issued".[31]

  Where a company has such a securities seal then the certificates (whether for shares or for debt securities) required to be issued under s 99(1 may be sealed with it,

- Section 1086: This empowers the Minister to "make provision by regulations for enabling or requiring title to securities or any class of securities to be evidenced and transferred without a written instrument". Such regulations:

  - "may make provision … for dispensing with the obligations of a company under section 99 to issue certificates and providing for alternative procedures."[32]

  - "shall contain such safeguards as appear to the Minister appropriate for the protection of investors …"[33]

  - "may … make provision with respect to the rights and obligations of persons in relation to securities dealt with under the procedures." [34]

  - "shall be framed so as to secure that the rights and obligations in relation to securities dealt with under the new procedures correspond, so far as practicable, with those which would arise apart from any regulations under this section." [35]

  - may—

    (a) require the provision of statements by a company to holders of securities (at specified intervals or on specified occasions) of the securities held in their name;

    (b) make provision removing any requirement for the holders of securities to surrender existing share certificates to issuers; and

    (c) make provision that the requirements of the regulations supersede any existing requirements in the articles of association of a company which would be incompatible with the requirements of the regulations." [36]

[31] Companies Act 2014 s 1017(1).

[32] Companies Act 2014 s 1086(4)(c).

[33] Companies Act 2014 s 1086(5).

[34] Companies Act 2014 s 1086(6).

[35] Companies Act 2014 s 1086(7).

[36] Companies Act 2014 s 1086(8).

- Section 1087B. This provides that a "relevant issuer" (i.e., a PLC with its securities represented in a CSD's securities settlement system) is not required to issue share certificates for securities registered in the name of a CSD or its nominee. Title of the CSD or its nominee to the securities is evidenced by the recording of their name and address in the register of members of the issuer.

6.3.5 Committee analysis

The Committee considered whether any amendment of these provisions was called for. On the face of it, certain amendments appear desirable. However, given that CSDR is directly applicable in Ireland, its provisions would override any conflicting provisions in the Companies Act.

The Committee discussed whether there were parallels to be drawn from the abolition of land certificates and certificates of charge effected by s 73 of the Registration of Deeds and Title Act 2006. The relevant provision provided for such certificates to cease to have validity after 3 years. The Committee noted the difference between a document issued by a State body like the Property Registration Authority on the one hand and, on the other, a document issued by a non-State entity like a company. When a share certificate is issued, it certifies a state of affairs as of the date of the certificate and nothing more. A company is at liberty to cancel such a certificate at any time or to issue a new certificate that supersedes a previously issued certificate. This has been a standard practice when for example shares were renominalised following the adoption of the Euro, when shares are consolidated into shares with a higher par value or when the par value is reduced. It is the case that certain lenders may take a deposit of share certificates as security by way of equitable mortgage for financial facilities. However, lenders do so in the full knowledge of the possibility of such certificates being superseded and cancelled by the issuing company. It is open to lenders in such circumstances to follow the procedure under Order 46 of the Rules of the Superior Courts to register their interests by way of a "Notice to restrain transfer of stock". [37] Accordingly, the Committee concluded that there was no legal impediment to the abolition of share certificates for existing certificated holdings ahead of the CSDR date of 1 January 2025.

The Committee noted the power of the Minister to make regulations under s 1086 (in addition to the power under s 3 of the European Communities Act 1972), which might be utilised in order to expressly disapply anomalous provisions of the Companies Act. The Committee concluded that it is an open point as to whether the Minister's power under s 1086 or that of the Minister for Finance under s 3 of the European Communities Act would be appropriate.

6.3.6 Recommendation

The Review Group therefore recommends that amendments be made to the Companies Act (whether by primary legislation or, subject to the advice of the Attorney General's office, by Regulations) to effect the following:

[37] RSC O. 46 Rule 6: "Any person claiming to be interested in any stock standing in the books or inscribed in the register (within the jurisdiction) of a company may, on an affidavit by himself or his solicitor in the Form No 27 in Appendix C, and on filing the same in the Central Office with a notice in the Form No 28 in Appendix C, and on procuring an attested copy of the affidavit and a duplicate of the filed notice authenticated by the seal of the High Court, serve the attested copy and duplicate notice on the company. "Rule 10: "10. From and after the service of the attested copy of the affidavit and of the duplicate of the filed notice, it shall not be lawful for the company to permit the stock specified in the notice to be transferred, nor, if the notice is expressed to be intended to stop the receipt of dividends, to pay the dividends on the stock so specified, so long as the notice shall remain operative."

- **to provide that nothing in section 67(4) shall be construed as requiring the issue of a certificate in respect of securities to which Article 3 of CSDR applies;**
- **to disapply section 99 in relation to the securities of a company to which Article 3 of CSDR applies;**
- **to provide that nothing in section 1017 shall be construed as requiring the issue of a certificate in respect of securities to which Article 3 of CSDR applies;**

An exception to these provisions should be made for the issue of global certificates in respect of an issue of securities, whether shares or debt securities.

6.3.7 Rights issues

A rights issue is an issue of new shares in a company following an offer of those shares to existing members whereby the right to subscribe in the new issue is proportional to the shareholding of the member. A typical rights issue would entitle a shareholder to subscribe for ***x*** shares for every ***y*** shares held as of a certain date, at a subscription price that would be materially below the then prevailing share price. The usual immediate result of the rights issue is that the share price reduces to somewhere between the previous price and the rights issue price, such that the right to subscribe has a market value and can be sold in the market. Typically, fractional entitlements are rounded down and sold in the market. Shares otherwise destined to shareholders domiciled in jurisdictions with burdensome securities laws (notably the USA) are typically excluded, with their rights being sold in the market and the profit then remitted to the shareholder.

Historically, rights issues were effected by the issue of provisional letters of allotment, which had renunciation forms attached. If a member that received the letter chose not to subscribe, they would renounce their rights by signing the renunciation. This would be done "in blank" in that no transferee was named, and the document therefore became a bearer instrument. It is on this account that s 1019, mentioned above, made an exception for what it described as "permissible letters of allotment".

6.3.8 Committee analysis

The Committee noted that art. 3 of CSDR applies to "transferable securities" that are "issued". Strictly speaking, while the shares are in the stage of having been provisionally allotted pro rata to shareholders, the shares have not been issued, and it is the right to have the shares issued that is traded. However, given the wide definition of "transferable securities" in CSDR, it is clear that trading in those rights will constitute trading in transferable securities. The CSDR definition cross refers to art. 1(44) of MiFID II, which provides:

> "'transferable securities' means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:
>
> (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;
>
> (b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
>
> (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures".

Although there is a difference between the allotment and issue of securities, for the purposes of art. 3 of CSDR, it appears that nil-paid rights in a rights issue, having been created by an issuer and being traded on a market, will be considered to be within its scope, meaning that transfers of those rights will require to be "represented in book-entry form as immobilisation or subsequent to a direct issuance in dematerialised form" and settled in the Euroclear CSD system. Documentation and procedures have already evolved to facilitate CSD settlement of rights issues, and the Committee is supportive of dematerialised representation of tradeable rights, in the same way as dematerialised securities.

6.3.9 Recommendation

As all transfers of nil-paid rights to securities of issuers admitted to a regulated market or MTF will require to be effected through a CSD, the Review Group recommends that s.1019 of the Act be disapplied to securities to which art.3 of CSDR applies.

7. Companies Act Issues for PLCs

7.1 Introduction

7.1.1 Public limited companies

There are approximately 4,000 PLCs on the register of companies, with less than 100 with equity securities traded on a market (EU regulated market or MTF, London Stock Exchange, NASDAQ, NYSE, or other public market). A significant number of the remaining companies are collective investment schemes regulated by the Central Bank under Part 24 of the Companies Act or as UCITS or AIFs under the relevant regulatory regimes. The issues considered in this section are (save for item 7.3) are in respect of all PLCs, quoted and unquoted.

7.1.2 Issues considered.

The issues addressed in this section of the report have arisen from individual CLRG members' own suggestions as well as matters referred from the Review Group's Corporate Governance Committee, where that Committee was of the opinion that the issue was more particularly of concern to PLCs.

7.2 Computation of periods of time

7.2.1 Time for delivery of forms of proxy

The time for delivery of a form of proxy before a general meeting of shareholders is a maximum of 48 hours before the meeting, but those 48 hours include weekend hours and hours on public holidays. Section 183 subsections (5) and (6) of the Companies Act provides

> "(5) The instrument of proxy ... shall be deposited at the registered office of the company concerned or at such other place within the State as is specified for that purpose in the notice convening the meeting, and shall be so deposited not later than the following time.
>
> (6) That time is—
>
> (a) 48 hours (or such lesser period as the company's constitution may provide) before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote; or
>
> b) in the case of a poll, 48 hours (or such lesser period as the company's constitution may provide) before the time appointed for the taking of the poll."

The Review Group has previously examined this issue and in its Report of 25 June 2020[38] concluded that "there is merit in amending section 183 of the 2014 Act to exclude hours at weekends and on public holidays from the computation of the 48-hour period, aligning the law with that of the UK and the Review Group accordingly recommends that the law be amended accordingly."[39] The Review Group remains of this view.

7.2.2 Determination of record date for the purposes of voting

In the amendments made to the Companies Act by the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020, the record date for voting was, for reasons related to the practical operation of the Euroclear CSD system, set at "close of business on the day

[38] Report on certain Company Law Issues arising under the EU Central Securities Depositories Regulation 909/2014 (CSDR), 25 June 2020.

[39] Ibid., para 4.7.5(f).

before a date not more than 72 hours before the general meeting to which it relates".[40] In the same way that hours at weekends and on public holidays are included in the calculation of the 48 hour limit before a meeting for the purposes of delivery of forms of proxy, those hours are included also in the computation of the 72-hour period.

7.2.3 Committee analysis

The Committee approached the issue on the basis that the record date should be as close as operationally possible to the meeting date. That said, the Committee had the benefit of significant input from the leading registrars to PLCs, who were able to confirm that there were two principal consequences of the inclusion of weekend hours in the computation of the 48-hour limit and 72-hour period.

The first is that PLCs are tending to consider themselves compelled to hold their general meetings on a Friday of a week (not containing a public holiday) in order to work with a Monday close-of-business record date. Where this is not possible, it has resulted in a need to have relevant personnel work at weekend times, giving rise to inconvenience to the relevant personnel and extra cost to the PLCs.

The second arises from the fact that once shares are voted in the Euroclear CSD before a record date, they may be blocked for settlement until the record date. Where this record date falls at a weekend, this, for all practical purposes, extends the blocking period and is a disincentive to shareholders voting. Even where the general meeting takes place on a Friday, evidence provided to the Committee indicated typical shareholder voting percentages of 60% to 70% in 2020 reducing to an average of approximately 40% in 2021.

The Committee took notice of the fact that the exclusion of weekend hours was being examined by the Corporate Governance Committee in relation to the proxy time limit for all companies but nonetheless considered it appropriate to formulate its own conclusions for the purposes of PLCs, whether or not their securities are admitted to listing or trading on a market.

7.2.4 Recommendation

The Review Group recommends that, for PLCs, hours on a Saturday, Sunday and public holiday be excluded from the calculation of:

- **the 72 hours in section 1078H of the Companies Act; and**
- **the 48-hour limit in section 183 of the Companies Act.**

7.3 Record date for adjourned meetings of "relevant issuers"

7.3.1 Adjournments of general meetings

Where a company's general meeting is adjourned, the standard form of proxy (see below at 7.4.1) provides that the proxy is to be entitled to attend and vote at any adjournment of the meeting, as well as the meeting proper. Accordingly, a form of proxy delivered in time for the meeting proper continues in force for that meeting and any adjournment.

Section 183 of the Companies Act (see above at 7.2.1) provides that a form of proxy can be delivered up to a time no earlier than 48 hours before an adjournment of the meeting – in other words, if a meeting is adjourned for more than two days, that will reopen the opportunity for forms of proxy to be delivered.

[40] Companies Act 2014, s 1087H, inserted by Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020, s. 12

Subject to alternative provisions in a company's constitution, where a meeting is adjourned for 30 days or more, notice of the adjourned meeting must be given as in the case of an original meeting. In other cases, it is not necessary to give any notice of an adjourned meeting.[41]

7.3.2 Practical issue for Euroclear Bank

Where there is an adjournment, without the issue of a fresh notice of the meeting, the Euroclear system can accept new voting instructions, so as to enable it to execute a form of proxy in respect of those new instructions. However, it cannot accommodate a changed record date or a change in previously given voting instructions.

7.3.3 Committee analysis

The Committee concluded that the law should be amended to accommodate the practicalities of the intermediated system, so as to retain the record date for the original meeting for any adjourned meeting, save where a fresh notice of meeting is issued. It noted that to seek to accommodate an amended record date would put relevant issuers to expense. In the event of there being an adjourned meeting that warranted a fresh record date – for example where it appeared that there was a sudden change in shareholder profile – an adjourned meeting could be convened with notice, enabling a new record date.

7.3.4 Recommendation

The Review Group recommends that section 1087G of the Companies Act be amended to read as follows:

(1) The provisions of section 1105 shall apply to general meetings held by a relevant issuer with the modification that 'record date' (as that expression is used in that section) in relation to a relevant issuer shall be close of business on the day before a date not more than 72 hours before the general meeting to which it relates (in this section called "the original meeting")

(2) Save where subsection (3) applies, where the original meeting is adjourned, the 'record date' for the original meeting shall also be the record date of the adjourned meeting.

(3) Where notice is given to members of an adjourned meeting, to take place no earlier than 14 days following the date of the notice, the 'record date' for the adjourned meeting shall be close of business on the day before a date not more than 72 hours before the adjourned meeting to which it relates.

7.4 Format of forms of proxy

7.4.1 Format of a form of proxy

Section 184 of the Companies Act prescribes the format of a form of proxy in the following terms:

> "An instrument appointing a proxy shall be in the following form or a form as near to it as circumstances permit—
>
> [name of company] ("the Company")

[41] Companies Act 2014, s 187(1), (6).

[name of member] ("the Member") of [address of member] being a member of the Company hereby appoint/s [name and address of proxy] or failing him or her

[name and address of alternative proxy] as the proxy of the Member to attend, speak and vote for the Member on behalf of the Member at the (annual or extraordinary, as the case may be) general meeting of the Company to be held on the [date of meeting] and at any adjournment of the meeting.

The proxy is to vote as follows:

Voting Instructions to Proxy (choice to be marked with an 'x'			
Number or description of resolution	In favour	Abstain	Against
1			
2			
3			
Unless otherwise instructed the proxy will vote as he or she thinks fit			
Signature of member: ..... Dated: (date)			

7.4.2 Submission

A submission from the Law Society Business Law Committee was received by the Review Group stating that certain issues had arisen from the introduction by the 2014 Act of the requirement to include an "abstain" option. Prior to the 2014 Act, the format of the form of proxy was a matter for the company to decide, with an optional format set out in Table A. In practice the form used in Table A was commonly used, often with some embellishments. However, section 184 now has statutory effect. The use of a different form of proxy from that prescribed by the section (e.g. one without an "abstention" box, or with any additional text) could, it was submitted, give rise to unprecedented questions as to whether, and if so what, or whose, "circumstances" did not permit the use of the set format, if that was justified, and, if not, whether the proxy, and any votes cast thereunder, are valid. Issues had, it was submitted, arisen in practice in particular for PLCs with overseas shareholders and overseas listings such as on the NYSE or NASDAQ, where different corporate governance procedures had evolved with regard to proxies and proxy votes, which in some cases differ from the rigid requirements of these sections of our Act.

7.4.3 Committee analysis

The amendments made by the Companies Act by the inclusion of an "Abstain" option were consciously made. It is considered good corporate governance. For example, the most recent Shareholder Voting Guidelines of PIRC, a leading proxy voting advisory firm state:

> "Proxy forms provided by companies should always offer a 'vote withheld' or abstain option. Institutional investors use such options to demonstrate concerns about a proposal.

PIRC accepts that such votes will not be counted in the calculation of the proportion of the votes 'For' and 'Against'."[42]

The most recent proxy voting guidelines of ISS, another proxy advisory firm state:

"Investors expect that information regarding the voting outcomes on the resolutions presented at the AGM will be made available as soon as reasonably practicable after the AGM. The information should include the number of votes for the resolution, the number of votes against the resolution and the number of shares in respect of which the vote was directed to be withheld, and the overall percentages for each group."[43]

Glass Lewis, another proxy advisory firm states the following:

"Adequate disclosure of vote results is particularly relevant in the UK as shareholders frequently utilise their right to "withhold" or "abstain" from certain proposals as a way to voice dissent, albeit in a non-binding fashion. Such votes, although often quite substantial, are not counted in the final tally of votes, and resolutions may be passed despite high levels of shareholder abstentions."[44]

Accordingly, the Committee was not convinced that there were reasons based on governance arguments that would justify the amendment of the law.

If, however, a PLC was subject to a regulatory requirement of a securities market to reformat its form of proxy, it was reasonable to permit such PLC to make such adjustments as would be so required

7.4.4 Recommendation

The Review Group recommends that the Companies Act be amended, by way of a provision in Part 17, to permit PLCs admitted to a securities market, which has requirements as to the format of a form of proxy that differ from that set out in the Companies Act, to use a form a proxy that complies with that market's requirements, notwithstanding that it is not in the format prescribed by the Companies Act.

7.5 Scheme of Arrangement "special majority"

7.5.1 Use of Part 9 Schemes of Arrangement

Part 9 of the Companies Act provides that a company may enter into a compromise or arrangement with its shareholders (or a class of shareholders) or its creditors (or a class of creditors). A scheme must be approved at a meeting of the relevant body of shareholders or creditors by way of a "special majority", as defined in section 449(1) of the Act, before the scheme is authorised (or "sanctioned" as the Act puts it) by the Court.

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

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[42] *PIRC Shareholder Voting Guidelines 2021,* Pensions and Investment Research Consultants Limited, 2021, p 16.

[43] *ISS United Kingdom and Ireland Proxy Voting Guidelines*, Institutional Shareholder Services, Inc., 2021, p 5.

[44] *An overview of the Glass Lewis approach to proxy advice United Kingdom* (which applies to Ireland also), 2021, p 15.

