COMPANY LAW REVIEW GROUP
an grúpa athbhreithnithe dlí cuideachtaí

Company Law for the 21st Century

Report on General Scheme of Companies Consolidation and Reform Bill

2007

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Chapter 1
Commendation of General Scheme to the Minister

I have great pleasure in attaching the Report of the CLRG on the General Scheme of the Companies Consolidation and Reform Bill for your consideration. This Report is intended to serve as a guide to, and a commentary on, the General Scheme of the Bill itself, and to outline the significant features of the Bill and the notable reforms and simplifications of Irish company law which it proposes to introduce.

The General Scheme is the culmination of an extraordinarily impressive and sustained programme of work by the Review Group, its members and constituent committees over the period since its inception in 2001. Starting out with the Review Group's First Report, and the recommendations for reform contained therein, the Review Group progressed tirelessly in great detail through successive drafts of the constituent Parts of what is now presented as the General Scheme. The exercise has truly been an extensive examination and distillation of every provision of Irish company legislation, all the time guided by the principles of enhancing Irish competitiveness, making regulation work better for Irish businesses, both indigenous and foreign direct investment, and optimising creditor and shareholder protection.

The result is a General Scheme which brings together the existing thirteen Companies Acts, dating from 1963 to 2006, into one streamlined, comprehensive Bill. The architecture of the General Scheme is inspired by the reality that 90% of companies currently registered at the Companies Registration Office are private companies limited by shares. Therefore, Pillar A of the General Scheme sets out the law as it applies to this, the most common company type. Pillar B then states how this law is applied, disapplied or varied for each other company type, such as the public limited company (plc) or guarantee company. In this way, a greater clarity and simplicity will be introduced into the layout of our companies code.

The General Scheme contains a number of significant reforms of Irish company law:

- The most commonly-used company type, the private company limited by shares, becomes the model company under the legislation, with all the provisions pertaining to it contained in a single volume – Pillar A.
- A private company limited by shares may have a single director.
- If the members of any private company limited by shares consent, a formal annual general meeting need not be held, as the meeting can now be carried out by written procedure.
- A private company limited by shares will have a single-document constitution, thereby replacing the previous need for two documents in the form of a memorandum and articles of association.
- There has been a root and branch review of all criminal offences arising under the Companies Acts, which has led to a proposed four-fold categorisation of all but a handful of the most serious offences, resulting in the standardisation of language and grading of all offences.
- The validation procedure may be used to enable companies to carry out certain transactions, subject to the required verification of solvency, and with built-in safeguards for creditors and shareholders.
- By removing the requirements to have an objects clause, the doctrine of *ultra vires* is removed for the private company limited by shares, which will now have the legal capacity of a natural person.
- For companies that wish to retain an objects clause, and a consequent limit on the powers of the company, the General Scheme provides for the designated activity company.

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Commendation of General Scheme to the Minister

It is also very relevant to note that the UK Department of Trade and Industry has estimated that the recent enactment of the Companies Act in that jurisdiction, which was similarly a consolidation statute, will result in savings of £150 million. This illustrates the significant benefits which ought to accrue to Irish competiveness as a result of our own Companies Consolidation and Reform Bill.

The General Scheme is by any standards a mammoth piece of legislation. It contains in excess of 1,250 heads, and is expected to be the biggest Bill in the history of the State.

This Report is intended to accompany the text of the General Scheme itself and to provide a commentary on the structure, the main changes, and areas of consolidation. It therefore gives an overview of the significant aspects of the Bill. Readers who would like to examine the provisions in greater detail can study the General Scheme itself, which is being published contemporaneously with this Report. The explanatory notes beneath each head in the General Scheme are intended to provide helpful information for each head, as they seek to explain the origin of the provision in existing legislation, or the rationale for reform, as appropriate. I have no doubt but that the publication of the General Scheme now, being in the nature of a public consultation, will give rise to many valuable comments which will go to enhancing the final statute to be enacted.

I would like to conclude by thanking you, as Minister for Trade and Commerce, for your support to the Review Group during our work on the preparation of the General Scheme.

The Steering Group which presided over the finalisation of the General Scheme (Mr Paul Egan, Mr Paul Farrell, Mr William Johnston, Mr Ralph MacDarby and Mr Vincent Madigan) are deserving of particular mention for their commitment and self-sacrifice in meeting with me on a weekly basis, mostly in their personal time, throughout 2006. Other persons who made a very significant contribution to the General Scheme were Ms Una Curtis, partner, KPMG, who did trojan work on Financial Statements, Annual Returns and Auditors. (Those also assisting on financial statements were CCABI's Mr Aidan Lambe and IAASA's Mr Ian Drennan). Mr Noel Rubotham and Mr Adrian Brennan contributed significantly to Winding-Up; Mr Kevin O'Connell gave significant assistance in relation to the categorisation of offences, compliance and enforcement and Ms. Máire O'Connor represented the funds industry in relation to the law on Investment Companies.

I would also like to acknowledge the dedication of the Secretariat in their assistance and support to all members of the Review Group. I would like, in particular, to thank Mr Eugene Forde who took over as Secretary to the Review Group in September 2006 from Dr Pat Nolan. I am deeply grateful to Eugene for his sterling work in project managing the production of this Report and the finalisation of the General Scheme.

Yours faithfully,

Dr. Thomas B. Courtney
Chairman
March 2007

Chapter 1

Membership of the Company Law Review Group

Chair:

Dr. Thomas B. Courtney	Partner, Arthur Cox

Members:

Mr. Paul Appleby	ODCE
Mr. Noel Rubotham	Courts Service
Mr. Conall O'Halloran	CCAB - Ireland
Mr. Jonathan Buttimore	Office of the Attorney General
Mr. John Olden	Law Society of Ireland
Mr. Ralph MacDarby	Institute of Directors
Mr. Michael Percival	Irish Bankers' Federation
Ms. Deirdre Somers	Irish Stock Exchange
Ms. Marie Daly	IBEC
Mr. Paul Farrell	Companies Registration Office
Ms. Muriel Hinch	Revenue Commissioners
Mr. Michael Halpenny	ICTU
Mr. Lyndon MacCann	Bar Council
Mr. Vincent Madigan	Department of Enterprise, Trade and Employment
Ms. Tanya Holly	Department of Enterprise, Trade and Employment
Ms. Nora Rice	Companies Registration Office
Ms. Máire O'Connor	McCann Fitzgerald
Mr. William Johnston	Arthur Cox, Solicitors
Mr. Jon Rock	Institute of Chartered Secretaries and Administrators
Mr Ian Drennan	IAASA
Mr Martin Moloney	IFSRA
Mr Paul Egan	Mason Hayes and Curran

Alternate Members:

Brian Binchy
Kevin O'Connell
Adrian Brennan
Eamonn McHale
Marie Hurley
Aidan Lambe
Ambrose Loughlin
Des Fullam
Esther Lynch
Geraldine McWeeney

Secretariat:

Eugene Forde (Secretary)
Conor Verdon
Jane Dollard
Eileen Bolger

Chapter 2

The Company Law Review Group and Its Work to Date

Introduction

The CLRG is a statutory advisory body to the Minister for Enterprise, Trade and Employment. Its task is to advise the Minister on the reform and modernisation of Irish company law. The CLRG is the engine for delivering a world-class companies code in Ireland. The CLRG's intention is to make company law a factor of competitive advantage in the Irish economy by making it simple to establish and operate a company, by creating legal certainty and promoting the highest standards of shareholder and creditor protection.

The CLRG was set up in February 2000 on foot of a Government decision and was accorded statutory advisory status by the Company Law Enforcement Act, 2001. Part 7 of that Act sets out the role and the advisory responsibilities of the CLRG and the basis on which its Members are appointed.[1] The CLRG is a standing advisory body that operates to a two-yearly cycle. Every second year the CLRG is assigned, by the Minister for Trade and Commerce, a work programme of issues for consideration.

Dr. Thomas B. Courtney, partner, Arthur Cox has chaired the CLRG since its inception. A number of Members have also served on the CLRG throughout its existence. Some nominating bodies have a policy of changing their nominee periodically. This has resulted in a mix of continuity and change which has contributed to the dynamics and outputs of the CLRG.

The CLRG follows the form of social partnership in including all relevant stakeholder interests. Its membership, as set out in Table 1 below, consists in the main of nominees from the bodies represented. In addition, the Minister added a number of individuals with legal or other relevant expertise to the Group.

Table 1: Constituent Membership of CLRG

Government Departments, including Revenue Commissioners and Courts Service	Regulatory bodies (ODCE, IAASA, Financial Regulator, Companies Registration Office, Irish Stock Exchange)
Self-regulating professions (accountants, barristers, solicitors)	Individual legal/finance practitioners
Employers or business interests	Trade Union Interests

[1] See Appendix 1 to this Report.