For PLCs whose securities are in a CSD's securities settlement system, there is a substituted form of special majority in s 1087D of the Companies Act:

> "(1) In section 449(1), 'special majority' insofar as it applies to members of a relevant issuer, means a majority representing at least 75 per cent in value of the members or class of members, as the case may be, present and voting either in person or by proxy at the scheme meeting.
>
> (2) Where any part of the issued shares of a relevant issuer is held outside of a central securities depository (or, as the case may be, a body nominated by that depository), and the special majority referred to in subsection (1) applies, the quorum for a scheme meeting referred to in subsection (1) shall be at least two persons holding or representing by proxy at least one-third in nominal value of the issued shares, or class of shares, as the case may be, in the relevant issuer and section 182 shall, in relation to that meeting, be construed accordingly."

In the case of PLCs, schemes of arrangement are frequently used as a means of effecting a takeover. Under a takeover scheme, the existing shares are either cancelled, with new shares being issued to the acquirer or shares are transferred to the acquirer. Such schemes of arrangement are popular for a number of reasons:

- A scheme of arrangement delivers 100% control of the company at a single point in time, enabling immediate integration of the acquired company in the acquirer's group, whereas the acquisition of control by acquisition of shares requires first receiving 90% acceptances (for a company listed on an EU regulated market) or 80% (for other companies) acceptances and then the institution of a separate procedure to "squeeze out" minority shareholders.
- The requirement for Court consent means that any substantive opposition to a takeover can be flushed out and aired in a pre-determined Court process. If and when sanctioned by a Court the takeover has finality. In the case of a takeover by acquisition of shares, it is open to individual shareholders to contest the compulsory acquisition such as to exclude their own shares. There is a possibility of a multiplicity of proceedings.
- The requisite majority in a scheme of arrangement – the "special majority" as defined in s 449 of the Companies Act – of 75% by value and a majority in number of shareholders voting is an easier threshold than the 90% or 80% of all shareholders in a takeover by acquisition of shares.

However, the majority in number or "headcount" requirement has an air of unreality to it, in view of the progressive distancing of the beneficial owners from those registered on the register of members. This has been compounded by the migration of quoted companies' securities to the intermediated securities settlement system of Euroclear. It was in anticipation of this migration that the Review Group examined the headcount issue in its June 2021 Report, which proposed an alternative means of arriving at the "special majority" in a scheme of arrangement, where there was a 75% vote in favour and a quorum of at least one-third of the shares being represented at the meeting. That proposal was enacted in the above-mentioned section 1087D, which for "relevant issuers" is operates effectively as a substituted (rather than a supplemental alternative) requirement

7.5.2 Submission

It was submitted that it was appropriate for there to be a supplemental, alternative, form of "special majority" to available to all PLCs to approve a scheme of arrangement among holders of securities or a class of security holders, such that a resolution passed with a 75% majority at a meeting with a

one-third (in value of securities represented) or more in attendance would also constitute a special majority.

7.5.3 Committee analysis

The Committee noted that this issue had been separately discussed at the Review Group's Corporate Governance Committee, where there was little support for a change to apply to companies generally.

In the case of PLCs, different considerations applied. In the case of PLCs whose securities are in a CSD's securities settlement system, there is complete detachment of beneficial ownership from the holder of those securities and the 2020 amendments had recognised this. However, the experience of Committee members in relation to unlisted PLCs also was that there was a significant evidence of the register of members not giving a true representation of the profile of the beneficial owners. This being the case, it would make sense for there to be a supplemental, alternative to the "headcount" test for schemes of arrangement in such companies.

The Committee did not propose to recommend repeal the present requirement for there to be a majority in number of creditors for a Part 9 scheme of arrangement among creditors, as that would require a separate evaluation from an insolvency perspective.

It was noted that there was no particular disadvantage for dissenting shareholders as all schemes of arrangement require Court sanction.

7.5.4 Recommendation

The Review Group recommends that an amendment be made to the Companies Act providing that in any scheme of arrangement among holders of transferable securities of a PLC, a special majority may be constituted either as at present (by a majority in number and 75% in value) or as provided for "relevant issuers" (a majority of 75% in value at a meeting with a one-third quorum).

A draft section 1170A to give effect to this, to be inserted in a new Chapter 17A in part 17, is set out in Appendix 4.

It was noted that the implementation of this recommendation would supersede section 1087D of the Companies Act.

Appendix 1:

Companies Act 2014, sections 1110A-1110C

1110A. Interpretation, application, and commencement (Chapter 8A)

(1) In this Chapter—

'**General Data Protection Regulation**' means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)[45];

'**intermediary**' means a person, whether situated in a Member State or elsewhere, that provides services, in relation to a traded PLC, of safekeeping of shares, administration of shares or maintenance of securities accounts on behalf of shareholders or other persons, and includes—

(a) an investment firm as defined in Regulation 3 of the European Union (Markets in Financial Instruments) Regulations 2017 (S.I. No. 375 of 2017),

(b) a credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012[46], and

(c) a central securities depository as defined in point (1) of Article 2(1) of Regulation (EU) No. 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No. 236/2012[47];

'**personal data**' has the meaning assigned to it in the General Data Protection Regulation;

'**traded PLC**' has the meaning assigned to it by section 1099(4).[48]

(2) A word or expression that is used in this Chapter and is also used in the Shareholders' Rights Directive has, unless the context otherwise requires, the same meaning in this Chapter as it has in that Directive.

[45] OJ No. L 119, 4.5.2016, p.1.

[46] OJ No. L 176, 27.6.2013, p. 1

[47] OJ No. L 257, 28.8.2014, p. 1

[48] Section 1099(4): In this section, and sections 1100 to 1110, 'traded PLC' means a PLC— (a) whose shares are admitted to trading on a regulated market in any Member State, and (b) that is neither— (i) an undertaking for collective investment in transferrable securities within the meaning of Article 1(2) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)5, nor (ii) a collective investment undertaking within the meaning of point (a) of Article 4(1) of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No. 1060/2009 and (EU) No. 1095/20106.

(3) This Chapter shall be read in conjunction with any applicable provision of European Union law adopted by the European Commission as an implementing act in accordance with the Shareholders' Rights Directive, including Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights10[49].

(4) This section shall come into operation on 3 September 2020.

1110B. Identification of Shareholders

(1) (a) A traded PLC, or its nominee referred to in paragraph (c), may request, from an intermediary that provides services with respect to the shares of the traded PLC —

(i) information regarding shareholder identity that relates to shares held in that traded PLC, and

(ii) the details of the next intermediary, if any, in the chain of intermediaries.

(b) A requester may state, in a request, that the information to which the request relates is to be provided to the requester by the intermediary from whom it is requested.

(c) A traded PLC may nominate a third party to make a request on its behalf.

(d) In this section, '**request**' means a request under paragraph (a), and '**requester**' means the person making the request.

(2) (a) An intermediary that receives a request and is in possession or control of the information to which that request relates shall, as soon as practicable, provide the requester with that information.

(b) An intermediary that receives a request and is not in possession or control of the information to which that request relates shall, as soon as practicable—

(i) inform the requester that it is not in possession or control of the information,

(ii) where the intermediary is part of a chain of intermediaries, transmit the request to each other intermediary in the chain known to the first-mentioned intermediary as being part of the chain, and

(iii) provide the requester with the details of each intermediary, if any, to which the request has been transmitted under subparagraph (ii).

(3) (a) (i) Subparagraph (ii) applies to an intermediary that—

(I) receives a request transmitted to it under subsection (2)(b), and

(II) is in possession or control of the information to which that request relates.

(ii) An intermediary to which this subparagraph applies, shall, as soon as practicable, provide the information to which the request relates—

[49] OJ No. L 223, 4.9.2018, p. 1.

(I) where the requester has made a statement under subsection (1)(b), to the intermediary that transmitted the request in accordance with subsection (2)(b), or

(II) where a requester has not made a statement under subsection (1)(b), to the requester.

(b) An intermediary that receives information under subparagraph (a)(ii)(I) shall, as soon as practicable, provide the information to the requester.

(4) Subject to subsection (5), the personal data of shareholders may be processed by a requester, traded PLC or intermediary under this section, in so far as it is necessary to—

(a) enable a traded PLC to—

(i) identify its existing shareholders in accordance with this section, or

(ii) communicate with the shareholders directly, or

(b) facilitate the exercise of shareholder rights and shareholder engagement with the traded PLC.

(5) Without prejudice to any longer storage period laid down by European Union law, and subject to subsection (6), where a requester or intermediary receives or otherwise processes the personal data of a person who is a shareholder in accordance with this section, that personal data shall not be so processed for longer than 12 months after the requester or intermediary, as the case may be, has become aware that the person concerned has ceased to be a shareholder.

(6) Subject to compliance with the Data Protection Acts 1988 to 2018 and the General Data Protection Regulation, a traded PLC or intermediary may process the personal data of shareholders in so far as doing so is necessary for any of the following purposes:

(a) carrying out, or facilitating the carrying out of, an investigation into suspected or alleged offences in relation to the traded PLC;

(b) engaging in or facilitating litigation relating to the shareholder or shareholders to whom the personal data relates;

(c) maintaining records of, and otherwise dealing with, unclaimed dividend entitlements;

(d) disposing of, or otherwise dealing with, shares of untraced shareholders;

(e) dealing with queries from former or current shareholders relating to their shares, including queries regarding historic transactions;

(f) adducing evidence of transactions, changes in ownership or dispositions of shares having taken place;

(g) compliance with applicable accounting, regulatory or tax requirements;

(h) compliance with any direction, instruction or other request from a regulatory or supervisory body;

(i) compliance with any provision of this Act.

(7) An intermediary that discloses information regarding the identity of a shareholder in accordance with this section shall not be considered to be in breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision.

(8) This section shall come into operation on 3 September 2020.

1110C. Transmission of information

(1) Subject to subsection (3), where a shareholder in a traded PLC requires information in order to exercise rights attaching to the shareholder's shares, the traded PLC shall, as soon as practicable after becoming aware of that requirement, provide an intermediary that provides services in relation to that shareholder's shares with—

(a) that information, or

(b) where the information is available on the traded PLC's website, a notice indicating where on the website the information can be found.

(2) (a) Subject to paragraph (b) and subsection (3), an intermediary (in this subsection referred to as a 'relevant intermediary') who is provided with the relevant information shall, as soon as practicable, transmit the relevant information to the shareholder to whom it relates.

(b) Where a relevant intermediary cannot transmit the relevant information directly to the shareholder to whom it relates, and the relevant intermediary is part of a chain of intermediaries, the relevant intermediary shall, as soon as practicable, transmit the relevant information to each other intermediary in the chain of intermediaries known to the relevant intermediary as being part of the chain.

(c) An intermediary to whom relevant information is transmitted under paragraph (b) and who can transmit the relevant information directly to the shareholder to whom it relates shall, as soon as practicable, transmit the information directly to that shareholder.

(3) Where a traded PLC transmits relevant information directly to the shareholder to whom it relates, subsections (1) and (2) shall not apply in so far as that information is concerned.

(4) (a) Subject to paragraphs (b) and (c), where a shareholder in a traded PLC has given to an intermediary (in this subsection referred to as a '**relevant intermediary'**) an instruction relating to the exercise of rights attaching to the shareholder's shares (in this subsection referred to as the '**relevant instruction**'), the intermediary shall, as soon as practicable and in accordance with the relevant instruction, transmit the information to which the relevant instruction relates to the traded PLC.

(b) Where the relevant intermediary cannot transmit the information to which the relevant instruction relates directly to the traded PLC in accordance with the relevant instruction, and the intermediary is part of a chain of intermediaries, the relevant intermediary shall, as soon as practicable, transmit the relevant instruction to each other intermediary in the chain of intermediaries known to the relevant intermediary as being part of the chain.

(c) An intermediary to whom the relevant instruction is transmitted under paragraph (b), and who can transmit the information to which the relevant instruction relates

directly to the traded PLC, shall, as soon as practicable and in accordance with the relevant instruction, transmit that information directly to the traded PLC.

(5) A shareholder in a traded PLC may nominate a third party to be the person to receive information or notifications under this section on the shareholder's behalf and, accordingly, references in this section to 'shareholder' shall be construed as including any such third party.

(6) In this section, '**relevant information**' means, as appropriate, the information referred to in paragraph (a), or the notice referred to in paragraph (b), of subsection (1).

(7) This section shall come into operation on 3 September 2020.

Appendix 2:

Commission Implementing Regulation (EU)2018/1212, Article 9

Deadlines to the be complied with by issuers and intermediaries in corporate events and in shareholder identification processes

1. The issuer who initiates the corporate event shall provide intermediaries the information about the corporate event in a timely manner, no later than on the same business day on which it announces the corporate event under applicable law.

2. When the intermediary processes and transmits information on corporate events, the intermediary shall ensure, where necessary, that the shareholders have sufficient time to react to the information received in order to comply with the issuer deadline or record date.

   The first intermediary and any other intermediary receiving the information regarding a corporate event shall transmit such information to the next intermediary in the chain without delay and no later than by the close of the same business day as it received the information. Where the intermediary receives the information after 16.00 during its business day, it shall transmit the information without delay and no later than by 10.00 of the next business day.

   Where the position in the relevant share changes after the first transmission, the first intermediary and any other intermediary in the chain shall additionally transmit the information to the new shareholders in its books, according to end of day positions on each business day, until the record date.

3. The last intermediary shall transmit to the shareholder the information about the corporate event without delay and no later than by the close of the same business day as it received the information. Where the intermediary receives the information after 16.00 during its business day, it shall transmit the information without delay and no later than by 10.00 of the next business day. In addition, it shall confirm the shareholder's entitlement to participate in the corporate event without undue delay and on such time as to comply with the issuer deadline or record date, as applicable.

4. Each intermediary shall transmit to the issuer any information regarding shareholder action without delay after it received the information, following a process allowing for compliance with the issuer deadline or record date.

   Any additional requirements pertaining to shareholder action, which the issuer requires the shareholder to provide under applicable law, and which cannot be processed as machine-readable or straight-through processing as provided for in Article 2(3), shall be transmitted by the intermediary without delay and in time as to comply with the issuer deadline or record date.

   The last intermediary shall not set a deadline requiring any shareholder action earlier than three business days prior to the issuer deadline or record date. The last intermediary may caution the shareholder as regards the risks attached to changes in the share position close to the record date.

5. The confirmation of the receipt of votes cast electronically as provided for in Article 7(1) shall be provided to the person that cast the vote immediately after the cast of the votes.

   The confirmation of recording and counting of votes as provided for in Article 7(2) shall be provided by the issuer in a timely manner and no later than 15 days after the request or general meeting, whichever occurs later, unless the information is already available.

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

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

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

7. The deadlines referred to in paragraphs 1 to 6 shall apply, to the extent necessary, to any cancellations or updates of the relevant information.

8. The intermediary shall time stamp all transmissions referred to in this Article.

Appendix 3:

Annex to Commission Implementing Regulation (EU) 2018/1212

Table 1 – Request to disclose information regarding shareholder identity

Type of Information	Description	Format	Originator of data
A. Specification of the request (separate request to be sent for each ISIN)			
1.Unique identifier of the request	Unique number specifying each disclosure request	[24 alpha numeric characters]	Issuer or third party nominated by it
2.Type of request	Type of request (request to disclose shareholder identity)	[4 alpha numeric characters]	Issuer or third party nominated by it
3. ISIN	Definition	[12 alpha numeric characters]	Issuer
4.Record Date	Definition	[Date (YYYYMMDD)]	Issuer
5.Issuer deadline	Definition. The Issuer deadline shall be set in compliance with Article 10 of this Regulation.	[Date (YYYYMMDD)]	Issuer
6.Threshold quantity limiting the request	If applicable. The threshold shall be expressed as an absolute number of shares (= no), or a percentage of shares or voting rights (= pc). The use of a percentage may affect the straight through processing of the request.	[Optional field. If applicable, then populated: no + 15 numeric characters Or pc + 5 numeric characters]	Issuer
7. Date from which the shares have been held	If applicable. The issuer shall indicate in its request how the initial date of shareholding is to be determined. Such request may affect the straight through processing of the request.	[Optional field. If applicable, then populated: YES]	Issuer

Appendix 3 – Annex to Commission Implementing Regulation (EU) 2018/1212

Type of Information	Description	Format	Originator of data
B. Specification regarding the recipient to whom the response must be sent			
1.Unique identifier of the recipient of the response	Unique national registration number preceded by the country code referring to the country of its registered office or LEI of issuer, or third party nominated by the issuer, issuer CSD, other intermediary or service provider, as the case may be, to whom the response shall be transmitted by the intermediary.	[20 alphanumeric characters. The country code is to be in the form of the 2 letter code as defined by ISO 3166—1 alpha-2 country code, or compatible methodology]	Issuer
2. Name of the recipient of the response		[35 alphanumeric characters. Format of Table 2, field C.2(a) or (b)]	Issuer
3. Address of the recipient of the response	BIC address, secured or certified e-mail address, URL for a secure web portal or other address details that ensure the security of the transmission	[alphanumeric field]	Issuer

Table 2 – Response to a request to disclose information regarding shareholder identity

Type of information	Description	Format	Originator of data
A. Specification of the original request by issuer			
1.Unique identifier of request	See Table 1, field A.1	[24 alphanumeric characters]	Issuer or third party nominated by it
2.Unique identifier of response	Unique number identifying each response.	[24 alphanumeric characters]	Responding Intermediary
3.Type of request	See Table 1, field A.2	[4 alpha numeric characters]	Issuer or third party nominated by it
4. ISIN	See Table 1, field A.3	[12 alpha numeric characters]	Issuer
5. Record date	See Table 1, field A.4	[Date (YYYYMMDD)]	Issuer
B. Information regarding shareholding by responding intermediary			
1.Unique identifier of the responding intermediary	Unique national registration number preceded by the country code referring to the country of its registered office or LEI	[20 alphanumeric characters. The country code is to be in the form determined in Table 1, field B.1]	Responding intermediary
2. Name of the responding intermediary		[35 alphanumeric characters]	Responding intermediary
3. Total number of shares held by the responding intermediary	The total number equals the sum of the numbers given in field B.4 and B.5	[15 numeric characters with, if applicable, a decimal separator '.' (full stop)]	Responding intermediary
4. Number of shares held by the responding intermediary on own account		[15 numeric characters with, if applicable, a decimal separator '.' (full stop)]	Responding intermediary
5. Number of shares held by the responding intermediary on account of someone else		[15 numeric characters with, if applicable, a decimal separator '.' (full stop)]	Responding intermediary