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The CLRG and Its Work to Date

First Report

The *First Report* of the CLRG was the culmination of its work programme for 2000-2001 and was published on 28 February 2002 and widely disseminated.

The *First Report* maps out a framework for the consolidation of what is currently an extremely complex companies code into a single Act. The code at present comprises thirteen Acts, all of which have to be read with reference to each other.

The overall focus of the *First Report* is on simplification and improving transparency. The idea at the heart of the report is to replace the public company (*plc*), by the most common type of company, the private company limited by shares, as the new model company in the legislation. This accords with the reality that 90% of all companies registered in Ireland are private companies limited by shares.

The *First Report* contains 195 recommendations. Significant recommendations include the following:

- The private company limited by shares should become the model or standard company type in the Companies Acts.
- Companies should be facilitated to transact business electronically and by sending abbreviated information to members, subject to right of access by members to request appropriate information.
- Private companies limited by shares need not hold an AGM if members consent unanimously.
- Categorisation of all criminal offences, graded according to their seriousness, following a root and branch review of the law.
- Reduction in the minimum number of company members from 7 to 2 for *plcs*.
- Removal of statutory declarations for registration and incorporation.
- Establish minimum fines for summary and indictable offences.
- Private companies limited by shares should have the legal capacity of natural persons (end of *ultra vires*).
- Fiduciary duties of directors are stated in the Companies Acts.
- A Commercial Division should be established within the High Court to deal with business-to-business litigation.
- Insolvency practitioners (liquidators, receivers and examiners) should be regulated through recognised professional bodies.

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

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The CLRG and Its Work to Date

Second Report

The *Second Report*, which covered the 2002-2003 Work Programme, builds on the framework established by the *First Report* and makes recommendations within the context of the proposed Companies Consolidation and Reform Bill. An important development in the course of the second work programme was the decision approved by the then Tánaiste and Minister for Enterprise, Trade and Employment, Mary Harney TD, to post the entire General Scheme of the new Bill on the website of the CLRG. This has been devised as a key part of a new Online Company Law Statute Book facility available to the general public and to interested parties. As they have been completed, each of the proposed Parts of the General Scheme of the Companies Consolidation and Reform Bill has been posted on the CLRG's Website for viewing and consultation.

This facility, available at www.clrg.org, includes access to all existing Companies Acts. The Statute book will help businesses considering incorporation, existing company directors, shareholders, creditors and the general public to navigate the complex area of company law. Each section of legislation features information specific to that section ranging from Oireachtas debates, explanatory memoranda, briefing notes to the Minister of the day and cross references to amending legislation.

The *Report on the Second Work Programme, March 2004*, is more technical in nature than the *First Report* and contains substantive recommendations in the following sectoral areas:

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

Third Report

The *Report on the Third Work Programme* (April 2006) covers the period 2004-2005. The intensive focus of the CLRG's work in that period was on the drafting of Heads of the General Scheme of the Company Law Consolidation and Reform Bill to implement the recommendations in the *First and Second Reports*. To that end, there were upwards of 50 meetings of the CLRG Steering Group during the period under review to design, draft and consider the draft Heads of the Bill.

During its work over the past two years, the CLRG has modified the component Parts of the proposed new Bill on the basis of issues highlighted or developed in its debates, but the overall framework is still very much the same as proposed in the CLRG's *First Report*. The CLRG recommended that the new Companies Consolidation and Reform Bill should have the following structure:

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PILLAR A – *The Private Company as the New Model Company*

1 – Definitions and Interpretation

2 – Incorporation and Registration

3 – Shares and Share Capital

4 – Corporate Governance

5 – Duties of Directors and Others

6 – Accounts, Audit and Annual Return

7 – Debentures and Charges

8 – Receivers

9 – Reorganisations and Takeovers

10 – Examinership

11 – Winding-Up

12 – Strike-Off and Restoration

13– Compliance, Investigation and Enforcement

14 – Powers and Duties of the Minister and Regulatory and Advisory Bodies

PILLAR B – *Other Corporate Forms and Miscellaneous Provisions*

- The public limited company, (or PLC) limited by shares[2]
- The designated activity company (or DAC)
  - – limited by shares, or
  - – limited by guarantee, having a share capital
- The Guarantee Company, limited by guarantee and without a share capital
- The Unlimited Company
  - – private unlimited company with a share capital (ULC); or
  - – public unlimited company with a share capital (PUC); or
  - – public unlimited company without a share capital (PULC).
- External Companies[3]
- Unregistered Companies
- Investment Companies[4]

For full details of each Part see Part III of this Report.

The process of drafting the General Scheme of the Bill is a dynamic one and refinements to the legislative proposals will continue to be posted on the CLRG website.

[2] Pillar B, Part 2 which provides for the PLC, makes provision for existing PLCs that are limited by guarantee but will not allow the creation of any new PLC, so limited by guarantee.

[3] These are all foreign companies; because it is necessary for the State to regulate these companies where they have a defined connection with the State, these are separately dealt with in the General Scheme.

[4] These are a variant mutation of the PLC, used by the very important funds industry, which require separate treatment in the General Scheme.

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Report on Directors' Compliance Statement

The CLRG's *Report on the Directors' Compliance Statement* (DCS) was published in November 2005. On 21 April 2005, the Minister for Trade and Commerce, Michael Ahern TD, had referred the issue of the DCS, required by section 45 of the Companies (Auditing and Accounting) Act, 2003, to the CLRG for review, pursuant to section 68(1)(h) of the Company Law Enforcement Act, 2001.

The CLRG was asked for its views on the proportionality, efficacy and appropriateness of the DCS, having regard to a number of factors. Following an intensive examination, which included risk and regulatory impact analysis, a majority of the CLRG[5] supported the recommendation of a new "*Section X*" which contained a mitigated version of the DCS[6]. This proposal, which was approved by Government in November 2005, will be taken forward in the context of the Companies Consolidation and Reform Bill.

EU Financial Services Action Plan (FSAP)

The company law-related measures of the FSAP are revisited and updated in the *Report of the Third Work Programme* (see Appendix 2 to this Report). The EU-derived influence on Irish company law has mainly been on public limited companies. After the initial assimilation of EU company law Directives into Irish law, there was a period of relative quiescence in EU-driven legislation in this area. That changed with the adoption of the EU Financial Services Action Plan.

On May 11 1999, the European Commission adopted an Action Plan outlining a series of policy objectives and specific measures to improve the European market for financial services during the five years following. The Action Plan suggested indicative priorities and timescales for legislative and other measures to tackle three specific objectives: a single market for wholesale financial services; open and secure retail markets for retail financial services; and financial market stability with state-of-the-art prudential rules and supervision. As a consequence of the FSAP, "The EU has adopted an unprecedented number of measures, not only updating existing law, such as that on prospectuses and insider trading, but also embarking into previously unregulated territory, such as market manipulation and takeover bids."[7]

The task of the CLRG in this context was how to address the implementation and consolidation, in Ireland, of company law emerging from EU initiatives set in train under the FSAP.

The CLRG considered to what extent it might be appropriate to decouple FSAP initiatives from the main reform and consolidation already in train. The distinction, on a thematic basis, was not clear-cut. While a number of the FSAP measures are clearly concerned with the marketing of products, others are concerned with corporate governance. The conclusion was that it was appropriate that the CLRG would continue to have the primary advisory role on FSAP measures and their appropriate transposition into Irish law to the extent that FSAP measures had a significant company law element and, as such, fell within the policy and legislative responsibility of the Department of Enterprise, Trade and Employment.

[5] The majority comprised 16 of the 19 voting members of the CLRG.

[6] The full Report of the CLRG on the DCS can be accessed at www.clrg.org/1streport/directors.asp

[7] Mason Hayes Curran, "European Union Securities Legislation", 2005, p. 5

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FSAP initiatives are complex to implement in domestic law because of their 'four-level' nature dealing with Principles, Regulations, Review and Enforcement. While ideally it might be appropriate to transpose the Principles level (i.e. the Council and European Parliament Directives) by statute, it would probably be more appropriate to transpose the subsequent levels by statutory instrument. Overall, the CLRG advocates a pragmatic approach to addressing these issues and to their appropriate 'interaction' with domestic company law. (Details of the approach being adopted to individual FSAP instruments are set out in Appendix 2 to this Report.)

The Current Report

Finally, this Report describes the approach and principles applied in drawing up the General Scheme of the Companies Consolidation and Reform Bill. It describes the general architecture of the Bill and the Risk Impact Assessment of the provisions in the Bill. It goes on to describe the main or new company law provisions. Further explanation of the links between the new Bill and the existing company law provisions may be found on the CLRG's website (www.clrg.org).

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The Principles Applied to the Simplification, Modernisation and Consolidation of Company Law

Introduction

Bringing greater clarification and simplification to the companies code is an imperative. Despite Ireland's economic advances, and indeed our state-of-the-art profile in some areas of business, there has not been an equal emphasis to date on bringing the *regulatory* company laws, and perhaps more importantly, *facilitatory* company laws, to a similar world-class level.

The importance of having an efficient and effective *regulatory* environment is set out cogently in the OECD April 2001 *Review of Regulatory Reform in Ireland*. That review notes:

> *Regulatory reform is helping Ireland to manage the consequences of fast growth and to build new capacities to sustain growth into the future… Regulatory reform is seen as a way to open up important infrastructure and policy bottlenecks to further growth and to attain efficiency improvements that can help manage inflationary pressures…. The Irish government is…using reform to establish a more competitive and flexible economy that can innovate, adapt and prosper even as the sources of its current prosperity change. The challenge is to move from growth based on using more resources (mostly more labour) to growth based on using resources better, that is, on productivity improvements. This shift in sources of growth requires a more nimble and dynamic economy rooted in a modern regulatory environment that is consistent with market forces, rewards productivity and innovation, and responds to consumer needs and changing market opportunities, domestic and international.*

By *facilitatory* company law is meant the legal code that permits business to be conducted through the registered company, for example, the law relating to corporate governance (e.g. the holding of meetings, whether of members or of directors) and the law relating to the rights of shareholders and creditors.

The CLRG considers that it is necessary to create a new structure for Ireland's company laws which will provide the wherewithal for innovation and capacity building. Whilst it is believed that the recommendations in this Report will provide the cornerstone for the new companies code, maximum benefit will come only over time. The CLRG's aspiration is to establish a company law framework perceived as among the world's best; a framework with a degree of efficiency and effectiveness in legislation and indeed in the administration of justice, such that Ireland provides a modern, simplified, less bureaucratic place to do business, both indigenous and FDI.

In this respect the CLRG is ever mindful of the requirement on it, contained in Section 68(2) of the Company Law Enforcement Act, 2001, *viz*.:

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

Throughout its work, in the analysis it conducts and in the recommendations it produces, the CLRG has sought to inform its decision-making processes with a consciousness of competition issues and of the need for the Irish economy to remain competitive. Indeed, our whole emphasis in bringing the framework on company law in Ireland into the 21st century is to ensure that economic activity is enhanced by both the efficiency and effectiveness of the company law regime. We have also been informed in our deliberations by a concern for where the balance of the public interest lies.

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1. Modernising and Consolidating Company Law

General Approach

To truly modernise company law to achieve the foregoing aims, requires consolidation of the existing legislative provisions, but more importantly, reforming the existing provisions so as to reflect modern business practices, and simplifying them to better facilitate business creation and operation. In its early deliberations, the CLRG came to the considered opinion that it would be best to first conduct a major review of existing company provisions, and to reflect the outcome of that review in a subsequent consolidation. Government subsequently approved the CLRG's recommendation to proceed with a single Companies Consolidation and Reform Bill in 2002. The CLRG has been mainly focussed on detailed drafting of the Bill since then. This Report therefore reflects the outcome of both the review and the consolidation of existing provisions to reflect business practices in the 21st Century.

International Experience

In approaching its task the CLRG was conscious that it was working in a world where the globalisation of capital, investment and business activity is an increasing fact of life.

Company law blossomed in the 19th Century. While the basic principles of sound corporate governance remain valid, company law undoubtedly needs ongoing and substantial updating and reform. There is significant cross-fertilisation internationally in company law. Developments in different common law jurisdictions offer a range of models not only for specific legislative changes but also for changes in the framework of company law, most usually differentiated by the public or private status of a company or by its size.

With a view to shaping a state-of-the-art company law regime for Ireland, the CLRG considered the most influential models and changes in company law in order to draw on the best elements of practice and regulation elsewhere. The CLRG, for example, looked at the changes brought about by the Canada Business Corporations Act, 1975. This drew substantially on the Model Business Corporations Act in the United States, while retaining elements of United Kingdom company law. The Australian Corporations Act, 2001 includes a highly developed and detailed securities law regime. We have had regard also to other jurisdictions which have modernised company law, such as the State of Delaware, Singapore, Malaysia and Hong Kong. The New Zealand Companies Act, 1993 broadly adopted a North American/Canadian model of corporate law and an entirely new framework for company law has developed there. Closer to home there are models and specific sections of legislation in England and Wales, Scotland and Northern Ireland which we felt could be emulated usefully.

It is instructive to note that in every peer jurisdiction we looked at there was a concern both to simplify the content of the company law regime and to improve the intelligibility of company law for both lawyer and non-lawyer. On foot of its analysis the CLRG decided it was appropriate to retain an omnibus companies code for Ireland and not to go the route of establishing a separate legal framework for small and closely-held companies, e.g. on the analogy of the 1984 South Africa Close Corporations Act. Rather, the Group thought the most constructive approach was to differentiate, clarify and disapply existing provisions in the companies code as much as possible within a single legal framework. The thrust of those proposals is being given effect in the General Scheme of the new Bill which we are proposing in this Report.

Compliance

For many years, from the perspective of consumer or customer protection, the emphasis has been on the legislative enactment of regulatory rules. The concern of the CLRG has been to shift that focus with a view to achieving best practice through *compliance* with balanced regulatory rules. Until

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the recent past, where compliance was not evident, there was little concentration on enforcement and the picture of low compliance was augmented by the corporate governance shortcomings (cf Report of the Review Group on Auditing[8]).

This general climate continues to change. Certainly, the area of company law enforcement is being accorded resources, rigour and commitment on foot of the Company Law Enforcement Act, 2001 which established the Office of the Director of Corporate Enforcement. The compliance policies applied by the Companies Registration Office have had a direct impact. The subsequent establishment of IAASA (the Irish Auditing and Accounting Standards Authority) on foot of enactment of the Companies (Auditing and Accounting) Act, 2003, seeks to supervise delivery of effective self-regulation by the recognised accountancy bodies.

Some New Rules

The CLRG believes that, in general terms, 'less law is best' and where possible has recommended the repeal of anachronistic provisions. To that end, we have sought to remove or lessen administrative burdens where possible and appropriate. In a limited number of other cases, the public interest requires the introduction of additional regulation, notably with regard to the regulation of insolvency practitioners, believing that the balance of the public interest lay with ensuring that in time all insolvency practitioners should be members of professional bodies.

2. Simplifying Company Law

Why the Need for Simplification

Simplification is a central part of the CLRG's role in ensuring that Ireland has a company law code that embodies best practice in both the content and operation of law. The CLRG's operating premise is that Ireland's company law code must be predicated on the principles of simplicity, effectiveness and balance. The CLRG is committed to ensuring that Irish company law will facilitate the transaction of legitimate business in a nurturing environment whilst always having the capacity to address any wrongdoing in the most effective manner possible.

The simplification of Irish company law was, without doubt, the most daunting of the areas which the CLRG was asked to consider. At the outset of the CLRG's deliberations, it was quickly realised that a body of law that must afford protection to shareholders and creditors and legislate for the orderly administration (whilst solvent and insolvent) of the entity, can never be truly simple.

In addition to the fact that company law is by its very nature highly technical, there are a number of reasons why the existing legal framework is complex:

1. The output of the last major review and consolidation of Irish company law was the 1963 Companies Act. Since then there have been twelve further amending Acts, and a multiplicity of statutory instruments which are required to be read as one with the Companies Acts.
2. Ireland's membership of the EU and its attendant responsibilities in relation to the harmonisation of laws has added to the volume and complexity of Irish company law. It is also notable that much EU-driven law has been applied in Ireland's domestic laws by statutory instrument. An additional *tranche* of company and securities law arises to be addressed under the EU Financial Services Action Plan.
3. Historically, legislation has never clearly distinguished the law applicable to private companies limited by shares (which constitute 90% of all companies registered in Ireland) from that applicable to public limited companies (which constitute 0.62%). This has resulted in small businesses being faced with an apparently massive company law code, when in fact a considerable amount has no application to their particular business enterprise.

[8] Department of Enterprise, Trade and Employment July 2000, *Report of the Review Group on Auditing*, Government Publications, Dublin.