Type of information	Description	Format	Originator of data
C. Information regarding shareholder identity (repeating block, to be filled in separately for each shareholder known to the responding intermediary)			
1(a). Unique identifier of shareholder in case of a legal person	1) A unique national registration number preceded by the country code for its country of registration or LEI or 2) where neither a LEI nor a registration number is available, a Bank Identifier Code (BIC) preceded by the country code for its country of registration OR 3) or a client code, which uniquely identifies every legal entity or structure, in any jurisdiction, preceded by the country code regarding its country of registration	[20 alphanumeric characters] [11 alphanumeric characters] [50 alphanumeric characters. The country code is to be in the form determined in Table 1, field B.1	Responding intermediary
1(b). Unique identifier of shareholder in case of a natural person	The national identifier as determined in Article 6 of Commission Delegated Regulation (EU) 2017/590	[35 alphanumeric characters]	Responding intermediary
2(a). Name of shareholder in case of a legal person		[35 alphanumeric characters]	Responding intermediary

Appendix 3 – Annex to Commission Implementing Regulation (EU) 2018/1212

Type of information		Description	Format	Originator of data
2(b) Name of shareholder in case of a <u>natural person</u>		1) First name(s) of the shareholder. In case of more than one first name, all first names shall be separated by a comma 2) Surname(s) of the shareholder. In case of more than one surname, all surnames shall be separated by a comma	[35 alphanumeric characters] [35 alphanumeric characters]	Responding intermediary Responding intermediary
3. Street address			[35 alphanumeric characters]	Responding intermediary
4. Post code			[10 alphanumeric characters]	Responding intermediary
5. City			[35 alphanumeric characters]	Responding intermediary
6. Country		Country code	[2 letter country code in the form determined in Table 1, field B.1]	Responding intermediary
7. Post code post box			[10 alphanumeric characters]	Responding intermediary
8. Number of Post box			[10 alphanumeric characters]	Responding intermediary
9. E-mail address			[255 alphanumeric characters]	Responding intermediary
Repeating block (repeat for the different types of shareholding or dates of shareholding)	10. Type of shareholding	Indication of type of shareholding. Select: O = shareholding on own account; N = nominee shareholding; B = beneficial shareholding; U = unknown	[1 alphanumeric character]	Responding intermediary
	11. Number of shares held by the shareholder	Number of shares held by the shareholder	[15 numeric characters with, if applicable, a decimal separator '.' (full stop)	Responding intermediary

Appendix 3 – Annex to Commission Implementing Regulation (EU) 2018/1212

Type of information		Description	Format	Originator of data
	12. Initial date of shareholding	If applicable.	[Date (YYYYMMDD)]	Responding intermediary
13. Name of third party nominated by the shareholder		If applicable, this field shall identify the third party who is authorised to take the investment decisions on behalf of the shareholder	[Optional field. If applicable, format of fields C.2(a) or C.2(b) above].	Responding intermediary
14.Unique identifier of third party nominated by the shareholder		If applicable, this field shall identify the third party who is authorised to take the investment decisions on behalf of the shareholder	[Optional fields. If applicable, unique identifier in the format of fields C.1(a) or C.1(b) above]	Responding intermediary

Appendix 4

Section 1110Q of the Companies Act 2014

1110Q. Extension of rights to beneficial owners of shares

(1) This section shall only apply to shares in a PLC which are admitted to trading on any of a MTF, the Main Market of the London Stock Exchange, the Alternative Investment Market (AIM) of the London Stock Exchange or such other stock market as the Minister may designate for the purpose of this section.

(2) For the purpose of this section,

"**central securities depository**" means a central securities depository within the meaning of the CSD Regulation;

"**CSD Regulation**" means the Regulation 909/2014 of the European Parliament and of the Council of 23 July 20141 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No. 236/2012;

'**MTF**' means a multilateral system as defined in point (22) of Article 4(1) of Directive 2014/65/EU; and

"**owner of any share**" has the same meaning as in section 101;

(3) Nothing in this section shall require a central securities depository to do anything which it is not already required to do by the other provisions of the Act and/or by the CSD Regulation.

(4) The owner of any share which is recorded in book-entry form in a central securities depository can exercise all of the rights conferred on a member with respect to that share by:

(a) sections 37(1)[50],

105(8)[51],

112(2)[52],

146(6)[53],

178(2)[54],

178(3) [55],

180(1)[56],

[50] Copies of constitution to be given to members.

[51] Provision of contract of purchase of own shares to members.

[52] Members' right to inspect contract of purchase of own shares.

[53] Members' right to remove directors.

[54] Convening of extraordinary general meetings by members.

[55] Convening of extraordinary general meetings on requisition of members.

185(1)[57],

1101[58] and

1104[59] provided that such owner has notified the PLC in writing that it is the sole owner of such share and that the notification is accompanied by such other evidence as the directors may reasonably require to confirm ownership of that share; and

(b) sub-sections 89(1)[60],

99(4)[61],

100(2)[62],

173(1)[63],

179(1)[64],

210(1)[65],

211(3)[66],

212(1)[67],

459 (5) to (8)[68] and

section 1147[69]

provided that such owner has filed as part of its application to the court an affidavit which confirms:

(i) that it is the owner of such share;

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[56] Persons entitled to notice of general meetings.

[57] Representation of bodies corporate at meetings of companies.

[58] Requisitioning of general meeting by members — modification of section 178(3) (traded PLCs).

[59] Right to put items on the agenda of the general meeting and to table draft resolutions (traded PLCs).

[60] Rights of holders of special classes of shares (to apply to Court to conceal variation of rights).

[61] Right of member to apply to Court for share certificate.

[62] Rectification of dealings in shares (right of member to apply).

[63] Rectification of register (right of member to apply).

[64] Power of court to convene meeting (right of member to apply).

[65] Civil sanctions where opinion as to solvency stated in (SAP) declaration without reasonable grounds (right of member to apply).

[66] Moratorium on certain restricted activities being carried on and applications to court to cancel (SAP) special resolution (right of member to apply).

[67] Remedy in case of oppression (right of member to apply).

[68] Right of dissenting shareholder to apply to Court to retain its shares or to vary a takeover offer.

[69] Right of shareholder in merger of PLCs to have loss made good by directors or experts.

(ii) that any share which is the subject of the application will remain in the ownership of the applicant until the court has made a determination in respect of the application;

(iii) that the owner is the exclusive beneficiary of such right which is the subject matter of the application and the share is not subject to any encumbrance that prevents the owner from exercising such right;

(iv) that any stamp duty which was payable in respect of its acquisition of its ownership of the share has been discharged in full; and

(v) where applicable, that its interest was notified to the PLC within the period required by section 265 or 1053 and Regulation 21 of the Transparency (Directive 2004/109/EC) Regulations, 2007.

(5) The references to a member, a holder of a share or a shareholder in sections

69(4)(b)[70],

89(4)[71],

96(8)[72],

108(1)[73],

111(2)[74],

180[75],

182[76],

185(1)[77],

228(3)[78],

228(4) [79],

252(2)[80],

[70] Allotment of shares.

[71] Rights of holders of special classes of shares.

[72] Transmission of shares on a death.

[73] Power to redeem preference shares issued before 5 May 1959.

[74] Effect of company's failure to redeem or purchase.

[75] Persons entitled to notice of general meetings.

[76] Quorum (at general meetings).

[77] Representation of bodies corporate at meetings of companies.

[78] Statement of principal fiduciary duties of directors (recognising interests of person that has right to nominate a director).

[79] Statement of principal fiduciary duties of directors (recognising interests of person that has right to nominate a director).

338[81],

339[82],

374(3)[83],

392(6)[84],

417(1)[85],

427[86],

457[87],

459[88],

460(4)[89],

1137(4)[90],

1147[91] and

1159(4)[92]

shall be deemed also to refer to an owner of a share who has satisfied the requirements in subparagraph 4(a) or 4(b) above with respect to that share.

(6) All persons who were entitled to receive notice of a meeting by virtue of subparagraph 4(a) above at the date the notice was posted, shall also be entitled to attend at the meeting in respect of which the notice has been given and shall be entitled to speak at such meeting provided that such person remains an owner of a share at such time.

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[80] Approval of company necessary for payment to director of compensation in connection with transfer of property (provision of information to member).

[81] Circulation of statutory financial statements.

[82] Right to demand copies of financial statements and reports.

[83] Publication of revised financial statements and reports.

[84] Liability of auditors to third parties,

[85] Extension of time for registration of charges and rectification of register.

[86] Registration against company of certain matters prohibited.

[87] Right to buy out shareholders dissenting from scheme or contract approved by majority and right of such shareholders to be bought out.

[88] Supplementary provisions in relation to sections 457 and 458 (including provision for applications to court).

[89] Construction of certain references in Chapter to beneficial ownership, application of Chapter to classes of shares, etc.

[90] General meetings of merging companies.

[91] Right of shareholder in merger of PLCs to have loss made good by directors or experts.

[92] General meetings of companies involved in a division.

(7) Neither paragraph 6 above nor the reference to section 185(1) in subparagraph 5 above, shall entitle the person to vote at a meeting of the company or exercise any other right conferred by membership in relation to meetings of the company.

(8) Where two or more persons are the owner of a share, the rights conferred by this section shall not be exercisable unless all such persons have satisfied the requirements in subparagraph 4(a) or 4(b) above with respect to that share.

(9) In the case of the death of an owner of a share, the survivor or survivors where the deceased was a joint owner of the share, and the personal representatives of the deceased where he or she was a sole holder, shall be the only persons recognised by the company as the persons entitled to exercise any rights conferred by this section in respect of that share provided that they or the deceased owner have satisfied the requirements in subparagraph 4(a) or 4(b) above with respect to that share.

(10) Where a share has been registered in the name of a nominee of a central securities depository, that nominee shall be recognised by for all relevant purposes as holding such share in trust for such central securities depository.

Appendix 5

Proposed Part 17, Chapter 17A, section 1170A

Schemes of Arrangement

(1) In section 449(1), "special majority" insofar as it applies to an applicable class [NOTE 1] means, in any particular instance at the option of a PLC, ***either:***

(a) (i) in the case of an applicable class consisting of shares, a majority in number representing at least 75 per cent in value of the members of the applicable class present and voting either in person or by proxy at the scheme meeting;[NOTE 2]

(ii) in the case of an applicable class consisting of transferable securities other than shares, a majority in number representing at least 75 per cent in value of the holders of the applicable class present and voting either in person or by proxy at the scheme meeting;[NOTE 3]

or

(b) where a super-quorum[NOTE 4] is in attendance at a scheme meeting:

(i) in the case of an applicable class consisting of shares, a majority representing at least 75 per cent in value of the members of the applicable class present and voting either in person or by proxy at the scheme meeting;

(ii) in the case of an applicable class consisting of transferable securities other than shares, a majority representing at least 75 per cent in value of the holders of the applicable class present and voting either in person or by proxy at the scheme meeting.

(2) In this section:

"**applicable class**" means any class of securities (whether shares or securities other than shares) of a PLC (including where the relevant issuer has only one class of securities);

"**super-quorum**" means:

(i) in the case of an applicable class of securities consisting of shares, members present in person or by proxy representing at least one-third in value of the members of the applicable class;[NOTE 5]

[NOTE 1] Defined in subs. (2).

[NOTE 2] This is equivalent to the existing s.449(1) definition for shares

[NOTE 3] This is equivalent to the existing s.449(1) definition for securities other than shares.

[NOTE 4] Defined in subs. (2).

[NOTE 5] This implements for shares CLRG Recommendation 4.4.4 on page 15 of its June 2020 Report on certain Company Law Issues arising under the EU Central Securities Depositories Regulation 909/2014 (CSDR).

(ii) in the case of an applicable class of securities consisting of securities other than shares, holders present in person or by proxy representing at least one-third in value of the holders of the applicable class.[NOTE 6]

END

[NOTE 6] This implements for securities other than shares CLRG Recommendation 4.4.4 on page 15 of its June 2020 Report on certain Company Law Issues arising under the EU Central Securities Depositories Regulation 909/2014 (CSDR).

COMPANY LAW REVIEW GROUP

REPORT ON THE CONSEQUENCES OF CERTAIN CORPORATE LIQUIDATIONS AND RESTRUCTURING PRACTICES, INCLUDING SPLITTING OF CORPORATE OPERATIONS FROM ASSET HOLDING ENTITIES IN GROUP STRUCTURES

DECEMBER 2021

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

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

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

21 December 2021

Dear Tánaiste,

Dear Minister,

I am pleased to present to you a Report of the Company Law Review Group (**CLRG**) on the consequences of certain corporate liquidations and restructuring practices including splitting of corporate operations from asset holding entities in group structures.

This and related issues have proven to be complex, requiring extensive discussion and analysis, reflected by the 11 meetings of the CLRG's Corporate Insolvency Committee in 2021 which considered the issues in this Report. I wish to pay tribute to the exceptional input of the Committee's Chair, Professor Irene Lynch Fannon, who led the discussion and analysis and formulation of the conclusions and recommendations in this Report. The Committee's approach was to improve access for creditors to the remedies available under the Companies Act, in the context of the Act's objective being to balance the respective rights of stakeholders.

Perhaps inevitably, it was not possible for there to be unanimity on all issues and accordingly, the Report notes where there was a majority view only.

As well as thanking the CLRG's Corporate Insolvency Committee for their engagement and input in examining these issues, I would also like to thank the Department of Enterprise, Trade and Employment for their support, in particular, Secretary to the Group, Mr Stephen Walsh.

Yours sincerely,

_____

Paul Egan SC
Chairperson
Company Law Review Group

1. Introduction to the Report

1.1 The Company Law Review Group

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

The CLRG consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and trade unions), regulators (implementation and enforcement bodies) and representatives from government departments including the Department of Enterprise, Trade and Employment (**the Department**) and Revenue. The Secretariat to the CLRG is provided by the Company Law Review Unit of the Department of Enterprise, Trade and Employment. Full lists of members of the Company Law Review Group and of the Corporate Insolvency Committee are set out in Section 2.

1.2 The Role of the CLRG

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

1.3 Policy Development

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

1.4 Contact information

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

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

Stephen Walsh
Secretary to the Company Law Review Group
Department of Enterprise, Trade and Employment
Earlsfort Centre
Lower Hatch Street
Dublin 2
D02 PW01 Email: stephen.walsh@enterprise.gov.ie

1.5 Work Programme and Policy Context

Item 1 on the Company Law Review Group's (CLRG) Work Programme 2020-2022 arises from commitments contained in the Programme for Government, '*Our Shared Future',*[1] in relation to workers' rights when a company goes into liquidation.

The Tánaiste wrote to the Chair of the CLRG on 30 July 2020, requesting that Item 1 be considered a priority issue:

> '*The first item on the Work Programme deals with commitments from the Programme for Government. Issues surrounding workers' rights when a company goes into liquidation have come to the fore in light of COVID-19, in particular the alleged practice of a minority of trading entities splitting their operations between trading and property with the result being the trading business (including jobs) go into insolvency and assets are taken out of the original business. I ask that the CLRG report to me on this matter by 31st December 2020. It is time that these issues not only be reviewed but also dealt with. Government will be ready to act on the findings and propose legislation where this can achieve results.'*

This issue raises three distinct questions surrounding:

- first, the legal provisions which serve to protect workers as creditors in corporate liquidations;

- secondly the alleged practice of restructuring corporate entities into trading operations and property holding companies which result in the removal of assets from the trading entity; and

- thirdly, the examination of legal provisions regarding removal of assets out of the original business including sales to connected parties on insolvency.

In his letter to the Tánaiste in late December 2020, the CLRG Chairperson outlined the CLRG's planned approach to this Work Programme Item. The Committee has divided the work into three separate workstreams: -

- The first workstream involved a review of existing legislative provisions regarding the provision of information to creditors generally and to employees specifically. The specific question was whether these provisions provide sufficient protection to employees and creditors or whether some of the reforms which have either been suggested earlier by the CLRG in its 2017 Report ought to be implemented and/ or whether there are additional measures which ought to be put in place.

  The CLRG Report on *Existing Legislative Provisions Regarding the Provision of information to Creditors Generally and in Particular to Employees* (March 2021) addressed this issue.

[1] Programme for Government: Our Shared Future gov.ie - Programme for Government: Our Shared Future (www.gov.ie)

- The second workstream involves a consideration of employees as corporate stakeholders. In particular, the CLRG were specifically asked to consider a concern regarding alleged restructuring and splitting of corporate operations entities within a group from asset holding entities with this occurring in a minority of cases.

- The third workstream (which is the subject of this Report) addresses:

    - the legal provisions that pertain to any sale to a connected party following insolvency of a company including who can object and allowable grounds of an objection;

    - transactions around insolvency which remove assets from the reach of creditors, including employees, and in particular involve the transfer of assets to connected parties.

Many of the provisions mentioned as being relevant to workstream 2 are also relevant to workstream 3 in that these can be broadly categorised as transactional avoidance provisions, sometimes referred to as 'asset swelling provisions'. This Report presents a combined review of the provisions relevant to each of these workstreams.

1.6 The CLRG Report on Existing Legislative Provisions Regarding the Provision of Information to Creditors Generally and in Particular to Employees (March 2021)

As mentioned above, the CLRG Report on *the Provision of information to Creditors Generally and in Particular to Employees* (March 2021) addressed workstream 1 of the work programme described above. This Report addresses workstreams 2 and 3 combined. The policy context in which this particular work is undertaken is similar to the concerns and issues described in the CLRG's Report of March 2021.

2. The Company Law Review Group Membership

2.1 Membership of the Company Law Review Group

The membership of the Company Law Review Group at [date] is set out in this table.

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

Fiona O'Dea	Ministerial Nominee (DETE)
Ciara O'Leary	Irish Funds Industry Association CLG (Maples and Calder LLP)
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace LLP)
Maureen O'Sullivan	Ministerial Nominee (Registrar of Companies)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Maura Quinn	The Institute of Directors in Ireland
Eadaoin Rock	Central Bank of Ireland
Doug Smith	Restructuring and Insolvency Ireland (Eugene F Collins)
Tracey Sullivan	Consultative Committee of Accountancy Bodies – Ireland (CCAB-I)

2.2 Membership of the CLRG Corporate Insolvency Committee

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

2.3 Legal Researchers to the Corporate Insolvency Committee

David Allen, B.L.	Barrister at Law
Matthew Brady, B.L.	Barrister at Law

3. Defining the Problem and the Economic Impact of COVID-19

3.1 Defining the problem outlined for Workstreams 2 and 3.

The Review Group's Corporate Insolvency Committee (the **Committee**) was anxious that the problem or mischief which has led to the concern amongst the public and other stakeholders should be adequately defined so that abusive incidences of corporate restructuring and re-organisation are separated out from a legitimate interest that any corporate group might have in organising its affairs, with a view to minimising business risk.