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4. The sources of company law are diverse. In addition to statute and statutory instruments there are also statutory codes and a common law and equitable judicial jurisprudence that now spans three centuries.
5. There has been a tendency to house in the Companies Acts, statutory provisions that do not apply to companies generally e.g., the role of IFSRA in monitoring the activities of investment companies in Section 258 of the 1990 Companies Act.
6. Company law involves the balancing of many conflicting and possibly competing interests. Whilst company law should facilitate and encourage economic activity and growth by licensing the use of the company as a business vehicle, the legislature must balance many competing principles including creditor protection, shareholder protection, corporate governance and incorporation and registration of companies. Balancing those principles has contributed to the complexity of the law, for example:

   - The necessity for *creditor protection* in company law has given rise to a considerable volume of both *preventative* and *remedial* laws. In the nature of such laws, brevity and succinctness have been sacrificed in an attempt to eliminate loopholes and the ingenuity of delinquent debtors;

   - The necessity to ensure compliance with company law has given rise to a considerable volume of law, most recently and extensively in the Company Law Enforcement Act, 2001;

   - The necessity to ensure that the investing public is protected has also added to the volume of company law in the area of *shareholder protection* and *corporate governance*.

General Approach

The CLRG approached its task in the belief that, notwithstanding the reasons for its complexity, the existing body of legislation could still be *simplified*. The CLRG agreed that simplification could be achieved by distinguishing particular types of companies and fine-tuning the principles identified in the preceding paragraph.

Although the CLRG's original and primary focus is the private company limited by shares, simplification and rationalisation also informed its codification and reform of the PLC, guarantee company and unlimited company.

In adopting this approach, company law was broken down into distinct principles and areas, and the law arising thereunder was reviewed with a view to its simplification.

Simplification through structural changes

The CLRG considered that a series of specific structural changes to the Companies Acts would greatly assist users of company law in accessing and understanding a highly technical code. Examples of such initiatives include ring-fencing the law applicable to private companies limited by shares and by the greater use of defined terms.[9]

Simplification through codification

The CLRG supports the codification in statute law of well-established common law and equitable principles of company law, such as in the area of directors' duties, as a further aid to simplification. However, although codification of the common law will add *new* statutory provisions to an already voluminous body of legislation, the CLRG feels that any disadvantage will be substantially outweighed by the advantage of clarity and certainty.

[9] In this respect the Review Group's approach can be seen to be similar to that of the New Zealand Law Commission's Report, *Company Law Reform: Transition and Revision*, (NZLC R 19) at Chapter 1.

Chapter 3

The Principles Applied to the Simplification, Modernisation and Consolidation of Company Law

Simplification through restructuring the Companies Acts

Much of current company law is contained in the model articles of association in *Table A* of the Companies Act, 1963. The CLRG believes that there is considerable merit in migrating those important corporate governance provisions to the primary legislation and eliminating *Table A* entirely. For private companies limited by shares the current two-document company constitution, composed of a memorandum of association and articles of association, is being replaced by a one-document constitution.

Achieving simplification by "thinking small first"

The CLRG recommends an increased focus, in the enactment of all future companies legislation, on the needs of the small private company limited by shares and in this respect fully endorses the "*think small first*" approach favoured by the UK Company Law Review Steering Group.[10] That Group's three guiding principles travel well to Ireland. These principles which aim to ensure that new legislation meets the needs of small private companies are (a) the law should be clear and accessible, but (b) accuracy and certainty should not be sacrificed unduly in an attempt to make the law merely superficially more accessible; and (c) the legislation should be structured in such a way that the provisions that apply to small companies are easily identifiable.

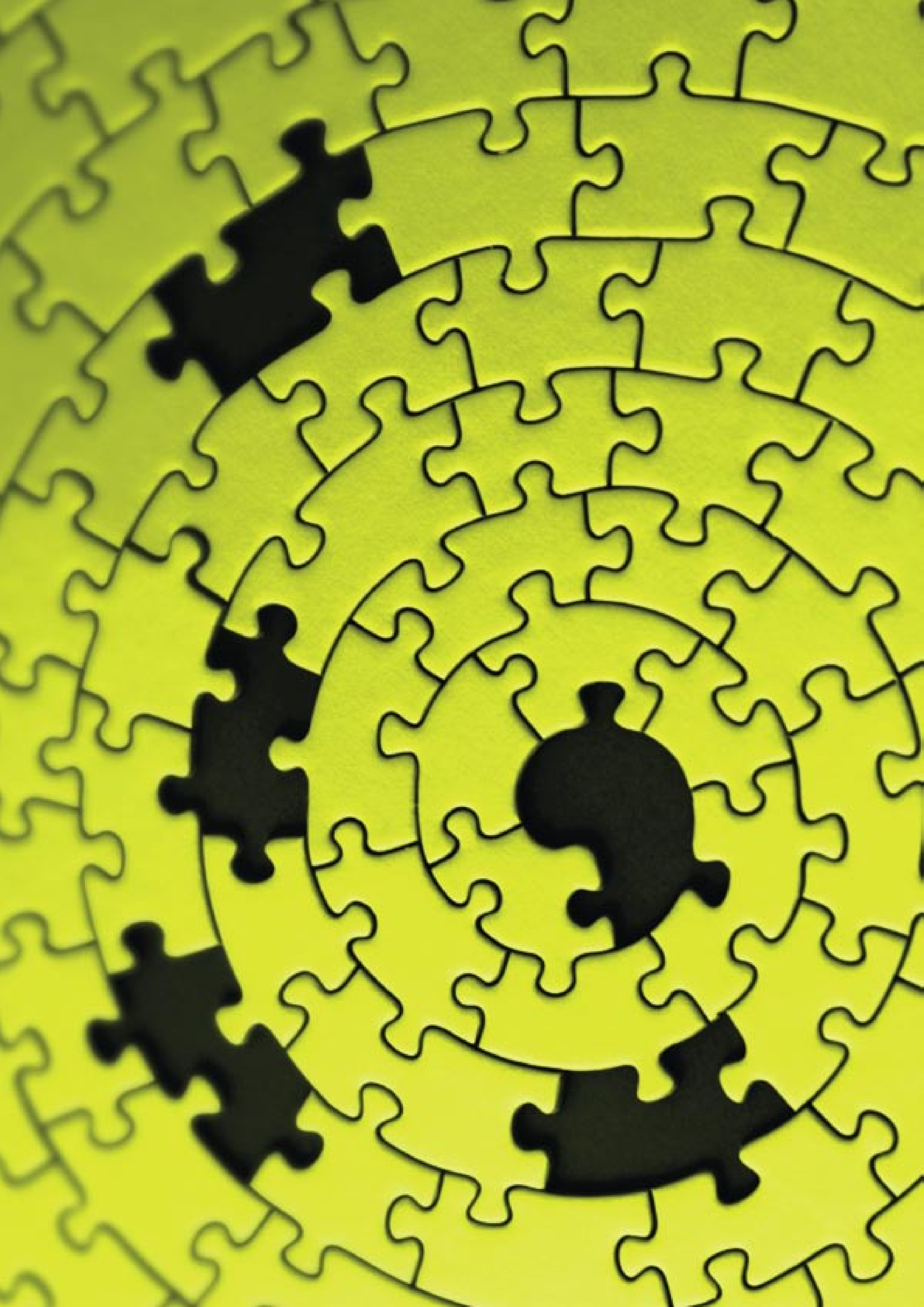
Summary

In summary, the CLRG's approach to simplification involves:

- A primary focus on the simplification of the law applicable to private limited companies.
- Simplification of PLCs, guarantee companies and unlimited companies through the restructure and rationalisation of the laws applicable to such companies.
- Simplification to be conducted from the perspective of the generic principles that are the *raison d'être* of our company laws, to wit: creditor protection, shareholder protection, corporate governance, incorporation and registration and the criminalisation of company law transgressions.
- The restructuring of the Companies Acts, the ring-fencing of law that is only applicable to private limited companies and the greater use of defined terms.
- Following the "*think small first*" approach when considering new companies legislation.
- The codification of well established common law and equitable principles of company law.
- The migration of widely adopted provisions, currently contained in Table A of the Companies Act, 1963, into primary legislation.

The foregoing sets out the CLRG's approach to generic simplification and will be complemented and supplemented by the simplifying of specific substantive provisions.

[10] Company Law Review Steering Group's, *Modern Company Law for a Competitive Economy – Final Report*, (2001) at para 2.34 (at p 37).



Chapter 4
Regulatory Impact Analysis

Introduction

As of July 2005 there is a requirement to apply a model of Regulatory Impact Analysis (RIA) across all Government Departments and Offices to:

1) all proposals for primary legislation involving changes to the regulatory framework;
2) significant statutory instruments; and
3) draft EU Directives and significant EU Regulations when they are published.