The general view of members of the Committee was that the incidence of abusive practices, although attracting headlines and a great deal of concern, is low. On the other hand, the Review Group recognises the importance of ensuring that restructuring and reorganisation proceeds within the confines of the framework provided in the Companies Act 2014 (as amended). As we have noted in our March 2021 Report, there are complex policy issues involved in this matter. In that vein the Committee sought to refine the issues which could be addressed by the CLRG, conscious that the Review Group's remit concerns company law only. This part of the Review Group's work focuses on corporate restructurings and necessarily revisits some recommendations (described below in Section 4) made by the CLRG in its 2017 Report.

In ensuring that the problem is appropriately defined, the Review Group has sought to differentiate between examples of group restructuring and of group insolvencies. In some cases, there may be aggressive corporate restructurings where valuable property assets are removed from a group in a receivership process prior to liquidation, while other examples might include a more straightforward insolvency of particular corporate entities within a group. In both cases, concerns can arise that employees and other creditors may not be given adequate notice of the insolvency. On the other hand, any group of companies is entitled to arrange its affairs in a manner which is appropriate to its needs provided such arrangements comply with company law. For example, even relatively small group structures include companies which hold property, and other related companies, which carry on the trading activities of the group. This structure may involve a small number of companies (two for example) with a parent holding company. A further common example is that trading activities of a group can be divided into separate corporate entities relating to geographical market sectors.

The ODCE noted that its reviews of liquidations generally demonstrated that issues of concern arise in only a small subset of cases with the conclusion being reached that in over 90% of all liquidations directors had acted honestly and responsibly.

Overall, the view of state agency and practitioner representatives on the group was that the abusive examples which informed the work programme item is reflective of only a small number of insolvencies. The transactional avoidance provisions which are considered below are key measures available to liquidators and others, including creditors and other stakeholders, which may address some of the issues which have arisen. These are often described as 'asset swelling measures'. However, it is acknowledged that these provisions are not often used. There are various reasons for this which are described initially in Section 5 below and considered in detail in further Sections of this Report. This Report seeks to address these issues.

3.2 The Economic Impact of Covid-19

The Review Group is particularly aware that, in addition to the concerns which gave rise to the 2017 CLRG Report, and to the creation of its current work programme, the consequences of the COVID-19 pandemic have added to those concerns. There is a general anticipation of an increase in corporate insolvency figures, particularly in the retail sector. Given this predicted scenario the issue of creditors' and workers' rights has come to the fore. While current figures do not show a marked increase in insolvencies, this is likely to be due to the continued availability of government supports to enterprises, together with banking, trade credit and landlord supports being provided to affected companies. [2]

Notwithstanding such supports it is expected that the continued COVID-19 restrictions throughout 2021 will result in an increase in the number of businesses going into insolvency processes. The economic impact of COVID-19 makes the subject matter of this report a priority. As the Government seeks to unwind the level of business supports as the effects of the pandemic subside, levels of insolvencies are expected to increase. Although it had been predicted that insolvencies would increase by Q3 2021, the World Bank has taken the view that it may be roughly three years from the beginning of the pandemic before we see the real impact of non-performing loans arising from the loss of business during this period.[3]

The Central Bank[4] has also acknowledged the impact that significant levels of Government supports have had on different sectors and the broader economy. In reviewing the impact of COVID-19 on SMEs the Central Bank notes that SMEs are likely to face considerable financial strain compared with larger corporations and households. The uneven nature of the impact of COVID-19 on different sectors of the economy is already apparent and it is expected that whilst insolvency is likely to occur across various sectors of the economy, a particular impact will be seen in hospitality (bars, restaurants, hotels) and retail sectors.

[2] The recent National Competitiveness and Productivity Council Bulletin 21-5, Firm Dynamism and Productivity, states that, "While Insolvency rates to date remain in line with pre-pandemic trends, as more of the economy opens up and financial supports are gradually withdrawn, this could result in the number of firms facing financial pressure." firm dynamism and productivity.pdf (competitiveness.ie)

[3] "The Calm Before the Storm: Early Evidence on Business Insolvency Filings After the onset of Covid-19". World Bank 2021. World Bank Document

[4] https://www.centralbank.ie/news/article/press-release-impact-of-covid-19-on-irish-enterprises-sudden-large-and-uneven-01-october-2020

4. Previous Reports and Policy Developments relevant to the Committee's work

4.1 CLRG Report on the Protection of Employees and Unsecured Creditors 2017

Some of the issues which are addressed in this report were considered by the CLRG in its Report on *The Protection of Employees and Unsecured Creditors 2017,* which entailed a root and branch review of all the provisions of the Companies Act 2014 (as amended) relevant to the treatment of employees and unsecured creditors in an insolvency, in particular in what could be termed 'an aggressive restructuring context'. Some of the issues considered in that Report continue to be relevant to the subject matter of this Report and as described in the following sections have been addressed in the Plan for Action on Collective Redundancies following Insolvency. Other outstanding matters are considered in detail below.

4.2 Plan for Action on Collective Redundancies following Insolvency

Having regard to concerns expressed following previous liquidations, Ministers of State Damian English and Robert Troy launched the Plan of Action for Collective Redundancies in June 2021. A particular focus was placed on identifying ways to ensure that incorporation cannot be used as a pretext to avoid a company's legal obligations to its employees and creditors. This policy initiative is not in response to any one previous corporate insolvency resulting in collective redundancies. Rather, it addresses the issues arising across the generality of such situations and seeks to further supplement existing legislative protections and safeguards afforded to affected stakeholders. This policy response has been informed by a number of initiatives[5] and combines legislative proposals in the areas of employment law governing insolvency and redundancy as well as legislative proposals in the area of company law and corporate insolvency law that are material to the protection of workers as creditors. In addition, clear and accessible information bulletins will be provided by the Department in relation to those remedies designed to secure the protection of employees and which are already a feature of the existing legal landscape. Separately, in recognition of the changing nature of the employment landscape and the vast and complex body of law that exists in this area, it is further proposed to move to establish an independent forum that will consider employment law issues into the future, similar to the Company Law Review Group. Membership of this forum will include stakeholders such as employee and employer representatives, as well as employment law and other legal experts.

4.3 Company Law

Following consideration of the CLRG'S recent 2021 Report "*Review of existing legislative provisions regarding the provision of information to creditors generally and in particular to employees*", as well as the outstanding recommendations of the 2017 Report on the *Protection of Employees and Unsecured Creditors*, the Department of Enterprise, Trade and Employment made nine recommendations for legislative amendment as part of the Plan for Action on Collective Redundancies following Insolvency. While the CLRG sought to arrive at a consensus in each of the

[5] Duffy Cahill Report of April 2016 (*Expert Examination and Review of Laws on the Protection of Employee Interests when Assets are separated from the operating Entity)*, CLRG 2017 *Report on the Protections for Employees and Unsecured Creditors* and the CLRG Report of March 2021 entitled *Review of existing legislative provisions regarding the provision of information to creditors generally and, in particular, to employees.*

reports, ICTU dissented to varying degrees and submitted minority reports. Three of the nine supported amendments are in response to the minority report.

The following recommendations were implemented in the *Companies (Rescue Process for Small and Micro Companies) Act 2021*, which was commenced on December 8th, 2021.

- amending s. 627 to clarify that the liquidator has power to bring/defend proceedings before the WRC and Labour Court.
- amending s. 587 to oblige the liquidator/director to ensure creditors are made aware that they have the right to form and participate in a Committee of Inspection.
- amending s. 666 to provide that where a Committee of Inspection is appointed it shall include at least one employee creditor member (ICTU minority report).

The following remaining recommendations will be progressed at a later stage by way of regulations or amendment to the Companies Act 2014:

- amending the ODCE's liquidator's form to include consideration given to employees by the director in the period leading up to liquidation.
- engaging with the Courts Service to allow for a petition notice in a court liquidation to be published on corporate websites (Superior Court Rules amendment).
- establishing a working group of stakeholders to examine the format of the Statement of Affairs and liquidation related CRO forms.
- obliging directors to notify employees of the petition filed at court; the court could then have regard to whether the company has met this obligation.
- enabling the court to direct the provisional liquidator to inform employee representatives of his/her appointment, to explain the process and to invite them to provide information on the company's affairs.
- obliging directors to furnish creditors with the Statement of Affairs within 24 hours of it being presented to court and amend ODCE's liquidator's form to include a question on whether this obligation has been fulfilled.

The issues considered and recommendations made as part of this report may also be progressed in the context of the overall plan.

4.4 Employment Law

Some of the issues relevant to the position of employees in corporate insolvencies were considered by the Duffy Cahill Report.[6] Its terms of reference recognised what it described as the "the complex interface between company law and employment rights law", noting that the two codes

[6] Ibid. See https://enterprise.gov.ie/en/Publications/Duffy-Cahill-Report.html

have been devised for very different purposes.[7] Its terms of reference also included a request that consideration be given to changes at this interface between these two codes of law. Notwithstanding the fact that the Government has engaged extensively with the Social Partners to respond to the anticipated rise in insolvencies the Irish Congress of Trade Unions (ICTU) has highlighted that some of the Duffy Cahill Report's recommendations remain outstanding. It should be noted, however, that the Plan for Action on Collective Redundancies following Insolvency was welcomed by all the Social Partners.

In view of its remit the Committee decided not to take a view on the adequacy of these provisions.

[7] https://enterprise.gov.ie/en/Consultations/Consultations-files/Appendix-1-Terms-of-Reference-for-Expert-Examination.pdf

5. Relevant Company Law Provisions and Considerations

5. 1 The Relevant Company Law Provisions

The Committee identified the following provisions of the Companies Act 2014 (as amended) as being worthy of further review:

- Section 599 of the 2014 Act, under which a related company may be required to contribute to debts of a company being wound up;

- Section 600 of the 2014 Act, under which the assets of related companies in liquidation may be pooled; and

- a possible addition to the 2014 Act (as amended) following the structure of section 224 (under which directors must have regard to the interests of employees) in order to impose on directors of companies a statutory obligation to consider the interests of creditors where it appears that a company is, or is likely to be, unable to pay its debts as they fall due. This proposal is reflective of statements in case law and has been the subject matter of a CLRG recommendation in 2017.[8]

- Additional provisions which are potentially relevant to both workstreams 2 and 3 include what are generally described as 'transactional avoidance provisions'. These include sections 602, 603, 604, 608, 609, 610, 612 & 613 of the Companies Act 2014 (as amended). These provisions can be generally described as provisions which have the effect of ensuring assets are not removed from the reach of creditors. Not all of the provisions have been given equal consideration as the Committee responded to particular submissions or observations.

Even though these provisions have, in many cases, been on the statute book in some form since the 1963 Companies Act and have, in other cases, been on the statute book since 1990, many of the provisions have been rarely used. The Review Group considers that there are a number of reasons for this being the case.

The first is that evidentiary requirements in the provisions are not always met. Some proposals are made to clarify provisions with this difficulty in mind. These are considered in Section 6 of this Report. Secondly, in relation to some of the provisions, pursuing the officers of the company or relevant alleged wrongdoers may not be worthwhile. This is particularly relevant when the purpose of the provision is to impose personal liability on directors or officers as in the case of section 610 on fraudulent and reckless trading (see below). Thirdly, in some cases, depending on the drafting of the legislation, the liquidator is personally liable for the costs of such action if unsuccessful. This is considered to be a deterrent and presents a challenging environment in which a liquidator must weigh the pros and cons of embarking on such action. This issue is considered in Sections 9 and 10 of this Report. Finally, the low level of funding to pursue such actions is also in question. For this reason, this Report makes some suggestions on the topic of third-party funding in insolvency related litigation at Section 8 below.

[8] See below Section 4.2.1

5.2 Provisions to be considered which are also considered in the CLRG 2017 Report

5.2.1 Proposed Section 224A of the Companies Act 2014

The 2017 CLRG Report recommended that the Companies Act 2014 would be amended to include the "imposition of a statutory obligation on directors of companies to consider the interests of creditors where it appears that a company is, or is likely to be, unable to pay its debts as they fall due." This proposal reflects an obligation which has already been described in case law, in particular in a decision of the Supreme Court in *Re Frederick Inns Ltd,*[9] where Blayney J. considered the issue of payments made by four companies to settle debts of related companies when the companies were under the management of directors 'pending imminent liquidation'. Holding that these payments were not "lawfully and effectively done" the court held that:

> "Because of the insolvency of the companies the shareholders no longer had any interest. The only parties with an interest were the creditors. The payments could not have been lawful because they were made in total disregard of their interests."[10]

In doing so the court referred to similar principles outlined in other common law jurisdictions.[11]

The obligation to have regard to the interests of creditors at a point of insolvency was reiterated in a statement of principles relevant to restriction provisions from Clarke J (as he then was) in *Re Swanpool Ltd.*[12] In considering how the issue of restriction is approached the court noted that approaches may differ depending on the facts but "[I]n broad terms there would seem to me to be three types of situation which the court is typically required to consider in such applications. They are:

1. Issues involving compliance by the company with its formal obligations under the Companies Acts including keeping books and records, making returns, holding meetings and the like;

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[9] *Re Frederick Inns Ltd* [1994] 1 ILRM 387

[10] *Ibid.*

[11] See *Kinsela and Another v Russell Kinsela Property Limited (in liquidation*) (1986) 4 NSWLR at p. 722: "In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration." See also *West Mercia Safetywear Ltd (in liquidation) v Dodd* [1988] BCLC 250.

[12] *In Re Swanpool Ltd* [2006] 2 ILRM 217 where Clarke J. stated at para 3.1: "In in Re Frederic Inns Limited [1994] ILRM 387 the Supreme Court had to consider the question of the duties of directors in a situation where a company was being wound up or where any creditor could have it wound up on the ground of insolvency. Blayney J., in giving the judgment of the court, found that in such circumstances the directors owed a duty to the creditors to preserve the assets so as to enable them to be applied pro tanto in discharge of the company's liabilities. There can be little doubt, therefore, that amongst the important duties of directors is to ensure that, when it becomes clear that a company is insolvent, the assets are preserved and dealt with in the way in which the Companies Acts require."

2. The commercial management of the company most particularly at the period when the company was insolvent or heading in that direction; and

3. Compliance by the directors with the obligations identified in *Frederick Inns* to ensure that once the company was facing insolvency its assets were dealt with in a manner designed to ensure the proper distribution of those assets in accordance with insolvency law."

Following consideration of COVID-19 measures during early 2020 by the CLRG, a proposal to codify this obligation appeared in the General Scheme of what became the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 [13], but this provision was not enacted at that time.

The 2020 Act primarily dealt with temporary, emergency measures designed to ensure the normal operation of the Companies Act for the duration of the pandemic. It provided for temporary amendments to the Companies Act to allow for virtual meetings as well as certain substantive amendments to insolvency law. Owing to the emergency nature of the Act it was drafted and brought through the Houses of the Oireachtas within a particularly compressed timeframe. As the insertion of the new section 224A was to be a permanent amendment, it was considered appropriate to remove it pending further policy analysis and consideration to ensure it accurately reflected the existing common law duty as set out in *Re Fredericks Inns*.

This obligation must now also be viewed in the additional context of Article 19 of Preventive Restructuring Directive *(*EU*)* 2019/1023, which sets down minimum rules for Member States' preventive restructuring frameworks, and which must be transposed by 17 July 2022.[14]

Article 19 directs that:

> "Member States shall ensure that, where there is a likelihood of insolvency, directors, have due regard, as a minimum, to the following:
>
> (a) the interests of creditors, equity holders and other stakeholders;
>
> (b) the need to take steps to avoid insolvency; and
>
> (c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business."

[13] Report on Measures to address Company Law Issues arising by reason of the COVID-19 pandemic. The suggested provision is as follows:
"(1) The directors of a company who believe, or who have reasonable cause to believe, that a company is unable or likely to be unable to pay its debts as they fall due, shall–
(a) have regard to the interests of the company's creditors; and (b) preserve the company's property.
(2) The duty in subsection (1) shall be owed to the company (and the company alone) and shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors.
(3) Where a director of a company acts in breach of his or her duty under subsection (1) and the company goes into insolvent liquidation then the director shall be liable to indemnify the company for any loss or damage resulting from that breach.
(4) For the purposes of subsection (3), a company shall be taken to have suffered loss or damage where, upon its insolvent liquidation, its creditors do not recover the sums which they would have received had there been no breach of the duty in subsection (1)."

[14] The Examinership process provided in Part 10 of the Companies Act 2014 and the rescue process outlined in Companies (Rescue Process for Small and Micro Companies) Act 2021 are relevant to this Directive.

Even where a duty to consider the interests of creditors might be imposed on directors nevertheless there are a number of considerations regarding the enforcement of directors' duties, particularly in a liquidation context. The statement of directors' duties in the Companies Act 2014 interfaces with provisions on disqualification, where directors can be disqualified for breach of duty. This is considered further below in Section 7. An additional approach is to consider a change in the law on the funding of insolvency litigation as mentioned in the previous section which is considered in detail in Section 8 below.

5.2.2 Recommendation

Amend the Companies Act 2014 to insert a new section 224A which:

a) codifies the duty identified by the Supreme Court in Re Frederick Inns Ltd and,

b) does so in a manner which takes account of the terms of Article 19 of Directive (EU) 2019/1023.

5.2.3 Consideration of Sections 599 and 600

Sections 599 and 600 were considered by the CLRG leading to its Report in 2017. Their precursors were sections 140 and 141 of the 1990 Act. Section 599 refers to the possible obligation imposed by a court on a related company *to contribute* to the pool of assets of a company in liquidation. (Contribution orders). Section 600 refers to *pooling orders*, where the assets of related companies in liquidation are pooled under a court order. The Committee did not consider this second provision to be particularly relevant to the issues at hand and therefore its observations focus on Section 599.

Section 599 of the 2014 Act provides a mechanism by which a company (for example a parent company) that is related to another company which is being wound up (a subsidiary) can be ordered to make a contribution to the debts of the company being wound up on foot of an application by a creditor, liquidator or contributory of the company. As such, section 599 provides a potential remedy for creditors who have been deprived of access to assets through the use of company structures. Pursuant to s. 599, the court is permitted to make a contribution order when it considers it *"just and equitable"* to do so. Subsection (4) stipulates that the court must have regard to the following factors in the exercise of its discretion:

a) The extent to which the related company took part in the management of the company being wound up;

b) The conduct of the related company towards the creditors of the company being wound up;

c) The effect which a contribution order would have on the creditors of the related company.

In addition, under s. 599(5) it is a mandatory requirement of the section that the court be satisfied that the circumstances giving to the winding up of the company are *"attributable"* to the acts of the related company.

5.2.4 Legislative history of Section 599.

The contribution order remedy was derived from a similar provision in s. 30 of the New Zealand Companies Amendment Act 1980[15]. The New Zealand provision was enacted on foot of a recommendation by the Macarthur Committee[16] in response to instances where well known public companies had *abandoned* their subsidiaries. The remedy was first enacted in this jurisdiction in s. 140 of the Companies Act 1990. As originally drafted, the Bill was identical to the New Zealand legislation. However, some perceived the contribution order to be anti-risk taking and anti-business. At the same time the issue of group liability was due to be addressed in the Ninth Directive (on corporate groups) at EU level[17] and it was felt by some that developments at EU level should be awaited. In this context, a number of changes were made to moderate the proposed provision. The section as enacted therefore differed from the New Zealand provision in a number of material respects:

1) First, the Irish legislation has both discretionary and mandatory elements. The Court is required to have regard, in the first instance, to three discretionary criteria in determining whether or not it is just and equitable to make a contribution order under s. 599(4). In addition, however, the court must also be satisfied that the circumstances which gave rise to the liquidation of the company were attributable to the acts of the related company under s. 599(5). In New Zealand, on the other hand, although the legislation does require the court to consider the extent to which the circumstances which gave rise to the liquidation were attributable to the acts of the related company, there is no requirement that this acts as a prerequisite to the making of an order;

2) Second, the express provision in the New Zealand legislation which permits the court to have regard to any other factor that it considers fit in exercising its discretion to make a contribution order was not included in the Irish legislation (1990 Act) on the basis that it was thought to give too broad a discretion to the Court;

3) Finally, a requirement that the Court consider the effect which such an order would have on the creditors of the related company was added to the Irish legislation at Seanad stage[18] and does not appear in the New Zealand provision. This is provided for in section 599(4)(c).

[15] Now contained in ss. 271(1)(a) and 272 of the Companies Act 1993.

[16] Final Report of the Special Committee to Review the Companies Act, 1973 (New Zealand).

[17] A draft "Ninth Company Law Directive on the Conduct of Groups containing a Public Limited Company as a Subsidiary" was circulated by the Commission in December 1984 for consultation. According to its Explanatory Memorandum, the Directive was intended to provide a framework in which groups can be managed on a sound basis whilst ensuring that interests affected by group operations are adequately protected. Such a legal framework, adapted to the special circumstances of groups, was considered to be lacking in the legal system of most Member States. The consultation on the draft Directive showed that there was very little support for such a comprehensive framework on group law: such an approach was largely unfamiliar to most Member States, and the business sector viewed it as too cumbersome and too inflexible. As a consequence, the decision was made not to issue an official proposal. However, since that time a number of European jurisdictions have made amendments to parent liability for group structures.

[18] It is perhaps worth noting that although the New Zealand legislation does not impose a similar requirement, the courts in New Zealand have expressed significant doubt that the section would be permitted to operate so as to prejudice the *bona fide* unsecured creditors of a related company.

5.2.5 The CLRG 2017 Report's observations on Section 599

The Irish and New Zealand provisions were examined in detail by the Review Group in the course of discussions leading to its 2017 Report.[19] At that time neither section 599 nor its predecessor had been the subject of a written judgment of the Superior Courts. This continues to be the case. The Review Group noted that the more liberal language in the text of the New Zealand legislation had not given rise to a significant volume of claims for contribution orders in that jurisdiction and that also continues to be the case.[20]

With the exception of ICTU, who recommended replication of the New Zealand provisions in Irish law, the Review Group did not recommend any change to s. 599 of the 2014 Act at that time. It was considered that the section provided an exceptional remedy that would only be used where very rare circumstances were present.

5.2.6 Attribution test in section 599(5)

During the current review the issues mentioned at (1)-(3) in section 5.2.4 were considered and, following debate, the Review Group, by a majority, suggests a qualification of the attribution test in s.599(5)

There was general agreement regarding the desirability of a modification of the test expressed in s.599(5) which prevents a court from making an order unless the '*court is satisfied that the circumstances that gave rise to the winding up of the company are attributable to the acts or omissions of the related company*.' The view was taken that this was a particularly restrictive provision and might prevent the use of the provision in the exceptional cases where such an order might be warranted.

The Review Group's proposal is to move subsection 599(5) with some rewording into *s.599(4)(d)* so that section 599 would, with the underlined change, read as follows:

> (1) On the application of the liquidator or any creditor or contributory of a company that is being wound up, the court, if it is satisfied that it is just and equitable to do so, may make the following order.
>
> (2) That order is one that any company that is or has been related to the company being wound up shall pay to the liquidator of that company an amount equivalent to the whole or part of all or any of the debts provable in that winding up.
>
> (3) The court may specify that that order shall be subject to such terms and conditions as the court thinks fit.
>
> (4) In deciding whether it is just and equitable to make an order under this section the court shall have regard to the following matters:
>
> (a) the extent to which the related company took part in the management of the company being wound up;

[19] See Section 3.3 and Appendix 5 of the Report.
[20] These issues are adumbrated in Section 4.1 above.

(b) the conduct of the related company towards the creditors of the company being wound up;

(c) the effect which such order would be likely to have on the creditors of the related company concerned.

(d) the extent to which circumstances that gave rise to the winding up of the company are attributable to the acts or omissions of the related company.

5.2.7 Recommendation

The Review Group, by a majority, recommends that the attribution test contained in section 599(5) be modified by the insertion of s. 599(4)(d) to provide for a less restrictive provision stating that the court can have regard to the extent to which circumstances that gave rise to the winding up are attributable to the acts or omissions of the related company.

5.2.8 Consideration by a court of other issues

A Committee majority favoured inserting the provision found in the New Zealand legislation which allows the court to have regard to any other factor that it considers fit in exercising its discretion to make a contribution order. The majority were satisfied that a provision allowing for a discretionary approach by the court would not open the floodgates of litigation but would allow for case-by-case decision-making and analysis which seemed appropriate as a tool for dealing with what the Committee considered to be exceptional, abusive cases as outlined in Section 3.1 above (Defining the Problem). The issues described in the following paragraphs were examples of matters which might require discretionary analysis by a court.

(i) Withdrawal of support for the company in liquidation

The need for judicial discretion in this context was underlined by experience as described by practitioners and by Revenue where a parent company might withdraw support previously provided to a subsidiary on the basis that the subsidiary was struggling and ought to be liquidated. For example, there have been cases where a subsidiary had ongoing commitments which had been supported by the parent and which were then withdrawn (this could arise for example under a leasehold arrangement with the parent supporting payments of rent). The Committee took the view that this decision, which is perfectly legitimate in most cases, might nevertheless warrant scrutiny in particular circumstances. The fact that a decision to withdraw financial support to a subsidiary could be considered quite differently underlined the importance of providing some discretion to the court.[21]

(ii) The holding of cross directorships in a group context

A further issue which gave rise to discussion was the holding of cross directorships within a group structure. This is an issue with other consequences and effects in other areas of company law and the Committee therefore acknowledged that this particular issue was not central to its

[21] Indeed, this reflects the fact scenario in *Lewis Holdings Ltd. v Steel & Tube Holdings Ltd*. [2015] 2 NZLR 831 where a contribution order was made and subsequently affirmed by the Court of Appeal [2016] NZCA 366.

deliberations. Nevertheless, it was agreed that when encountered in practice, this issue confounded the idea that each company within a group was managed as a separate entity. In fact, there was little evidence in these kinds of situations that there was any reality to the proposition that directors in such circumstances were independently considering each of the companies separately. This again underlined the importance of providing for judicial discretion in this area.

5.2.9 Recommendation

The Review Group, by a majority, recommends the insertion of a provision similar to the New Zealand provision, which allows the court to have regard to any other factor that it considers fit in exercising its discretion to make a contribution order.

5.2.10 The 'Interests of Justice' Exception.

It has been observed that in the context of groups, Irish law already allows for a discretionary decision of the courts to lift the corporate veil where the 'interests of justice' requires it. Indeed, case law was referred to in the debates surrounding the initial introduction of this legislation. This is sometimes referred to as an aspect of the single economic entity approach to corporate groups and has its origins in an English precedent *DHN Food Distributors v London Borough of Tower Hamlets* [22] where the emerging treatment of groups as a single economic entity for accounting purposes was considered as part of the approach of the court with the court holding that the separate personality of companies that were related in a group structure could be set aside where the interests of justice required it. This approach was subsequently adopted into Irish law in *Powers Supermarkets (Quinnsworth) v Crumlin Investments (Dunnes)*.[23]

The exceptions to the general doctrine of corporate personality in a group structure are outlined by Laffoy J. in *Fyffes v DCC*.[24] The exception, which relies on a broad discretionary 'interests of justice' criterion is somewhat controversial however, in that having been developed in English law in the 1970s, it has been reconsidered following a detailed judgement delivered by the UK Supreme Court in Prest *v. Petrodel Resources Ltd.* [25] which took a more restrictive approach to this issue. This decision has been approved by Laffoy J. in the Supreme Court decision of *O'Donnell and Ors v Bank of Ireland*.[26] In the intervening years since the Fyffes decision there have been a few references to

[22] DHN Food Distributors v London Borough of Tower Hamlets [1976] 1 WLR 852.

[23] Powers Supermarkets (Quinnsworth) v Crumlin Investments (Dunnes) [1981] 6 JIC 2201

[24] Fyffes plc v DCC plc and Ors. Laffoy J. [2005] IEHC 477. This particular part of the judgement was approved by Fennelly J. delivering the opinion of the Supreme Court in that case. See [2007] IESC 36

[25] [2013] UKSC 34

[26] *O'Donnell and Ors v Bank of Ireland &Ors.* [2014] IESC 77 In Paras 36-41 of its judgement the court describes the principles set out by the UKSC in *Prest v Petrodel Resources Ltd.* [2013] UKSC 34 pertaining to exceptions to the rule on corporate personality and states in Para. 41 that 'Therefore, there appears to be no basis upon which to depart from the ordinary rules of separate corporate personality in this case."

the principle but no decisions which disregarded the separate personality of corporates in a group, particularly with a view to imposing liability as between related companies.[27]

[27] In *Goode Concrete v. CRH plc* [2012] IEHC 116, Cooke J indicated that he would have been prepared to lift the corporate veil on the interest of justice principle in the course of an application for security for costs, but did not do so as the companies in question were foreign companies.
In *Aim Cash & Carry Limited v. All Points Building Maintenance Ltd* [2014] IEHC 555, Keane J refused to lift the veil because the two entities were not under the same control so it could not be said that they were part of the same economic entity. There is also a passing reference to the single economic entity doctrine in the decision of McGovern J in *IIB Internet Services ltd v. Motorola* [2012] IEHC 567 which concerns an application to dismiss proceedings. The Defendants contended that the single economic entity doctrine did not represent the law in this jurisdiction. Citing a number of the cases (Power Supermarkets *et al*), McGovern J was satisfied that the Plaintiffs had raised an arguable ground which would comfortably get them over the threshold of an application to dismiss as bound to fail.

6. Transactional Avoidance Provisions

6.1 Introduction

The following paragraphs provide a review of what are called 'asset swelling measures' and / or 'transactional avoidance provisions'. Generally, where successfully pursued, the outcome of actions under these provisions has the effect of recovering funds or assets from companies or individuals, whether connected parties or otherwise, which form part of the pool of assets available to the creditors of the insolvent company. As described above in Section 5.1, there are a number of reasons why these provisions are not used as frequently as anticipated or expected. This Section considers the provisions in the context of the first of these reasons, namely the evidentiary requirements contained in the provisions per se.

6.1.1 Sections 597 and 598

These refer to circumstances where last minute floating charges are created. The Committee did not spend time considering these provisions as no particular submissions had been received as to substantive reform. However, a recommendation is made regarding third-party litigation funding to support the operation of these provisions as described in Sections 8 of this Report. Of relevance to the discussion in Sections 8 to 10 of this Report is that neither of these provisions specifies the applicant, i.e., whether this is the liquidator or the company, rather the section is couched in passive terms.

6.1.2 Section 602

This contains provisions that relate to voidance of dispositions of property after the commencement of a winding up. This section prohibits the post-liquidation disposition of property, any transfer of shares and any alteration in the status of members of a company. This subsection is a merger and expansion of section 255 of the Companies Act 1963, which dealt with voluntary winding up, and section 218 of the Companies Act 1963, which dealt with court ordered windings-up. This section now creates an express avoidance of property dispositions in voluntary windings-up, identical to that in court ordered windings-up. This provision was not considered in any detail by the Committee as no particular submission was received in relation to it. Again, the applicant is not specified in the section itself and this point is relevant to the discussion in Sections 8 to 10 of this Report.

6.1.3 Section 603

This contains provisions that relate to voidance of executions against property of a company. If a winding up order is made, any attachment, sequestration, distress or execution which is being effected against the property of the company and which has been put in force after the commencement of the winding up shall be void. This section re-enacts section 219 of the Companies Act 1963. It has been amended to apply to all types of winding up and not merely to court ordered windings-up. This recognises that two primary objectives of winding up, common to both court ordered and voluntary windings-up, are to enable the orderly realisation and the fair distribution of the company's assets. Both of these objectives are subverted by allowing individual creditors to obtain payment out of a company's assets other than by the ordinary rules of realisation and distribution in a winding up. This provision was not considered in any detail by the

Committee as no particular submission was received in relation to it. As with s. 602 the applicant is not specified in the section.

6.1.4 Section 604

This section operates to set aside as void any payment or disposition of company property made in favour of a creditor ***"with a view to giving the creditor…preference over the other creditors of the company"*** (emphasis added) where the payment or disposition is made within six months of the commencement of a winding up and the company is, at the time of the commencement of the winding up, unable to pay its debts. Subsection 4 contains a rebuttable presumption to the effect that any payment or disposition made in favour of a 'connected person' as defined in the Act shall be presumed to have been done with a view to giving that person an unfair preference and be invalid accordingly. The provision replicates in material part what had been termed the fraudulent preference provision contained in section 286 of the Companies Act 1963, (as amended) which was derived from the personal bankruptcy legislation. The most significant change to the section implemented by the 2014 Act was the substitution of the phrase "unfair preference" in place of "fraudulent preference" so as to clarify that fraud was not a required proof pursuant to the section. The fact that the provision has been the subject of very few reported decisions of the Superior Courts to date suggests that the provision has been underutilised and that the amendment implemented by the 2014 Act has not led to any major change of this position.

Notwithstanding the removal of the reference to fraud, the section remains a very difficult one to prove. The difficulties relating to the original provision regarding proof of intent to prefer can be equally applied to the 2014 provision. The previous provision was interpreted to mean that the applicant must establish that the dominant intention of the company at the time of entering into the disputed transaction was to give the creditor a preference over the other creditors. The difficulties with this are two-fold: First, establishing corporate intent or motive requires that such intent be imputed from a controlling individual(s) to the legal entity. This will often be a difficult onus for a liquidator to discharge. Second, the requirement that the intention to prefer must be shown to be the dominant motive under the previous legislation meant that, on some interpretations, where a creditor pressurised the debtor for payment, this negated the intent.

Other factors which may have influenced the extent to which the section has been relied upon are the lack of funds generally available to bring proceedings in an insolvent liquidation, a matter which is considered in this Report, as well as the possibility that the person against whom the relief is sought may not be a 'mark' (namely that the assets or moneys will not be returned to the creditors).

It was observed that this provision is borrowed from traditional bankruptcy law, so the issue of proof of intent is somewhat misplaced and outdated in a corporate setting. Yet the 2014 legislation continues to refer to the concept of a corporate debtor engaging in a payment to a creditor 'with a view to giving the creditor…a preference over the other creditors of the company'. It is difficult to demonstrate how one can easily attribute such an action to a corporate entity, namely that a corporate entity enters into a transaction *with a view* to achieving a particular purpose. [28]

[28] See generally Lynch Fannon, I and Murphy G: *Corporate Insolvency and Rescue* (Bloomsbury Professional, 2012) paras. 9.118-9.122.

Nevertheless, on balance the majority view of the Committee was that the provision was used in practice (without being litigated) and that the provisions of section 608 complemented this provision.

6.1.5 Preferences in favour of connected guarantors

During the Committee's deliberations some questions were raised about the scope of the connected parties provisions provided for in Section 604(4) and their application to connected guarantors. Subsection (2) provides that a disposition of company property that is done with a view to giving any creditor, *or any surety or guarantor for the debt due to such creditor*, a preference over the other creditors of the company, shall be deemed an unfair preference, *inter alia*, if a winding up of the company commences within 6 months after the date of the disposition.

Subsection (4) in turn provides that an act to which subsection 2 applies in favour of a connected person which was done within two years before the commencement of a winding up of the company shall, unless the contrary is shown, be deemed, in the event of the company being wound up, to have been done with a view to giving such person a preference over the other creditors and be invalid accordingly.

A question was raised on a hypothetical scenario described in the following terms: where nine months before the commencement of a winding up, the company pays a debt due to its bank (an unconnected creditor) and therefore falling outside the 6-month look-back period. However, that debt is secured by personal guarantees given by the company's two directors (connected persons). Does the two-year time limit apply so that the payment can be set aside as an unfair preference? The answer appears to be yes. On balance the Committee felt that this provision was clear.

There was discussion about the fact that the provision relied on particular time limits within which transactions could be challenged under the section and whether there would be merit in providing for the suspension of the operation of these hard deadlines in appropriate cases where the action of individuals involved seemed to point to a deliberate attempt to evade the statute.

6.1.6 Recommendation

The Review Group, by a majority, recommends an amendment to section 604 in the following terms:

> **"The Court may make an order under this section notwithstanding that the transaction or transactions the subject of an application pursuant to the section do not fall within the time periods specified in ss. 2(a) and (4) above, where it is satisfied that it would be just and equitable to do so based on the circumstances surrounding the impugned transaction or transactions."**

6.1.7 Section 605

This section concerns the liabilities and rights of persons who have been unfairly preferred. This section re-enacts section 287 of the Companies Act 1963. The term "fraudulent" has been changed to "unfair" to reflect that the section may be triggered in the absence of fraud. This provision was

not considered by the Committee as it is a follow on from section 604 and no particular submissions were received concerning its terms.