'RIA is a tool used to assess the likely effects of a proposed new regulation or regulatory change. It involves a detailed analysis to ascertain whether or not the new regulation would have the desired impact. It helps to identify any possible side effects or hidden costs associated with regulation and to quantify the likely costs of compliance on the individual citizen or business.' (Dept. of the Taoiseach, RIA Guidelines, October 2005)

The General Scheme of the Companies Consolidation and Reform Bill is composed of over 1,250 Heads. The consideration of RIA in this Chapter will focus (a) on the overall impact of the Bill, and (b) on the major changes proposed that have a regulatory impact.

The template for carrying out an RIA is contained in the RIA Guidelines issued by the Department of the Taoiseach in October 2005. The difference between a *Screening* RIA and a *Full* RIA is primarily the depth of the analysis. In this instance, the benefits of the proposed legislation, though hard to monetise, are so self-evident, especially as compared with costs, that a Full RIA would not be warranted. The template for a Screening RIA, as set out in the Guidelines is as follows:

"*Description of policy context, objectives and options (for example different forms of regulation)*

(i) A brief description of the policy context.
(ii) An explicit statement of the objectives that are being pursued.
(iii) An identification of the various policy options or choices which are under consideration.

Identification of costs, benefits and other impacts of any options which are being considered

(i) Identification of likely costs, estimation of their magnitude and to whom they fall.
(ii) A description of expected benefits and where these will fall.
(iii) Verification that there will not be disproportionately negative impacts on
- *(a) national competitiveness*
- *(b) the socially excluded or vulnerable groups*
- *(c) the environment*

and that the regulations do not
- *(I) involve a significant policy change in an economic market*
- *(II) impinge disproportionately on the rights of citizens*
- *(III) impose a disproportionate compliance burden on third parties*

and other criteria to be decided from time to time by Government

(iv) Summary of costs, benefits and impacts of each option identified and identifying the preferred option where appropriate.

Consultation

Summary of the views of any key stakeholders consulted - which must include any relevant consumer interests and other Government Departments.

Enforcement and compliance

Brief description of how enforcement and compliance will be achieved."

Chapter 4
Regulatory Impact Analysis

Work on the Companies Consolidation and Reform Bill predates the Government decision on RIA by some five years and work on the General Scheme now produced was instigated by the CLRG following the decision of the Government to implement the recommendations in its *First Report* in 2002. Moreover, although the General Scheme does provide a broad regulatory framework for the incorporation and operation of companies, much of company law is to do with facilitating the use of the company as an instrument for economic development, the structuring of people's relations and the operation of private civil relationships.

Nonetheless, the whole project to review and reform company law is imbued with the principles underpinning RIA, i.e. to produce evidence-based proposals for regulatory reform on the basis of testing such options for reform with regard to the compliance and enforcement costs arising for such reform, and to consult intensively and extensively with company law stakeholders on the proposals.

The policy context and the overall objective of simplifying, modernising and consolidating company law are described in Chapters 2 and 3 above. Chapters 2 and 3 explain the structure of the Bill, reflecting the primacy of the private limited company as the preferred company model in the present day Irish economy.

Overall, the benefits to the citizen and to the country are: a simplified regime for the establishment and operation of companies, based on the company model which is used by 90% of Irish companies, while ensuring the highest standards of corporate governance and of creditor and shareholder protection. In so doing, the new regime will greatly facilitate business start-ups and the fostering of investment and innovation as the driving force of the Irish economy.

Main Changes

The CLRG has identified the following significant proposed changes to the regulation of companies and has conducted its screening RIA around these significant regulatory changes (see Table 2):

Table 2: Main Regulatory Changes Proposed

Legislative Change	Potential Impact
Creation of new regime for private companies limited by shares which will involve the change from having a memorandum and articles of association to having a one-document constitution.	Existing private companies will be required to either (a) adopt a new constitution to conform or (b) opt out by members' resolution and change "Limited" in name to "Designated Activity Company" (or "D.A.C.").
As a consequence, the requirement that some companies change their name.	Public guarantee companies will have to change from "Limited" to "Guarantee Company"; private companies limited by guarantee or limited by shares but having an objects clause will have to change their name from "Limited" to ""Designated Activity Company" or "D.A.C.") Unlimited companies will have to change their name by the addition of the words ("Unlimited Company").
Requirement for company liquidators to have qualifications.	This will prevent certain persons from acting as liquidator.
Introduction of priority filing of particulars of charges.	This may result in particulars of charges created by companies being delivered twice to the CRO.

Chapter 4
Regulatory Impact Analysis

Although there are a multiplicity of reforms contained in the General Scheme, the foregoing are the only reforms that have a significant regulatory impact upon the operation of companies. In applying the RIA template to the General Scheme, particular regard will be had to each of the foregoing changes in legislation which effect changes to the regulatory environment for companies.

Description of policy context, objectives and options

(i) A brief description of the policy context.
On 9 March 1999, the Government approved the implementation of the recommendations in the Report of the Working Group on Company Law Compliance & Enforcement.[11] That report concluded that in the interests of competitiveness "Ireland must combine modernisation and codification of its company law in a period of major company law reform". These recommendations included establishment of the CLRG as an ongoing mechanism for the review and modernisation of company law. Since its inception, the CLRG's major task has been the creation of the General Scheme for the modernisation, consolidation and reform of company law.

The Act which established the Group requires that,

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

The CLRG's aspiration is to establish a company law framework perceived as among the world's best; a framework with a degree of efficiency and effectiveness in legislation and indeed in the administration of justice, such that Ireland provides a modern, simplified, less bureaucratic place to do business for both indigenous and foreign-owned corporations. The CLRG's intention is to make company law a factor of competitive advantage in the Irish economy by making it simple to establish and operate a company, while retaining the highest standards of shareholder and creditor protection.

The General Scheme, as set out in this Report, has its origin in the concept of and framework for restructuring, consolidating, simplifying and modernising company law in Ireland mapped out by the CLRG in its *First Report* (February 2002). In July 2002, the Government approved implementation of the full set of recommendations in that Report. There have been two subsequent substantive reports covering the periods 2002-2003 and 2004-2005 which have developed and clarified the recommendations in the *First Report.* The result of this intensive analysis is the draft General Scheme of the Companies Consolidation and Reform Bill.

(ii) An explicit statement of the objectives that are being pursued.
As indicated at (i) above, the global objectives of the Bill are to restructure, consolidate, simplify and modernise company law in Ireland. The Bill will radically restructure the companies code principally by establishing the most common type of company chosen by Irish business, the private company limited by shares, as the standard company type and rewriting and reordering the Act to reflect that point. The Bill will consolidate and modernise the existing thirteen Companies Acts and many statutory instruments that require to be read with the existing Companies Acts into a single Act. The Bill will simplify the companies code by facilitating the law pertaining to each company type to be accessed in a much clearer and more integrated way than is currently the case. The existing Principal Act dates from 1963 and the General Scheme proposes changes in a number of procedures, for example, to take account of technological and organisational developments in the conduct of business and communications and emerging best practice in corporate governance.

[11] Department of Enterprise Trade and Employment 30 November 1998 *Report of the Working Group on Company Law Compliance and Enforcement*, Government Publications (Pn. 6697).

Chapter 4
Regulatory Impact Analysis

This will lighten the regulatory burden, particularly on private companies, whilst balancing the interest of members, creditors and the public.

(iii) An identification of the various policy options or choices which are under consideration
Each existing provision in the companies code was reviewed to see if it should be re-enacted, amended or repealed. Similarly, proposals for change in existing legislation were scrutinised to determine their necessity and desirability. The legislative proposals in the General Scheme reflect that intensive scrutiny as applied by the CLRG.

The CLRG considered whether to pursue the option of restatement of the companies code as provided for under the Statute Law (Restatement) Act, 2002 but decided against, as this was too limiting with regard to the reforms necessary to sustain Irish competitiveness by improving the efficiency and effectiveness of Irish company law.

The CLRG also considered if it was appropriate to deal with the consolidation and reform of company law in a two-stage process by firstly availing of the consolidation procedure provided for under Dáil and Seanad Standing Orders and then proceeding with a reform Bill. The conclusion was that this was not an efficient use of resources as it would entail the drafting of two very long and complex Bills. Furthermore, the publication of three versions of the companies code, (pre-consolidation, post-consolidation, post-reform) within a short space of time may lead to further confusion. For reasons of national competitiveness and the maintenance of the status quo,not addressing both the reform and consolidation of company law in Ireland, was not a viable option.

Identification of costs, benefits and other impacts of any options which are being considered

(i) Identification of likely costs, an estimation of their magnitude and to whom they fall and (ii) a description of expected benefits and where these will fall.

Enactment of the measures imposed in the General Scheme will not increase the enforcement costs of the Bill. The enforcement bodies in question are mainly the Office of the Director of Corporate Enforcement and to lesser extents the Companies Registration Office and the Irish Auditing and Accounting Supervisory Authority. While there are a number of proposals in the Bill intended to streamline and assist these bodies in the application of their power, none of the recommendations in themselves give rise to significant additional costs.

The beneficiaries of the proposed changes in Ireland's companies code will be the State, companies and the users of company law – businesses, shareholders, employees, creditors and investors.

There are a great many benefits that will accrue as a result of the enactment of the measures contained in the new Bill. These include:

Benefits at the company level:

- A greatly simplified framework for corporate incorporation and activity. The consolidation of the thirteen Companies Acts from 1963 to 2006 will substantially increase the penetrability, accessibility and transparency of the Irish companies code making it state of the art. These positive benefits will enhance the attractiveness of Ireland as a place to do business and will assist in encouraging foreign direct investment. Indigenous business will also be assisted, particularly those that operate through the private company limited by shares which will be made the model company in the

companies code. The structure of the new Bill will also improve the intelligibility of the laws applicable to various corporate types such as Public Limited Companies, Guarantee Companies, Unlimited Companies, DACs and Investment Companies.

- A substantially reduced regulatory regime will operate for the private company limited by shares which will be permitted to have just one director, assume the same contractual capacity as a natural person, have the possibility to dispense with holding AGMs, avail of the written resolution procedure for majority as well as unanimous resolutions and adopt a one-document modernised constitution instead of the current two-document memorandum and articles of association. These reforms will be introduced with sufficient safeguards to balance the rights of shareholders, creditors and the public interest. For example, the members may object to the waiver of the AGM and insist on the meeting being held.

- All companies will benefit from the lighter-touch regime concerning the disclosure of directors' interests in shares and debentures facilitated by the introduction of a 1% de minimis provision. This is a significant change from the provisions of Part IV of the 1990 Act, which required any interest (even a single share) held by a director to be disclosed.

- A unified principles-based validation procedure can be availed of by companies. This will allow them to engage in otherwise prohibited activity, once certain conditions that protect the interests of relevant stakeholders have been met. This balance is inherent in safeguards in the validation procedure. For example, the requirement for a statutory declaration of solvency protects creditors' interests, while the necessity for a special resolution protects members' interests. Finally, the procedure as a whole is in the public interest as it is transparent and clear.

- A greatly simplified and unified conversion scheme is introduced whereby companies can convert from one company type to another with greater certainty and clarity of requirements.

Benefits at the national level:

- Ireland will become a more attractive place to do business and as a consequence, significant benefits will arise for national competitiveness.

- The criminal law regime applicable to all companies has been greatly simplified and consolidated by the categorisation system, where almost all offences created by the legislation are assigned a level of 'seriousness' ranging from category 1 to category 4. This categorisation system was devised and introduced by the CLRG and will greatly reduce complexity, clarify auditors' obligations to report certain offences and ensure greater certainty of the criminal law framework in the companies code.

- The changes being introduced to the manner in which official court liquidations are to be conducted will improve the efficiency of official liquidations, reduce the administrative burden on the Courts Service, ensure that liquidators have a minimum competency and carry appropriate insurance and reduce the costs of winding-up through the eventual reduction or removal of the 2% levy on assets realised in official liquidations, to the manifest advantage of the creditors of insolvent companies.

- Arising from the intensive review of the *Directors' Compliance Statement [section 45, Companies (Auditing and Accounting) Act 2003]* undertaken by the CLRG in 2005, it was estimated that this provision would give rise to minimum set up costs of €90,000 and ongoing annual costs of €40,000 for the companies affected, in order for them to establish systems and procedures to ensure compliance. The revised version of the Directors' Compliance Statement, devised by the CLRG and approved by the Government in December 2005, will give rise to only very marginal costs to the companies to which it applies.

Chapter 4

Regulatory Impact Analysis

Costs:

In terms of costs, the following proposals in the Bill have been identified as having the potential to give rise to certain one-off costs in the short term on the part of existing companies. The measures in question, their likely costs and the benefits that will arise to companies that incur such costs are as follows:

⊙ Creation of new regime for private companies limited by shares involving the change from having a memorandum and articles of association to having a one-document constitution.

Table 3

Possible Reason for Cost	Estimated Cost	Benefits Accruing
Existing private companies will be required to either (a) adopt a new constitution to conform or (b) opt out by members' resolution and change "Limited" in name to "Designated Activity Company" or "D.A.C."	(a) To change constitution circa €2,000 to €3,000 legal fees; (b) To change name c €500 legal fees and c €1,500 to change headed notepaper. It should be noted that companies can opt out and elect to take the cheaper cost option (b) although to do so will prevent them availing of the myriad financial and administrative benefits that accrue to the new model company.	Converting to new model private company will give rise to the following benefits (non-exhaustive): ⊙ Multi-member companies can waive AGM and save annual costs; ⊙ Only one director will be required; ⊙ Doctrine of *ultra vires* disapplied – easier to get loan capital; ⊙ Majority resolutions can be by written resolution – saving costs of convening and holding EGMs.

⊙ Requirement that certain companies change their name

Table 4

Possible Reason for Cost	Estimated Cost	Benefits Accruing
Public guarantee companies will have to change from "Limited" to "Guarantee Company"; private companies limited by guarantee will have to change their name from "Limited" to "Designated Activity Company" or "D.A.C."); Unlimited companies will have to change their name by the addition of the words ("Unlimited Company").	To change name c €500 legal fees and c €1,500 to change headed notepaper.	Requiring certain companies to change their name will give rise to the following benefits (non-exhaustive): ⊙ The public can readily identify each company type; ⊙ The identification of the new model company is facilitated; ⊙ Companies that have the word "limited" can be assumed to have the same contractual capacity as a natural person; ⊙ It will become apparent in dealing with an unlimited company that it is a corporate person and not a natural person.

⦿ Requirement for company liquidators to have qualifications

Table 5

Possible Reason for Cost	Estimated Cost	Benefits Accruing
Will prevent certain persons from acting as liquidator	Costs here will be in income not earned by those unqualified individuals prevented from acting as liquidator. This will, however, be greatly mitigated by the 'grand fathering' of individuals who are currently acting as liquidators.	Requiring liquidators to have qualifications will give rise to the following benefits (non-exhaustive): ⦿ Increased standards in the conduct of liquidations; ⦿ Increased accountability as liquidators are members of regulated professions; ⦿ Significant cost reduction for official liquidations due to reduced court supervision, facilitated by mandatory qualifications for liquidators; ⦿ Mandatory insurance will assist accountability too.

⦿ Introduction of priority filing of particulars of charges

Table 6

Possible Reason for Cost	Estimated Cost	Benefits Accruing
May result in particulars of charges created by companies being delivered twice to the CRO	Additional administrative charge (€25 per filing) and additional transaction costs in taking security	Priority filing will give rise to the following benefits (non-exhaustive): ⦿ New regime is elective; chargees need not effect priority filings; ⦿ Increased sources of finance to business as security backed lending in high risk situations will be facilitated.

(iii) Verification that there will not be disproportionately negative impacts on

(a) national competitiveness

The impact on national competitiveness will be entirely positive for the following reasons:

- Diminution of compliance burden, hence of costs, leading to improved competitive position vis-à-vis competitor jurisdictions;
- Fostering a pro-business climate and awareness among potential investors that Ireland is an efficient place to do business;
- The law will be more straightforward and less complex structurally (one Act instead of thirteen Acts) and in content (better alignment of common law and EU-derived law). Therefore there is likely to be a reduction in the need for, and costs of, companies, creditors or individuals having to obtain external expert advice.

(b) the socially excluded or vulnerable groups
The impact of the proposed General Scheme is neutral on socially excluded or vulnerable groups.

(c) the environment
The impact of the proposed General Scheme is neutral on the environment.

Furthermore the proposed General Scheme does not, as per analysis above;
(d) involve a significant policy change in an economic market
(e) impinge disproportionately on the rights of citizens
(f) impose a disproportionate compliance burden on third parties.

Consultation

The CLRG includes all relevant interests which are the consumers and users of company law. Its membership, as set out below, mostly consists of nominees from the bodies represented.
In addition, the Minister added a number of individuals with legal or other relevant expertise to the Group. See Table 7.

As a consequence of the significant changes proposed with regard to the diminution of court involvement in the area of winding-up and insolvency, see 2(ii) above, the CLRG engaged with the Irish Insolvency Group, who represent insolvency practitioners, as these proposals were being elaborated. In addition, the General Scheme contains a number of proposals intended to facilitate the general regulation of property management companies.