6.1.8 Section 608

This provides that where, during the winding up of the company, it can be shown on application to the court by a liquidator, contributory or creditor of a company that a disposal of property of the company has taken place which has, as its effect, the perpetration of a fraud on the company, its creditors or members "…the court may, if it deems it just and equitable to do so, order any person who appears to have the use, control or possession of such property or the proceeds of the sale or development thereof to deliver it, or pay a sum in respect of it, to the liquidator on such terms or conditions as the court sees fit" . Section 608(5) goes on to state that the provision is "in addition to, and not in substitution for, any restitutionary or other relief by way of recovery".

Whereas section 604 requires proof of an intention to give an unfair preference, in contrast it will suffice for the purposes of section 608 to establish that the ***effect*** of a disposition is to perpetrate a fraud on the company, its creditors or members. It should be noted, however, that a similar requirement set out in the predecessor to section 608 gave rise to some controversy. In *Re Le Chatelaine Thudichum Ltd* Murphy J, citing Courtney, held that the phrase in the legislation:

> "…merely requires that the company, its creditors or members be deprived of something which it is, or to which they are, lawfully entitled" [29]

On the facts before him, the judge was satisfied that the effect of the disposition was to deprive the company of its assets and to diminish the pool of assets available to the creditors of the company, thereby perpetrating a fraud within the meaning of the statute on both the company and the creditors. In arriving at this conclusion, the court was influenced by the fact that the respondent was aware that the company was insolvent at the time of the disposition and could not, therefore, be considered to have acquired the property bona fide.[30]

In *Re Devey Enterprises*[31] Laffoy J observed that 'strangely, despite the fact that twenty years have elapsed since section 139 (the previously enacted provision from the 1990 Companies Act) was enacted, it has been the subject of very little judicial consideration.' She went on to refer to the summary of the provision provided by MacCann and Courtney in their annotation to the Companies Acts:

> "In order to set aside a disposition of assets the liquidator does not have to prove that the company intended to defraud its creditors. Rather, he has the lower evidential burden of merely establishing that the effect of the disposition has been to defraud the creditors. However, in *Re Comet Food Machinery Co Ltd* [[1999] 1 ILRM 475] the Supreme Court observed, albeit obiter, that the section could be invoked if it were established that assets had been diverted with a view to frustrating a judgment against the company. This is hardly a controversial observation since, in such circumstances, the disposition would not only have had the effect of defrauding the creditors; rather, it would have been intended to defraud them."

[29] [2010] 1 I.R. 529 at p. 539
[30] *Ibid.* at p. 541
[31] [2011] IEHC 340

In summarising the facts on the evidence before her Laffoy J. concluded that 'in reality the respondents had procured a gratuitous disposition of the company's money in their own favour' and that this had the effect of perpetrating a fraud on the company and its creditors. As a consequence, the court ordered the respondents to repay to the company a sum exceeding €1 million.

The more recent decision of the Court of Appeal in *Re Tucon Process Installations Ltd v Bank of Ireland* [32] casts some doubt on the correct interpretation of this provision. In the earlier decisions described above, namely *Re Le Chatelaine Thudichum v Conway* and *Re Devey Enterprises Ltd,* it seemed to be clear that the effect of this provision was that to set aside certain transactions the liquidator only had to prove that the effect of the disposition in question was to perpetrate a fraud on the company, its member and or creditors. The focus in both cases was the distinction of this provision from the fraudulent preference provision embodied in s. 138 of the 1990 Act, now s. 604 of the Companies Act.

However, in *Tucon Process Installations v. Bank of Ireland*[33], Hunt J made the following observation of the requirement:

> "…improper dispositions or misapplications of company property will be caught by the section, but payments in favour of creditors or for the benefit of the company concerned will not be included in an order made under the section. A simple payment made to an unsecured creditor when the company is insolvent will not, without more, trigger the operation of the section…The type of additional ingredient necessary…must amount to an impropriety before the provisions of the section are engaged"[34]

The dictum was upheld on appeal with the Court of Appeal affirming that the transaction did not offend the provisions of section 608[35].

It should be noted that in *Re Tucon Process Installations Ltd.* an issue arose as to whether the appellant company had *locus standi* as the section refers to the application being brought by the liquidator, creditor or contributory. In this case both the High Court and the Court of Appeal held that the appellant company had *no locus standi* to bring the application. Therefore, the judgement regarding the substantive provision is *obiter*. The facts in *Tucon* concerned payments in *the normal course of business* of moneys into a bank account held by the company in the respondent bank, the payments having the effect of reducing an overdrawn account. In contrast, in the other cases there were specific, unorthodox arrangements made to address repayments to creditors of amounts outstanding. For example, in *Chatelaine* the disposition concerned transfer of stock and assets as payment for rent outstanding. In effect, a transaction which could not be regarded as being in the ordinary course of business.

Furthermore, it is not clear that the transfer of moneys by debtors into a bank account as occurred in *Re Tucon Process Installations* is in fact a disposition within the meaning of the section. This issue is indeed alluded to but not resolved in the Court of Appeal judgement. For example, in Para 26 reference is made to 'dispositions of the company' and to 'dispositions made by an insolvent

[32] [2016] IECA 211
[33] [2015] IEHC 312
[34] *Ibid*., at pp. 7-8
[35] [2016] IECA 211

company'. However, the facts in this particular case did not involve dispositions by the company but lodgements by ordinary debtors of the company in the company's account. It would seem that this particular decision is particularly fact specific.

In considering the case law to date the Committee took the view that the only lack of clarity is whether the provision requires something more than a late payment to a particular creditor. Specifically in the context of this Report the question would be whether payments to companies within a group would be exempt from this provision if these were simply payments of outstanding debts, albeit where the payments were made to related companies.

The Committee considered that the provision could be amended to state that "payments made in the ordinary course of business" are exempt from the provision. The Committee took the view that payments to employees in the ordinary course of business could be specifically mentioned in this exemption from the operation of the provision.

6.1.9 Recommendation

The Review Group recommends that Section 608 be amended to state that "payments made in the ordinary course of business" are exempt from the provision. This includes payments made to employees in the ordinary course of business.

6.2 Officer liability

6.2.1 Section 609

This section provides for the imposition of personal liability on officers of a company where proper books of account are not kept and re-enacts section 204 of the Companies Act 1990. This provision was not considered in any detail by the Committee as no particular submission was received in relation to it.

6.2.2 Section 610

This affords the court the power, *inter alia*, to impose personal liability on any officer of an insolvent company who was *"knowingly a party to the carrying on of any business of the company in a reckless manner"*. The action is available to a liquidator, examiner, receiver, creditor or contributory of a company. Although the concept of trading in a reckless manner is not defined, subsection (3) deems two particular classes of conduct as reckless, namely where the officer of the company was a party to:

a) the carrying on of the business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in their position, the person ought to have known that their actions or those of the company would cause loss to creditors; and

b) the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment.

Like other provisions considered in this report, the fact that there are a limited number of reported cases on section 610 and its predecessors[36] is suggestive of the possibility that the provision is another which has been underutilised to date. This provision is a particular example of where difficulties have arisen in the interpretation and application of the section. In this regard a few observations can be made.

First, the section seems to waver between the imposition of an objective standard and the availability of a subjective defence. While the concept of recklessness in Irish law is generally considered to set an objective standard, the use of the word *'knowingly'* in subsection (1)(a) appears to import a subjective element to the test[37]. This can be contrasted with the objective standards set out in subsection (3), which in turn can be contrasted with the apparently subjective standard set out in the subsection (8) defence.

Second, the fact that the predecessors to section 610(3) have been interpreted as mandatory deeming provisions which deem conduct that would not otherwise amount to reckless trading as reckless, without any room for consideration of the circumstances of a particular case, appears to have been problematic. In *Re Hefferon Kearns Ltd[38],* for example, Lynch J. described the predecessor to subsection (3)(b) above as a draconian provision.[39] On the facts of the case, the judge felt compelled to make a finding of reckless trading pursuant to the subsection but relied on the *'honestly and responsibly'* defence to avoid making a declaration pursuant to the section.

More recently, in *Re Appleyard Motors Ltd[40]* it was held that the use of the word *"would"* in the predecessor to subsection (3)(a) outlined above meant that it would not suffice for the purpose of invoking the section to show that a director ought to have known that his actions *might* cause loss to a creditor. Rather, the use of the word required that *"the loss to the creditor must have been foreseeable to a high degree of certainty"*[41]. The finding of the High Court that the director had been guilty of reckless trading pursuant to subsection (a) was overturned on that basis. Commentary has suggested that the Court's decision may have been influenced by a desire to avoid the seemingly unjust consequences that flowed from the mandatory nature of the deeming provision on the particular facts of the case.[42] The decision appears to set a very high standard to be met on an application pursuant to the section.

At least one commentator is of the view that the intention of the legislature in enacting the provision was to set an objective test of recklessness and that the provisions in subsection (3) would be examples of what would constitute recklessness, rather than the mandatory deeming

[36] Section 297A of the Companies Act 1963 as inserted by s. 138 of the Companies Act 1990. A similar provision set out in s. 33 of the Companies (Amendment) Act 1990 was repealed by s. 180 of the Companies Act 1990 and replaced by s. 297A of the 1963 Act. The predecessors are in materially similar terms to s. 610. Many of the issues highlighted in this part of the Report have been considered by the Law Reform Commission in its Report on Regulatory Powers and Corporate Offences Vol 1 [2018]. See www.lawreform.ie
[37] *Re Hefferon Kearns Ltd (No. 2)* [1993] 3 I.R. 191 at 222.
[38] *Ibid*.
[39] *Ibid.* at pp. 224-225.
[40] *Ibid.*
[41] *Ibid.* at para. 41.
[42] See Breen, *"Re Appleyard Motors Ltd; Toomey Leasing Group Ltd v. Sedgwick: Another Nail in the Coffin for Reckless Trading?"* (2018) 25(9) CLP 204

provisions which they ultimately became[43]. The same commentator suggested that it would be beneficial to amend the section to reflect that intent[44].

Finally, the defence set out in subsection 8, which affords the court a discretion to relieve a director from liability under the section where it is satisfied that the director has acted honestly and responsibly, has been the subject of criticism on two grounds: First, it has been said that the issue of honesty ought to be irrelevant to a consideration of whether somebody has acted recklessly. Second, it is difficult to reconcile a finding that someone has acted recklessly with one that they have acted responsibly,[45] as occurred in *Re Hefferon Kearns.*

6.2.3 Proposed amendments to section 610

Four changes to the provision are proposed by the Committee:

1. The use of the word *'knowingly'* would be removed from the section, with a view to making the test for reckless trading an objective one;

2. Subsection (3) would be amended so as to make the conduct referred to therein examples of what might amount to reckless behaviour in a particular situation, rather than a mandatory deeming provision requiring that the conduct referred to be deemed as reckless trading regardless of the particular circumstances involved;

3. The use of the word *'would'* in subsection 3(a) of the section would be replaced by the phrase *"was likely to…"* with a view to lowering the threshold required under the subsection;

4. The defence in subsection (8) would be amended in a manner that would make it similar to the defence contained in section 214(3) of the Insolvency Act 1986 in England and Wales.

The proposals would be incorporated into an amendment of the section in the following terms with proposed amendments shown by underlining and deletion.

> (1) If in the course of the winding up of a company or in the course of proceedings under Part 10 in relation to a company, it appears that—
>
> (a) any person was, while an officer of the company, ~~knowingly~~ a party to the carrying on of any business of the company in a reckless manner, or
>
> (b) any person was knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company, or creditors of any other person or for any fraudulent purpose,
>
> the court, on the application of the liquidator or examiner of the company, a receiver of property of the company or any creditor or contributory of it, has the following power.

[43] Breen, *"Fictions or Guidelines? The Deeming Provisions in Section 610 of the Companies Act 2014"* (2019) 26(9) CLP 168.
[44] See Breen, *ibid.*
[45] See Breen, *"Fictions or Guidelines? The Deeming Provisions in Section 610 of the Companies Act 2014"* (2019) 26(9) CLP 168.

(2) That power of the court is to declare, if it thinks it proper to do so, that the person first-mentioned in paragraph (a) or (b) of subsection (1) shall be personally responsible, without any limitation of liability, for all or any part of the debts or other liabilities of the company as the court may direct.

(3) Without prejudice to the generality of subsection (1)(a), an officer of a company ~~shall be deemed~~ **may be found** to have been knowingly a party to the carrying on of any business of the company in a reckless manner if—

(a) the person was a party to the carrying on of such business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his or her position, the person ought to have known that his or her actions or those of the company ~~would~~ **was likely to** cause loss to the creditors of the company, or any of them, or

(b) the person was a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as all its other debts (taking into account the contingent and prospective liabilities).

(4) Notwithstanding anything contained in subsection (2), the court may grant a declaration on the grounds set out in subsection (1)(a) only if—

(a) paragraph (a), (b), (c) or (d) of section 570 applies to the company concerned, and

(b) an applicant for such a declaration, being a creditor or contributory of the company or any person on whose behalf such application is made, suffered loss or damage as a consequence of any behaviour mentioned in subsection (1).

(5) In deciding whether it is proper to make a declaration on the ground set out in subsection (3)(b), the court shall have regard to whether the creditor in question was, at the time the debt was incurred, aware of the company's financial state of affairs and, notwithstanding such awareness, nevertheless assented to the incurring of the debt.

(6) Where the court makes a declaration under this section, it may provide that sums recovered under this section shall be paid to such person or classes of persons, for such purposes, in such amounts or proportions at such time or times and in such respective priorities among themselves as such declaration may specify.

(7) On the hearing of an application under this section, the applicant may himself or herself give evidence or call witnesses.

(8) Where it appears to the court that any person in respect of whom a declaration has been sought on the grounds set out in subsection (1)(a) ~~has acted honestly and responsibly in relation to the conduct of the affairs of the company or any matter or matters on the ground of which such declaration is sought to be made,~~ **did, from the time he or she knew or ought to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation, take every step with a view to minimising the potential loss to the company's creditors as (on the assumption that he or she had knowledge that there was no reasonable prospect that the company would avoid**

going into insolvent liquidation) he or she ought to have taken, the court may, having regard to all the circumstances of the case, relieve him or her either wholly or in part, from personal liability on such terms as it may think fit.

The Committee expressed a majority view in favour of these proposed amendments.

6.2.4 Recommendation

The Review Group, by a majority, recommends that amendments be made to section 610 of the Companies Act 2014 as outlined above in this Report.

6.2.5 Relationship of Section 610 to the proposed Section 224A in Section 5.2.1 of this Report regarding the statement of duties to creditors.

The reckless trading provision discussed above is entirely different from the provision regarding duties to creditors. The reckless trading provision is a specific cause of action open to various stakeholders which potentially allows for contribution to the corporate assets to be made by directors who are personally liable for the debts of the company. The proposed provision as regards a director owing duties to creditors will be enforceable in the normal manner, primarily as a cause of action for the company. Even if a breach were found the issue of a remedy is open to the court in accordance with the normal framework. In that vein the interface between section 224A as proposed and the disqualification provisions is discussed in Section 7 below.

6.2.6 Section 612

This sets out the power of the court to assess damages against certain persons. This section provides for a summary procedure whereby redress may be obtained in respect of breaches of duty perpetrated by directors and other officers. This section derives from section 298 of the Companies Act 1963, inserted by section 142 of the Companies Act 1990 and amended by section 50 of the Company Law Enforcement Act 2001. The title has been amended to reflect that it does not relate solely to damages against directors. This provision was not considered in any detail by the Committee as no particular submission was received in relation to it.

6.2.7 Section 613

This sets out the power of the court to assess damages against a director of the company's holding company. The effect of this section is to extend the misfeasance provisions of section 612 to a situation where a director of a holding company has been guilty of wrongdoing in relation to the assets or affairs of any subsidiary. This section re-enacts section 148 of the Companies Act 1990. This provision was not considered in any detail by the Committee as no particular submission was received in relation to it.

7. Further provisions which may be of relevance.

7.1 Disqualification Provisions under s. 842

Section 842 of the Companies Act 2014, provides:

> 'On the application of a person specified in section 844 or of its own motion, the court may make a disqualification order in respect of a person for such period as it sees fit if satisfied…
>
> "(a) that the person has been guilty, while a promoter, officer, statutory auditor, receiver, liquidator or examiner of a company, of any fraud in relation to the company, its members or creditors,
>
> (b) that the person has been guilty, while a promoter, officer, statutory auditor, receiver, liquidator or examiner of a company, of any breach of his or her duty as such promoter, officer, auditor, receiver, liquidator or examiner,
>
> (c) that a declaration has been granted under section 610 in respect of the person,
>
> (d) that the conduct of the person as promoter, officer, statutory auditor, receiver, liquidator or examiner of a company makes him or her unfit to be concerned in the management of a company…."

The individuals specified in Section 844 who can make such an application to have a director or officer disqualified include individual shareholders, employees and creditors amongst others.

In Ireland there has been considerable litigation under section 842 (d) but much less under any of the grounds mentioned in section 842(a), (b) or (c) which are relevant to the discussion in the report as they relate to fraud, breach of duty and a breach of section 610. In addition, the litigation has not been brought by employees or creditors as indicated in Section 844 but primarily by liquidators or the ODCE. This is, perhaps, unsurprising in that other stakeholders tend to be primarily focussed on achieving a monetary return and usually rely on liquidators and/or the ODCE to deal with the regulatory aspect. This probably reflects concerns about the significant costs and risks associated with the making of such applications but may also be a practical issue in that they may not have access to all relevant evidence. Such parties regularly make complaints to liquidators and/or the ODCE recommending that restriction or disqualification proceedings should be brought where they consider that the circumstances of the case warrant it. It is not clear why the interface between these provisions has not resulted in further litigation.

It is also not clear why the interface between these provisions and Section 224 which provides that directors owe a duty to employees has not been considered or litigated. This is of particular relevance to the concerns expressed by ICTU and other groups regarding actions of management in the restructuring/ reorganisation space. It is possible that an employee (or a trade union) could indeed bring or threaten to bring disqualification proceedings against a director for breach of the duty owed in section 224, but this does not seem to have occurred. This is also relevant to the proposal made to add an amending section 224A providing for a duty owed by directors to creditors.