As part of a commitment to accountability and transparency, as each Part of the General Scheme was formulated it was posted on the CLRG website, www.clrg.org, for viewing and for consultation by the general public and interested parties. The completed General Scheme will similarly be available.

Table 7: Constituent Membership of CLRG	
Government Departments, including Revenue Commissioners and Courts Service	Regulatory bodies (ODCE, IAASA, Financial Regulator, Companies Registration Office, Irish Stock Exchange)
Self regulating professions (accountants, barristers, solicitors)	Individual legal/finance practitioners
Employer and business interests	Trade Union interests

Enforcement and Compliance

No change to existing enforcement bodies or their powers is proposed, except in a very limited number of cases (notably by establishing IAASA's powers to regulate insolvency practitioners).

Chapter 5
The Architecture of the General Scheme

The General Scheme of the Heads of Bill is broken down into two separate groups of provisions or **PILLARS.** This gives effect to the CLRG's recommendation that it is critical to the achievement of simplification and modernisation of company law that the law applicable to private companies limited by shares is 'ring-fenced' from the law applicable to all other types of company.

PILLAR A – *The Private Company as the New Model Company*

PILLAR A is concerned exclusively with the private company limited by shares, now referred to by its more long-standing and simpler name of the "private company". The General Scheme will give effect to the primacy of the 'private company' as the preferred corporate entity of the vast majority of people who incorporate companies. It thus becomes the new model company in Irish company law.

Thus, every provision of company law that is or may be applicable to the private company is to be found in **PILLAR A**.The self contained approach proposed for the private company is comprised of 14 separate **Parts**, *viz.:*

1 – Definitions and Interpretation

2 – Incorporation and Registration

3 – Shares and Share Capital

4 – Corporate Governance

5 – Duties of Directors and Others

6 – Accounts, Audit and Annual Return

7 – Debentures and Charges

8 – Receivers

9 – Reorganisations and Takeovers

10 – Examinership

11 – Winding-Up

12 – Strike-Off and Restoration

13 – Compliance, Investigation and Enforcement

14 – Powers and Duties of the Minister and Regulatory and Advisory Bodies

Thus, grouped into these **14 Parts** are all provisions in the Companies Acts and significant statutory instruments that are relevant to private companies limited by shares. The CLRG believes that this approach ensures that (a) the law is clear and accessible, (b) accuracy and certainty have not been sacrificed in an attempt to make the law merely superficially more accessible and (c) the legislation has been structured in such a way that the provisions that apply to the private company are easily identifiable.

Chapter 5

The Architecture of the General Scheme

The key features of the private company provided for in **PILLAR A** are:

1. It is to be limited by shares and must have a share capital.
2. It is to have the same capacity as a natural person i.e. the doctrine of *ultra vires* will have no application to the private company.
3. It is to have a one-document constitution which will replace the current two-document constitution that is the memorandum and articles of association.
4. It will have a limit of 99 members, (introduced for private companies by the Investment Funds, Companies and Miscellaneous Provisions Act, 2006) but there will be a carve-out from this for property management companies that are formed as private companies so that they may have an unlimited number of members, provided they are all co-owners in the same development.
5. It cannot publish a prospectus or list its shares or debentures.
6. It requires just one director and a company secretary (who may not be the same persons).
7. It can have just one member.
8. Its member (or members, acting unanimously) can waive the requirement to hold an AGM.
9. Its members can pass a majority written resolution.
10. It will be eligible for audit exemption, provided it meets the requirements for availing of the exemption.

As can be seen from **Part 2** of **PILLAR A**, an elective conversion of existing private companies limited by shares to the new model private company is proposed. It is anticipated that companies seeking to avail of the advantages of the new regime will avail of this conversion procedure. Following the prescribed procedure, a default conversion procedure will apply to convert existing private companies limited by shares to the new model regime, unless the company in question passes a resolution otherwise, i.e. making it one of the other generic types of company.

PILLAR B – *Other Corporate Forms and Miscellaneous Provisions*

The General Scheme envisages that, in addition to the private company, there will be ten other types of company, *viz*. –

- The public limited company (or PLC) – limited by shares[12]
- The designated activity company (or DAC)
  - limited by shares or
  - limited by guarantee having a share capital
- The Guarantee Company, limited by guarantee and without a share capital
- The Unlimited Company
  - private unlimited company with a share capital (ULC); or
  - public unlimited company with a share capital (PUC); or
  - public unlimited company without a share capital (PULC).
- External Companies[13]
- Unregistered Companies
- Investment Companies[14]

In summary, leaving to one side external, unregistered and investment companies, the General Scheme provides for five generic types of company: (1) the new model company (i.e. the private company limited by shares); (2) the public limited company; (3) the designated activity company; (4) the guarantee company and (5) the unlimited company.

[12] Pillar B, Part 2 which provides for the PLC, makes provision for existing PLCs that are limited by guarantee but will not allow the creation of any new PLC, so limited by guarantee.

[13] These are all foreign companies; because it is necessary for the State to regulate these companies where they have a defined connection with the State, these are separately dealt with in the General Scheme.

[14] These are a variant mutation of the PLC, used by the very important funds industry which require separate treatment in the General Scheme.

Chapter 5

The Architecture of the General Scheme

The CLRG believes that there are legitimate users of each type of company and that Irish company law should facilitate business and the wider community by making appropriate provision for different types of companies. In such a corporate universe, what is fundamental is clear delineation and demarcation between the various types of company and the law applicable to them (both the facilitative and the regulatory regime). The CLRG believes that the structure proposed in the General Scheme achieves the necessary demarcation between possible corporate types and has ensured that a deliberate and purposeful application of a facilitative and regulatory scheme of provisions applies to each. Moreover, the structure as proposed will discipline future thinking on the appropriateness of particular provisions to the different types of company.

The law applicable to each of these other types of company is provided for in PILLAR B of the General Scheme, which is comprised of 10 Parts, viz.:

1 – Definitions

2 – Public Limited Companies

3 – Designated Activity Companies

4 – Guarantee Companies

5 – Unlimited Companies

6 – Re-registration and Conversion

7 – External Companies

8 – Unregistered Companies

9 – Investment Companies

10 – Miscellaneous

The architecture of Parts 2, 3, 4, 5, 7, 8 and 9 of PILLAR B (each of which concerns a particular type or generic categorisation of company) follows a uniform path. First, in each such Part in PILLAR B, the law that applies to the private company, as set out in PILLAR A, is expressly applied to the PILLAR B-type company, subject to the disapplication of certain provisions that are not relevant or otherwise inappropriate to the PILLAR B-type company. Secondly, additional provisions that are not contained in PILLAR A (because they are of no relevance to private companies) are set out where they are applicable to a particular PILLAR B-type company.

Chapter 6

Exposition of PILLAR A of the General Scheme: The Private Company

Chapter 6.1

Definition and Interpretation

Interpretation

PILLAR A, Part 1 of the General Scheme contains those defined terms and expressions and rules of interpretation which apply generally in the Bill. Individual chapters of the General Scheme also contain definitions specific to the issue under consideration.

The terms and expressions defined in **Part 1** include most of the definitions found in Section 2(1) of the 1963 Companies Act and some of the definitions found in Section 2(1) of the 1983 Companies (Amendment) Act and Part 3 of the 1990 Companies Act. To these are added those necessitated by subsequent amendments of the law and those which have been rendered appropriate, resulting from the changes to and updating of the law proposed in the Bill.

New definitions

"annual general meeting" and "extraordinary general meeting". These expressions, whilst used, were not previously defined (but were explained in Part IV of the 1963 Act).

"constitution" is defined as meaning the constitution of a company as provided for in **Part A2**, *Head 3.*

"contravention" is defined as including failure to comply.

"designated activity company" is defined as a company to which **Part B3** applies.

"functions" is defined to include powers and duties, which affect the Companies Registrar and the Director of Corporate Enforcement.

"insolvency proceedings" is defined as insolvency proceedings opened under Article 3 of the Insolvency Regulation in a Member State of the European Union other than the State and Denmark where the proceedings relate to a body corporate.

"management company" is defined as a company that is wholly and exclusively formed and operated to manage a building or series of buildings and whose members are the owners of a freehold or leasehold estate or interest in a part of such building or buildings.

"non-cash asset" is defined as any property or interest in property other than cash (including foreign currency). This is taken from Part 3 of the 1990 Companies Act (Transactions with Directors), but has application beyond duties of directors, [in share capital and accounts].

"officer of the Director", taken from the Company Law Enforcement Act, 2001 is defined as

(a) an officer of the Minister assigned to the Director of Corporate Enforcement,

(b) a member of An Garda Síochána seconded to the Director of Corporate Enforcement, or

(c) a person employed by the Minister or the Director of Corporate Enforcement under a contract for service or otherwise, to assist the Director of Corporate Enforcement in carrying out functions of the Director of Corporate Enforcement under the Companies Acts or any other Act.