In Ireland the public enforcement of director's duties through disqualification and restriction has occurred within an overall context of viewing compliance with director's duties as serving a public interest function in addition to the private law enforcement of directors' duties. This shift in emphasis has taken legislative form since the passing of the Companies Act 1990 and is continued in the Companies Act 2014 (as amended). This section describing further possibilities regarding public enforcement of directors' duties continues that policy direction.

8. Funded litigation in insolvency.

8.1 Introduction

In its 2017 Report, the Review Group noted that a significant difficulty in the protection of unsecured creditors and employees in insolvency can be the cost of bringing an action for breach of directors' obligations. In its discussions on the anti-avoidance provisions referred to elsewhere in this report, the Review Group once again identified the lack of funds available to a liquidator to prosecute proceedings as an issue which was likely to inhibit the utilisation of the sections. As such, the Group felt it appropriate to give some consideration to the issue of third-party funding of litigation, in particular in the limited context of insolvency litigation.[46]

8.2 The current position in Ireland

In this jurisdiction, the rules against maintenance and champerty have operated to prohibit third party funding of litigation generally. The issue of third-party funding (which is now legal in certain circumstances in other common law jurisdictions) has been considered by the Law Reform Commission in a 2016 Issues Paper[47] and by the 2020 Report of the Review of the Administration of Civil Justice by the Group chaired by former President of the High Court, Peter Kelly referred to below.

The issue of litigation funding was also considered in two relatively recent decisions of the Supreme Court. First, in *Persona Digital Telephony v. The Minister for Public Enterprise*[48], it was held that an arrangement between the Plaintiff and a professional third-party funder to fund the litigation in return for a share of its proceeds offended the rule against champerty. In doing so, however, Denham CJ (as she then was) commented that it might be appropriate to have a modern law on the third party funding of litigation but considered that this raised complex issues of policy which fell more properly to be considered by the legislature than the courts.[49] Delivering a concurring judgment, Clarke J. (as he then was) agreed with the conclusion that the proceedings raised complex issues of policy involving the right of access to justice which fell more properly to be considered by the legislature than the courts. In coming to that conclusion though, Clarke J expressed a *"significant feeling of disquiet"*[50] with the result of the decision on the basis that it would lead to a very real possibility that the plaintiff might not be able to bring its claim to trial.[51] While the judge agreed with the conclusion reached by Denham CJ, he did sound a warning that if no action was taken by the legislature, the Courts might have no option but to intervene to find a remedy in an appropriate case. Further concurring judgments were delivered by McMenamin and Dunne JJ[52].

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[46] Company Law Review Group Report on Protection of Employees and Unsecured Creditors 2017, Section 6.4 pp. 93-94.
[47] Law Reform Commission Issues Paper, Contempt of Court and Other Offences and Torts Involving the Administration of Justice, LRC IP 10-2016
[48] [2017] IESC 27
[49] [2017] IESC 27, judgment of Denham CJ at para. 54(vi)
[50] *Ibid*., judgment of Clarke J at para. 2.1.
[51] Paras. 2.6-2.9
[52] It is understood that McKechnie J delivered a dissenting judgment concluding that the plaintiff should be permitted to avail of third-party funding in the claim, but the approved judgment is not yet available.

More recently, (2019) in *SPV Osus v. HSBC Institutional Trust Services (Ireland) Ltd*[53] the Supreme Court held that the assignment of various causes of action to a party without any interest in the litigation was champertous and unenforceable. While O'Donnell J. (as he then was) acknowledged that there might be a significant public interest in making litigation more accessible to people of ordinary means[54], including through the provision of some limited and regulated form of third party funding, the judge considered that the objections of the common law to the commodification of litigation, in particular the assignment of causes of action, retained force and vitality.[55] Clarke CJ delivered a concurring judgment which repeated the concerns he had expressed in *Persona* that there was a significant and increasing problem with access to justice which required urgent consideration[56]. Although the Chief Justice (as he then was) again expressed the view that the matter ought to be addressed by the legislature, he took the opportunity to emphasise again that a point could be reached where the court would be compelled to intervene if the legislature did not.[57]

> "2.*8 However, it may be that this is just another consequence of the separate legal personality of joint stock companies. That analysis does not, in my view, warrant a significant change in the law being imposed by court decision so as to give rise to a potentially unregulated market in litigation. Doubtless the legislature can pay proper regard to considerations such as that just identified in deciding on any potential changes. But I have ultimately come to the view that an unregulated change in this area has the potential to do more harm than good. As a matter of common law, therefore, it seems to me that the position identified by O'Donnell J. needs to be maintained unless and until there is considered legislative change.*
>
> *2.9 I would finally add that, undesirable as unregulated change might be, I would wish to reiterate the point made in Persona that a point might be reached where the courts had no option but to go down such a route if it became clear that no real effort was being made on the part of the legislature to address issues such as those which came into focus on this appeal."*

Leaving the broader picture aside the following paragraphs present an argument as to why this issue can be exceptionally treated in insolvency law.

8.3 Funded litigation in the specific context of insolvency law.

It is important to note that neither of the decisions considered in the previous section related to the use of litigation funding in the more limited and specific context of insolvency proceedings. The possibility of third-party litigation funding in the context of corporate insolvency has not yet been considered in any reported case in this jurisdiction, [58] whereas the use of third-party funding in insolvency proceedings has traditionally operated as an exception to the prohibition against funding in a number of common law countries. In 2020, the issue was considered by the Kelly Group Report, which made the following recommendation:

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[53] [2019] 1 I.R. 1
[54] At p. 52
[55] At p. 58
[56] [2019] 1 I.R. 1 at p. 8.
[57] *Ibid.* at p. 9.
[58] See however, *Re Gaelic Seafoods (Ireland) Ltd* Record No. 2002/153COS, Order of Ms Justice Finlay Geoghegan dated 21 December 2006.

> *"The Review Group does see merit, in the more immediate term, in the more limited proposal of the Irish Society of Insolvency Practitioners that third party funding should be available to liquidators, receivers, administrators under the Insurance (No. 2) Act 1983, the Official Assignee or trustees in bankruptcy to fund proceedings intended to increase the pool of assets available to creditors, on condition that the applicant was satisfied that a reasonable case against a prospective defendant existed and would result in increasing the pool of available assets. Such funding arrangements would have an obvious benefit in ensuring that the creditors of a company or individual or members of a company were not left without effective recourse against misfeasance or fraud on the part of the debtor or company concerned."*[59]

The lines of authority in other jurisdictions which have led to the conclusion that assigning a cause of action to a third party is a permissible use of the liquidator's power of sale could lead to the same conclusions in this jurisdiction and could support a limited change to rules against third party funding as they apply to liquidation.[60] Following an approach similar to other countries the starting point is that under section 559 of Part 11 of the Companies Act 2014 the definition of property 'means all real and personal property which includes *any right of action by the company or liquidator under the provisions of this Act or any other enactment*'. Section 614 provides for the vesting 'of all or any part of the property of whatsoever description belonging to the company or held by trustees' to vest in the liquidator. Finally, under Section 627, in Part 3 of the included Table, subsection b) allows the liquidator to 'sell the property of the company by public auction or private contract'. Based on statutory provisions similar to these three provisions permission for third party funding of actions in insolvency has been given by courts in other common law jurisdictions, thus carving out exceptions to the general rules against champerty and maintenance.

Turning to the actual wording of the provisions which relate to transactional avoidance which are considered in this Report, namely Sections 599, 604, 608 and 610 it does seem that in the case of Section 604 (based on an older bankruptcy law provision) it is not clearly stated as to whom the cause of action belongs. This is also the case as regards Sections 597 and 598 which relate to the invalidity of floating charges. In the other provisions the cause of action rests with the liquidator, rather than with the company. In *Re Oasis Merchandising Ltd*[61], the English Court of Appeal drew a distinction between assets which were the property of the company at the time of the commencement of the liquidation, on the one hand, and assets which only arose after the liquidation had commenced and were recoverable by the liquidator pursuant to a statutory power, on the other. The court held that it was only the former category that fell within the liquidator's statutory power of sale under the Insolvency Act 1986 so as to permit a liquidator to enter into some form of funding arrangement. The effect of that decision was that claims under the transactional avoidance provisions in the Insolvency Act, as well as their proceeds, could not be assigned. The decision became the subject of criticism.[62] However, the same issue might not arise in this jurisdiction because, unlike in England and Wales, the definition of 'property' in the 2014 Act

[59] *Review of the Administration of Civil Justice: Review Group Report*, Chaired by former President of the High Court Peter Kelly, October 2020, at p. 325.

[60] See generally Symes, C. and Lombard, S: Judicial Guidelines for Insolvent Litigation Funding Agreements (2020) 28 Insolvency Law Journal 165 which considers the development of the law in Australia in addition to methods of addressing policy concerns and issues in the context of a more developed structure.

[61] [1997] 2 WLR 764

[62] See Finch and Milman, *Corporate Insolvency Law: Perspectives and Principles (3rd ed., Cambridge University Press, 2017)* at pp. 474-477 and various further references contained therein.

specifically includes any right of action of the liquidator. Nevertheless, in practice, there does appear to be a lack of certainty on the point.

Subsequently though, section 118 of the Small Business, Enterprise and Employment Act 2015 inserted what has been described as a clarifying provision into the Insolvency Act in England so as to expressly permit liquidators to assign various causes of action which arise after the commencement of a liquidation and which vest in a liquidator (as well as the fruits of any such cause of action). [63]

It seems likely that the effect of the two recent decisions of the Supreme Court in this jurisdiction, together with the uncertainty regarding the scope of the exception in insolvency proceedings just outlined, might well dissuade insolvency practitioners and funders from pursuing an argument or course of action based on existing provisions, particularly in circumstances where maintenance and champerty remain both torts and criminal offences.

In conclusion it appears that the best way to address the matter, would be to clarify that there is an exceptional treatment of actions in insolvency already in the Companies Act 2014, legislation which is more recent than the provenance of the rules against champerty and maintenance, and that these provisions operate without prejudice to the continuing rules against maintenance and champerty. This position is reflective of other common law jurisdictions described above. This proposal simply amounts to a clarification of existing law and reflects the proposal described above emanating from the Kelly Report. The CLRG notes that consideration is already being given to a broader reform of the maintenance and champerty rules by the Department of Justice and by the Law Reform Commission, but a full review of these recommendations is beyond the scope of the work of the Company Law Review Group. The Department of Enterprise, Trade and Employment noted that there may be practical difficulties emanating from carving out insolvency from the broader reform project and any recommendations made by the Committee to this effect would require extensive consultation with the Department of Justice.

This outcome could be achieved by amending the Companies Act 2014. Following considerable debate, the Committee has come to the recommendation as below.

[63] The wording of the relevant provision is as follows:
"Power to assign
(1) This section applies in the case of a company where—
(a)the company enters administration, or
(b)the company goes into liquidation; and "the office-holder" means the administrator or the liquidator, as the case may be.
(2) The office-holder may assign a right of action (including the proceeds of an action) arising under any of the following—
(a)section 213 or 246ZA (fraudulent trading);
(b)section 214 or 246ZB (wrongful trading);
(c)section 238 (transactions at an undervalue (England and Wales));
(d)section 239 (preferences (England and Wales));
(e)section 242 (gratuitous alienations (Scotland));
(f)section 243 (unfair preferences (Scotland));
(g)section 244 (extortionate credit transactions)."

8.4 Recommendation

Recognising the particular circumstances of insolvency proceedings, the Review Group, by a majority view, is broadly supportive of provision being made to allow for litigation funding in such proceedings.

However, the Review Group recognises that there are significant and legitimate concerns about possible adverse and potentially unforeseen consequences of such funding and agree that careful consideration would need to be given to the identification of appropriate conditions and safeguards that should be attached to the introduction of rules allowing such funding. These could, for example, include provisions such as those that apply in the UK which specify that the funders cannot have any role in the litigation and that the funding must be approved in advance by the creditors of the company.

Accordingly, the Review Group recommends that further detailed consideration should be given to the identification of the conditions and safeguards that would be necessary to ensure that the risks associated with the approval of litigation funding in insolvency can be minimized.

9. Role of costs in the non-litigation of provisions in Chapter 6 of Part 11 of the Companies Act 2014. (Described in this report as 'asset swelling' or 'transactional avoidance' provisions).

The Committee considered the position that pertains to liability for costs arising in connection with actions that can be taken under the asset swelling measures described in this report and that are contained in Chapter 6 of Part 11 of the Companies Act 2014. Concerns were expressed that the risk of having costs awarded against a liquidator personally could act as a significant deterrent to the taking of action on foot of these provisions.

9.1 The *Ballyrider* Principles

The so-called "Ballyrider principles", set out the main rules governing the awarding of costs by the courts in cases involving liquidations. The principles were enumerated by McKechnie J. in a judgement in the Supreme Court in the case of *The Revenue Commissioners v. Anthony J. Fitzpatrick in his capacity as Liquidator of Ballyrider Limited (in voluntary liquidation)*[64]. These have been referred to and/or applied on a number of occasions subsequently[65]. The principles set out by McKechnie J. are as follows:

> *"(1) Where proceedings are initiated or defended by the liquidator in the name of and on behalf of the company, he has no personal liability in respect of any cost order made in favour of an adverse litigant: any such order is against the company. Such a litigant may seek security for costs.*
>
> *(2) Where the proceedings in question are in his own name and even if acting as such, then subject to the point next made the normal rules, vis-á-vis an adverse litigant will apply. If a cost order is made the liquidator incurs a personal liability in respect of same: as such the sufficiency or insufficiency of the company's assets is irrelevant.*
>
> *(3) In this situation, a distinction exists between where the liquidator is the initiator of such proceedings and where such engagement is forced upon him. In the latter situation case law shows that he must be entitled to defend without the risk of a personal cost order being made against him: public policy so dictates.*
>
> *(4) In the proceedings first mentioned as the liquidator incurs no personal liability the question of seeking to have recourse to the company's assets does not arise.*
>
> *(5) In the proceedings second mentioned, the position will be as follows:*
>
> *(i) Where acting for and on behalf of the company the liquidator will ordinarily be entitled to have recourse to the assets of the company in respect of both the costs incurred by him as a party and also in respect of the cost order awarded in favour of the adverse litigant.*
>
> *(ii) Even when acting for and on behalf of the company, if the liquidator has committed acts or omissions amounting to misconduct, then ordinarily he will not be entitled to have*

[64] Supreme Court, 31 July 2019, Appeal No. 2016/107.
[65] *Eteams International v. The Governor and Company of Bank of Ireland* [2020] IESC 23; *Re Cherryfox Ltd: Fitzpatrick v. Revenue Commissioners* [2020] IECA 123; *Anthony J Fitzpatrick as Liquidator of Elvertex Ltd (in Liquidation) v. O'Sullivan and Lyons* [2021] IEHC 166.

recourse to the assets of the company in respect of the cost order. Examples of the type of conduct which might be so described, include misfeasance, bad faith, negligence, personal unfitness for office and dishonesty.

(iii) On the other hand, where an honest mistake has occurred and has been made in good faith, a liquidator is much less likely to be deprived of such an order.

(iv) Just as there will be cases which are clear-cut on one side or the other, there will also be situations which may be borderline. In such circumstances the provisions of section 631 of the Companies Act 2014 are available and if utilised the court will have regard to section 281 of the 1963 Act and the relevant case law above mentioned. In doing so the Court will consider the representative capacity and the common law and statutory obligations imposed on the litigant, in order to determine whether there are sufficient grounds on the balance of probability to deny him such a course."

In simple terms, the principles confirm that if the proceedings are issued in the name of the company, any costs arising, including any adverse costs order, will be made against the company.

However, if the proceedings are issued in the name of the liquidator, then the costs, including any costs awarded to the other party costs, will usually have to be borne in the first instance by the liquidator. From the principles it seems that liquidators will ordinarily be able to recover such costs out of the funds in the liquidation. The exception is where the proceedings are improperly brought or are brought to further the interests of the liquidator rather than to benefit the liquidation. For example, if a liquidator were to take proceedings seeking to overturn a decision to remove him or her as liquidator. Of course, it should be noted that this is a simplistic summary of the applicable rules and, as noted in the principles, there can be cases that are not clear-cut, and such cases may have to be determined on their merits by the Courts.

The various provisions contained in Chapter 6 of Part 11 specify that actions may be taken by the company in some instances, by the liquidator in others (viz. sections 599, 608 and 610 of the 2014 Act) and are silent in other cases. Thus, in considering taking certain actions, liquidators may face the prospect of having to bear the costs of the proceedings, including the costs of the other party, while the capacity to recover such costs from the liquidation may be uncertain.

9.2 Tests applied by liquidators before initiating legal proceedings

The issue of costs is an important factor in the decision-making process on whether, or not, to initiate various types of proceedings in the interests of a liquidation. The Committee heard that typically, there are three core questions that a liquidator must ask himself or herself before initiating proceedings. These are:

1. Does the liquidator consider that he/she has sufficient evidence to be reasonably confident of succeeding in the proceedings and do the potential benefits to the liquidation outweigh the risks involved if the case is unsuccessful? A prudent liquidator would usually want to have legal advice that supports these positions.

2. Has the respondent, or respondents, the financial resources to meet any determination, including in relation to costs, that might be made by the Courts in favour of the liquidation?

3. Are there sufficient resources in the liquidation to fund both the liquidator's own costs and possible costs awarded to the other party in the event that the action is unsuccessful?

If the answer to either of the first two questions is negative, then it would be difficult to conclude that there was a reasonable basis for initiating the action.

The third question is somewhat more complex. Where the action is one that rests in the liquidator's own name and if there are sufficient resources in the liquidation, then the liquidator can safely proceed without risking personal or firm funds. However, he or she might consider it prudent to consult with the creditors before proceeding given the risk that unsuccessful litigation could seriously deplete the funds otherwise available to creditors.

If there are no, or only limited, funds in the liquidation, there may be other options available to the liquidator. For example, the liquidator could seek funds or an indemnity from the creditors to cover the costs of the action. In this regard, it was noted that the Revenue Commissioners will, in appropriate cases, consider the provision of an indemnity to enable actions to be taken that are considered likely to produce a better outcome for the creditors, including themselves.

The liquidator could seek to take out some form of insurance policy to address this issue. However, it is understood that the cost of this type of insurance tends to be prohibitively expensive in practice.[66]

The liquidator could decide to proceed anyway despite the knowledge that an unsuccessful application could result in him or her having to bear significant costs.

In other jurisdictions, access to third party litigation funding can be of use in these types of situations. This matter has been considered in detail in section 8 above.

If the liquidator is unable to fund or be indemnified against the costs of litigation, then it is unlikely that he or she would initiate proceedings.

9.3 Security for costs orders

Where an action is being taken in the name of the company, the respondent will often seek confirmation that there are sufficient funds to meet their costs in the event that they succeed in the proceedings. If they have any doubt on the matter, they may apply to the Courts for a "security for costs" order. In order to obtain an order for security for costs, a defendant must satisfy the court (a) that it has a *prima facie* defence to the claim, and (b) that the plaintiff company would have insufficient assets to meet an award of costs in the event that the proceedings were unsuccessful[67]. In addition, even where those criteria are satisfied, a plaintiff company may successfully resist the application *inter alia* where it can satisfy the court on a *prima facie* basis that

[66] Of note in this context in *Greenclean Waste Management Ltd v. Leahy* [2015] IECA 97 where an ATE insurance policy was unsuccessfully relied upon by the plaintiff it was noted that the policy in question provided €210,000 worth of cover for the Plaintiff's own solicitor's disbursements and the defendant's costs. The premium payable for that level of cover was €52,500.

[67] Section 52 of the Companies Act 2014.

it would have been able to discharge any costs order made against it were it not for the defendant's alleged wrongdoing[68].

9.4 Priority attaching to costs of litigation

Under section 617 of the 2014 Act, any costs, charges and expenses properly incurred in the winding up of a company, including the remuneration of the liquidator, shall be payable out of the property of the company remaining after payment of *inter alia* the fees and expenses properly incurred in *'preserving, realising and getting in the assets'*. This is expressly subject to any order made by the court in winding up but provides for an order of priority in which the *'necessary disbursements',* including legal costs incurred by the liquidator, rank in priority to their remuneration. Further, while there is no express reference in section 617 to any adverse costs order made against the company, it has been held that where an action is brought by the company after liquidation commences, the costs of a successful litigant will generally rank in priority to all other claims[69], including the liquidator's own costs and remuneration[70].

The position, therefore, appears to be that where a liquidator issues proceedings in the name of the company, the costs of the action will generally rank as a priority expense in the liquidation. Thus, the company's (and liquidator's costs) and those of the adverse litigant will rank above the liquidator's remuneration.

Turning to situations where the action rests with the liquidator, in practice, it also appears to be accepted that the *Ballyrider* principles are authority for the fact that the liquidator will generally be entitled to have recourse to the assets of the company for the costs of proceedings instituted in their own name (both in respect of their own costs and any costs order made against them). There are two issues that cause uncertainty.

The first are statements from the English courts which contradict this position where it has been held that an adverse costs order made against the liquidator personally on foot of statutory claims similar in their terms to section 604 and section 610 would not rank as a cost or expense in 'preserving getting in or realising the assets of the company' as the cause of action and the proceeds therefrom were the property of the liquidator rather than the property of the company.[71]

The second area that lacks clarity is that even if it is assumed in accordance with the *Ballyrider* statements that the liquidator is entitled to seek to have recourse to the assets of the company in relation to costs of litigation brought in his own name, it is not clear, but seems likely that such costs would also rank as a priority expense under section 617.

These specific problems have been addressed in England and Wales through Rules of Court where the Insolvency (England and Wales) Rules 2016, expressly provide (in Rule 6.42 relating to voluntary windings up and in Rule 7.108 relating to compulsory windings up) for priority for "expenses which are properly chargeable or incurred by the liquidator in…the preparation [or] conduct...of any legal proceedings…. which the liquidator has power to bring in the liquidator's own name…."

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[68] *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* [2009] IEHC 7. See further *Quinn Insurance Ltd v. PricewaterhouseCoopers (A Firm)* [2018] IEHC 15; [2020] IECA 109; [2021] IESC 15.
[69] *Comhlucht Páipéar Ríomhaireachta Teo v. Údarás Na Gaeltachta* [1991] I.R. 320
[70] *Rheffrorhefferone CHA Limited* [1999] 1 I.R. 437; *Re Brandon Plant Hire Ltd* [2021] IEHC 462
[71] Re Floor Fourteen Ltd; Lewis v. Inland Revenue Commissioners [2001] 2 BCLC 392

This approach does appear to provide certainty that the liquidator has a right of recourse to the assets of the company regarding the costs of any action in priority to other expenses in the liquidation, where the action is brought in his or her own name. In addition, the rules also provide that the Courts can order that the costs involved should be paid by the liquidator in cases which might align with the *Ballyrider* principles outlining abusive instances on the part of the liquidator. This addresses both the issue of access to assets to cover costs and the issue of priority.

Given that it appears that in all cases costs will rank above remuneration in the priority for payment, it was suggested to the Committee that the prospect that liquidation funds, that might otherwise be available for liquidator remuneration, would be expended on legal costs could act to inhibit the taking of proceedings under Chapter 6. However, this would not be a factor where there are sufficient funds in a liquidation to cover both any legal costs that might arise and remuneration or in cases where there are little or no funds in the liquidation. Furthermore, a liquidator might seek to protect their entitlement to remuneration in specifying the terms that should apply to any indemnity that might be sought in order to take proceedings.

9.5 Consideration of the provisions in the context of the costs issues.

It is not clear why the provisions considered in this Report differed as to the appropriate applicant – whether the provision mentioned the liquidator, the company or was silent on this issue. This point is returned to in Section 10 of this Report.

It could be the case that following consideration it might be appropriate to recommend that the company would be included as a possible applicant in all cases. This would enable the various types of actions could, in all cases, be taken in the name of the company which would mean that the costs issues would accrue to the company rather than to the liquidator personally.

However, there were concerns expressed by some members of the Committee that an approach which increased the number of corporate entities named as plaintiffs to court proceedings might actually result in greater inhibition of the use of the provisions in Chapter 6 of Part 11 of the 2014 Act, as respondents would invariably seek security for costs unless there was obviously an abundance of assets in the liquidation. Concern was expressed that this could add significant costs to any planned proceedings and could result in cases being struck out at the outset unless liquidators could prove that there would be sufficient assets to meet any possible adverse costs order. It was considered by some members of the Committee that this approach could also prevent liquidators being made liable for costs where they improperly take actions. In addition, some Committee members expressed the view that the potential exposure to personal liability can play an important role in deterring any liquidator that might be tempted to engage carelessly in speculative or inappropriate litigation.

These various concerns were not shared by other members of the Committee.

The Committee was also conscious that the suggestion to include the company as applicant in all cases could give rise to unintended consequences. As an example, a concern was raised to the effect that if the causes of action under sections 599, 608 and 610 were to vest in the company, this could, in a particular case, complicate other issues such as the extent of a charge over the “assets of a company”.

10. Who can bring the action?

A final issue which was raised as part of the outline of the original Work Programme relates to who can bring the relevant actions which have been described in this Report. As the Committee considered the wording of the relevant provisions it emerged that in relation to some provisions, for example sections 597 and 598 on invalidity of floating charges and section 604 on unfair preferences, no applicant was specified. In others the cause of action was available to the liquidator but not the company, for example section 608. Yet, section 559 refers to property including 'any right of action by the company or liquidator'.

The distinction between a right of action vesting in the company and/ or the liquidator is significant both in relation to the issues of third-party funding described in Section 8 and the issue of the liquidator's personal liability for costs described in Section 9. The Committee has considered the possibility that allowing an action to be taken by the company may resolve some of the issues arising in relation to the non-litigation of these provisions. However, the Committee is cognisant that there may be unintended effects regarding such a change and that these must be considered carefully.

10.1 Recommendation

The Review Group recommends further consideration of the modernisation of these provisions so as to describe relevant applicants as including the liquidator, the company, a creditor, or contributory in all cases.

COMPANY LAW REVIEW GROUP
an grúpa athbhreithnithe dlí cuideachtaí

COMPANY LAW REVIEW GROUP

Consideration by the Judicial Planning Working Group of the number of and type of judges required to ensure the efficient administration of justice

Standing Committee Memorandum of Advice
to the Department of Enterprise Trade and Employment

16 JULY 2021

Company Law Review Group

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

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

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

Invitation for Submission and Request to CLRG

By letter dated 30 June 2021 from Nicola Kelly, Secretary to the Judicial Planning Working Group (**JPWG**) to the Secretary General of DETE invited DETE to make a submission as a stakeholder organisation in the justice sector, by reference to the JPWG's terms of reference. DETE in turn requested the CLRG to provide such input as it considered appropriate for the purposes of DETE's response to this request, notwithstanding that certain members of the CLRG and bodies nominating members to the CLRG would be separately contributing to the JPWG's processes.

CLRG Standing Committee

In view of the short timeframe, a meeting of the CLRG's Standing Committee (**the Committee)** was convened and was held on 14 July 2021. The Standing Committee (formerly named the Statutory Committee) is an ad hoc Committee convened and chaired by the CLRG Chair, membership of which is open to all CLRG members. Following an invitation to CLRG members, the Standing Committee constituted for the purpose of this memorandum of advice was composed as follows:

Paul Egan SC	Chairperson (Mason Hayes & Curran LLP)
Alan Carey	The Revenue Commissioners
Máire Cunningham	Law Society of Ireland (Beauchamps)
Marie Daly	Irish Business and Employers' Confederation (IBEC)
Emma Doherty	Ministerial Nominee (Matheson)
James Finn	The Courts Service
Shelley Horan	Bar Council of Ireland
Prof. Irene Lynch Fannon	Ministerial Nominee (School of Law, University College Cork)
Dr. David McFadden	Ministerial Nominee (Companies Registration Office)

Grace O'Mahony	Central Bank of Ireland
Maura Quinn	The Institute of Directors in Ireland
Doug Smith	Restructuring and Insolvency Ireland (Eugene F Collins)
Stephen Walsh	Secretary to the CLRG (DETE)

Consideration of JPWG's terms of reference

The Committee considered the JPWG's Terms of Reference, deciding to provide input in relation to four of the 10 headings. The Committee decided to limit its inputs to areas which affect the administration and enforcement of company law, and that those inputs would be focused on specific outcomes that would facilitate and improve such administration and enforcement.

	Terms of reference of the Judicial Planning Working Group	**Approach of the CLRG Standing Committee**
1.	To consider the number of and type of judges required to ensure the efficient administration of justice over the next five years in the first instance, but also with a view to the longer term.	Provide advice
2.	To consider the impact of population growth on judicial resource requirements.	Abstain
3.	To consider, having regard to existing systems, the extent to which efficiencies in case management and working practices could help in meeting additional service demands and/or improving services and access to justice.	Abstain
4.	To evaluate the estimated impact of the Covid-19 pandemic on court caseload in the short, medium, and long term and strategies for reducing waiting times to significantly improve on pre-Covid levels.	Abstain
5.	To examine the experiences of other jurisdictions (particularly Common Law areas), and obtain accurate and up to date information on judicial practices and case management systems, together with caseload data in relation to Irish courts.	Abstain
6.	To consider the costs associated with additional judge numbers, including salaries, allowances, judicial support staff and chambers.	Abstain
7.	To review forthcoming and proposed policy and legislative reforms that may impact on the requirement for judge numbers including;	

	Terms of reference of the Judicial Planning Working Group	Approach of the CLRG Standing Committee
	a. Recommendations of the Civil Justice Review	Abstain
	b. The O'Malley Review on victims of crime	Abstain
	c. Family Justice Reform	Abstain
	d. Review of Legal Aid financial eligibility criteria	Abstain
	e. Courts Service Modernisation Programme	Abstain
	f. Commencement of relevant provisions of the Assisted Decision Making Capacity Act 2015	Abstain
	g. Judicial Appointments Commission Bill	Abstain
	h. PfG[1] commitment to establish a new Planning and Environmental Law Court	Abstain
	i. Insolvency Review	Reserve position to make a submission when more is known about this Review
	j. Economic development.	Abstain
8.	To make recommendations for developing judicial skills in areas such as white collar crime.	Provide advice
9.	To make recommendations on relevant issues such as judicial workload, barriers to entry, efficiency gains, and speed of access to justice.	Abstain
10,	To consider the implications of Brexit on the courts in regard to judicial resources and potential increased workloads arising.	Provide advice

Number of and type of judges required to ensure the efficient administration of justice

(Item 1)

1. The Committee notes that there is a satisfactory level of competence in company law (to include corporate insolvency law) among judges of the High Court. Whereas judges are appointed not solely as company law judges, there is a sufficient number who have the necessary level of knowledge of the law, without requiring that it be explained to them, in order to rule on company law matters and to compose reasoned judgments where necessary.

[1] *Programme for Government: Our Shared Future*.
https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/

2. The Committee notes the comments of High Court President Ms Justice Mary Irvine and agrees that there is, and there appears likely to continue to be, a shortage of High Court judges.

3. Where company law matters are within the competence of the Circuit Court, the Committee concludes that there is insufficient company law expertise consistently available in such a way as to render the Circuit Court an efficient forum for company law matters. There are a number of factors leading to and which illustrate this conclusion:

    a. It is possible for examinerships of small companies to be commenced by and conducted under the supervision of the Circuit Court. However, as the necessary legal and accounting expertise required for examinerships is concentrated in Dublin, the conduct of examinerships outside Dublin has had the unintended consequence of adding to legal and accounting costs, in light of the requirement for the relevant professionals to travel to Court destinations outside Dublin for court hearings in the examinership process when in a regional Circuit Court.

    b. The nature of the Circuit Court is that civil sittings of the Court in many venues outside Dublin do not sit throughout Court terms. The judges in a particular circuit change from time to time. The Circuit Court outside Dublin does not sit on Mondays. The combination of these factors means that the customary availability of the High Court for urgent matters and familiarity of the judge with the particular examinership is not matched in the Circuit Court.

    c. Circuit Court judges are by and large drawn from areas of legal practice other than company law.

    d. Although it is possible for applications to restore dissolved companies to the register to be conducted through the Circuit Court, it is more efficient and not much more expensive than the Circuit Court for parties instead for such applications to be dealt with on the Monday Chancery list in the High Court.

4. If company law matters are to be placed within the competence of the Circuit Court, there are a number of steps that should be taken:

    a. Instead of permitting regionalism to supersede specialism, in the case of company law matters, provision should be made so that there should be no more than two locations where the Circuit Court would deal with company law matters, which the Committee suggests be Dublin and Cork.

    b. Such a provision could be modelled on the provisions in section 866 of the Companies Act 2014 for District Court prosecutions brought by the Registrar of Companies where it is possible for these to be brought not only in the district of the relevant company's registered office, but also in the Dublin Metropolitan District or in Carlow (where the Companies Registration Office has an office). This provision allows for the benefits of specialism while respecting the local nature of that court's jurisdiction.

    c. Specified Circuit Court judges should be identified as those to deal with company law matters.

    d. The relevant judges should have the benefit either of a satisfactory level of company law experience in their previous professional practice or have been provided with detailed induction and training in company law matters.

5. The Committee notes that with the amendments to the Companies Act 2014 by the Companies (Rescue Process for Small and Micro Companies) Act 2021 which provide for the new small companies administrative rescue process (**SCARP**), Circuit Court examinerships are likely to become rarer exercises.

6. Some Committee members suggested that part-time judges, like they have in England, might improve matters. In substance it should be no different from senior lawyers sitting as arbitrators or on an arbitral panel. As against that, the prevailing view was not in favour of part time judges, not least on account of a likely requirement for a constitutional referendum to amend Article 35.3 of Bunreacht na hÉireann, which provides:

> "No judge shall be eligible to be a member of either House of the Oireachtas or to hold any other office or position of emolument."

The development of judicial skills in areas such as white collar crime

(Item 8)

7. Breaches of the Companies Act giving rise to criminal proceedings are a subset of corporate crime generally. The Committee believes that the primary responsibility of a judge in a criminal trial is to understand criminal procedure and to give a correct and comprehensible charge to the jury.

8. That said, where there is a complex company law issue, some members of the Committee are of the view that the judge should either have a satisfactory level of company law experience in their previous professional practice or have been provided with detailed induction and training in company law matters.

Implications of Brexit on the courts in regard to judicial resources and potential increased workloads arising

(Item 10)

9. In its submission to the Government in relation to DETE's *Action Plan for Jobs 2018*, the Law Society of Ireland highlighted four areas where the Government could better position to attract post Brexit international litigation business:

   a. "Increase the number of specialist judges, appoint additional registrars to create greater capacity, reduce delays and increase efficiencies;

   b. Increase the use of technology to improve timeliness and efficiency of legal administration;

   c. Prioritise the promotion of alternative dispute resolution options to free up capacity in the court system; and

   d. As part of the current review of civil court rules, ensure the administrative burden on businesses and individuals is minimised."[2]

   The Committee agrees with these points.

[2] https://www.lawsociety.ie/login?ReturnUrl=/News/Media/Press-Releases/four-ways-for-ireland-to-become-a-centre-for--international-dispute-resolution-post-brexit/

10. The *Ireland for Law* initiative, jointly led by the Bar of Ireland, the Law Society of Ireland, IDA Ireland and the Department of Justice notes that:

> "Ireland is recognised internationally as a leading global centre for international financial services. At the end of 2019, over 430 financial institutions employing over 47,000 people provide financial services to every major economy in the world from Ireland. We are home to 9 of the world's top 10 software companies and 15 of the world's top 25 financial services companies.
>
> Ireland is a global leader in aviation leasing, a global tech hub, and a world leader in funds, insurance, pharma and life sciences. Ireland is now becoming a primary centre for the provision of legal advice, and transactional services in these sectors."[3]

11. In the *Justice Plan 2021*[4] of the Department of Justice the following objective is stated:

> "Provide appropriate support for the Ireland for Law Initiative following Brexit".

The appropriate support requires:

a. a sufficient number of judges;

b. with satisfactory knowledge of:

- company law (to include insolvency law);
- the areas of law in which disputes are likely to arise, including those identified by *Ireland for Law:*
    i. financial services generally and other discrete sectors such as aviation leasing, funds and insurance;
    ii. technology generally and including other discrete sectors such as pharma, life sciences; and
    iii. intellectual property law as it applies to these industries;
- corporate transactions generally, including mergers and acquisitions, debt structuring, company restructurings, issuances and alterations in share and debt capital, financial investment arrangements and corporate compliance; and

c. with sufficient practical support by way of human resources and technology.

END

[3] https://www.irelandforlaw.com/choose-irish-law

[4] http://www.justice.ie/en/JELR/Department_of_Justice_Action_Plan_2021.pdf/Files/Department_of_Justice_Action_Plan_2021.pdf