Chapter 6.1
Definition and Interpretation

In addition, "Acting Director" is defined as a person appointed under **Part A14**, *Head 52* [Section 11, Company Law Enforcement Act, 2001] as the Acting Director of Corporate Enforcement.

"ordinary resolution", heretofore not defined, is defined as a resolution of the type provided for in **Part A4,** *Head 62(1).* This dispenses with the expressions "the company in general meeting", and aligns the term with common usage.

"public holiday" is defined as a day which is a public holiday under the Organisation of Working Time Act, 1997, and replaces the expression "bank holiday" from the 1963 Act.

"registered office" is now defined. The expression "the office" (meaning the registered office) formerly found in Table A of the 1963 Companies Act (most of whose provisions are now integrated into **PILLAR A**) is no longer used.

"the Registrar" is now defined as the Registrar of Companies. The expression "registrar" insofar as it refers to the custodian of a register of a company is not used in the Bill.

"undischarged bankrupt" is defined as a person who is declared bankrupt by a court of competent jurisdiction, within the State or elsewhere, and who has not obtained a certificate of discharge or its equivalent in the relevant jurisdiction.

"validation procedure" is defined as the procedure provided for in **Part A4,** *Head 71.* This is the procedure to be followed in order to provide the corporate governance and approvals required for certain transactions such as the provision of financial assistance, the approval of guarantees of certain loans to directors and certain transactions involving the share capital of a private company.

"written resolution" is defined as a resolution of the type provided for in **Part A4,** *Heads 64 and 65.*

Amended definitions

"the Bankruptcy Acts" is updated to refer to the Bankruptcy Act 1988, as amended.

"the court", when used in any provision of this Bill in relation to a company, is amended to include not only the High Court but also, where another court is prescribed for the purposes of that provision, that court.

Deleted definitions

Definitions which have been removed are:

"articles", in view of its use in **PILLAR A** (only in **Part 2).**

"bank holiday", in view of the new expression "public holiday".

"the minimum subscription", in view of this matter being limited to **Part B2.**

"private company", in view of the concept of "private" companies as an exception to the definition of "company" being reversed and obsolete.

"prospectus", in view of matters pertaining to prospectuses being dealt with in **Part B2.**

"share warrant", in view of its being superseded by the expression "bearer share".

"Table A" and "Tábla A" (1963 Companies Act), in view of there being no such tables for companies generally, and matters related to the regulations in those tables now being dealt with in **Part A4**.

In **Part 1** we also define "subsidiary" which has been broadened to extend now to "subsidiary undertakings" within the meaning of the European Communities (Group Accounts) Regulations, 1992, with the result that there is now one definition for general company law purposes as well as for financial statements. There is also a definition of "wholly owned subsidiary".

Chapter 6.2

Incorporation and Registration

PILLAR A, Part 2 of the General Scheme makes provision for the incorporation and registration of the new model company, referred to here as a private company.

Chapter 1 of **Part 2** seeks to make greater use of defined terms in order to make the legislation more succinct.

Head 1 contains two important definitions *viz*. the 'status date' and the 'end of the transition period'. These dates regulate the transition of existing companies to the new company model provided for in the Bill (see ***Chapter 6*** below and in particular *Head 32*). They provide that the 'status date' shall be six months after the head comes into effect and that the transition period concludes one year later. The Minister is given power to alter these dates.

Chapter 2 sets out the way in which a company is incorporated.

Head 2 abolishes the distinction between a memorandum of association and articles of association, combining these into a single document called a constitution. This will only apply to private limited companies. The head also alters the number of members that a private company may have by allowing all of the persons who are property owners in a property management company to be members without limit as to their number.

Head 3 sets out the content of the constitution which, significantly, does not include an objects clause.

Head 6 converts the statutory declaration on the incorporation of a company into a declaration under the Bill. This will facilitate electronic company incorporation as statutory declarations are not covered by the Electronic Commerce Act, 2000.

Chapter 3 governs corporate capacity and authority and contains important new law.

Head 20 provides that a company has "full and unlimited capacity to carry on and undertake any business or activity, do any act or enter into any transaction and for those purposes has full rights, powers and privileges." A private company therefore has no limit on capacity while the company is, of course, required to act within the law.

Head 21 confirms the position that a company may appoint a person to be a person entitled to bind the company.

Head 22 is a new provision aimed at enhancing clarity and certainty in relation to the authority of the board of directors to bind the company and gives added protection to persons dealing with the company.

Head 23 reforms and clarifies the law applicable to powers of attorney.

Chapter 4 governs contracts and other transactions.

Head 25 provides that a company may have more than one common seal.

Head 26 provides that in order to have a seal for the purpose of conducting business abroad a company does not require specific powers to operate abroad.

Chapter 5 covers the company name, registered office and legal proceedings.

Head 33 provides that a company may use as its registered office, the office of an agent approved for that purpose and that in the event that the agent changes address, no notice of change of address is required from the company.

Head 35 alters the law as it applies to security for costs in legal proceedings. Current law provides that the judge in a case may require "sufficient" security as to costs. The word "sufficient" has

been deleted. The effect of this will be to give the court discretion as to the amount of security that is required. The current position is that the court is required to order that "full security" for costs is given in other circumstances and, traditionally, one third of the costs is the norm.

Head 36 is aimed at enhancing the enforcement of orders and judgments against companies and their officers. It provides for the transfer, from the Rules of the Superior Courts to primary legislation, of the option, with the court's permission, to enforce a judgement against a company to sequestrate the property of the company or the directors.

Chapter 6 provides for the conversion of an existing private company limited by shares to a limited company under **PILLAR A**.

NB: Companies and their advisers should take particular note of this Chapter as it contains default provisions that will apply to the existing company if it takes no action. (There will be extensive publicity and explanations issued on the operation of these provisions before they come into effect.)

A Designated Activity Company (DAC) provided for in **PILLAR B** of the Bill is essentially the same as a private company under **PILLAR A** except that it must have a memorandum of association which will contain an objects clause with consequential limitations on the capacity of the company (see ***Chapter 6.3*** below).

Head 37 is the main default provision and provides that, unless an existing company (i.e. a private limited company that exists at the status date) re-registers as a DAC or other company type in the meantime, it shall become a private company under this Pillar at the end of the transition period i.e. the period of twelve months commencing on the status date. *Subhead (2)* provides that before the status date i.e. within the six months after the head comes into effect, a company may convert to a DAC by ordinary resolution. *Subhead (3)* provides that where an existing company has published a prospectus or has obtained an admission to trading on a regulated market for its debentures it must re-register as a DAC. Only a DAC (not a private company of the new model variety) may publish a prospectus to be admitted to trading (see **PILLAR B, Part 3**).

Head 38 creates a right for certain members or creditors to apply to the court for an order requiring the company to re-register as a DAC.

Head 39 provides that until the end of the transition period, the law applicable to a DAC shall apply to an existing company unless and until it re-registers as another company type.

Head 40 provides that an existing company may adopt a new constitution. This effectively means that it may do so during the transition period.

Head 41 creates the capacity for, and places an obligation on, the directors of an existing company that has not adopted a constitution under *Head 40* or re-registered as a different company type to prepare and adopt a new constitution.

Head 42 provides that failing all of the above, an existing company shall be deemed to have a constitution as required under this Pillar.

Head 43 provides that certain members or creditors may apply to the court for relief if they consider that their rights have been prejudiced particularly by the failure of the directors to adopt a new constitution that properly protects those rights.

The *First Schedule* provides a model form of constitution for a private company.

Chapter 6.3
Shares and Share Capital

PILLAR A, Part 3 is concerned with share capital. This Part contains those parts of Part III of the 1963 Act, as amended, as are applicable to the new model company. Supplementary provisions affecting public companies concerning share capital, including those prescribed for such companies by the Second Company Law Directive, are contained in **Part B2**. Historically, the Companies Acts have been preoccupied with the preservation of share capital on the balance sheet of a company, with a view to protecting creditors. The CLRG has worked from the basis that, in the case of private companies at least, the historically strict rules on capital maintenance ought to be capable of being relaxed where the solvency of companies is not in doubt. In addition, we have sought to remove undue complexity from certain routine transactions involving share capital.

Chapter 1 is concerned with interpretation provisions and incorporates present defined terms concerning share capital along with new defined terms required in view of amendments to the law.

Head 1 contains the general definitions used in this part.

The existing definitions of "called-up share capital", "capital conversion reserve fund" and "capital redemption reserve fund" are retained. In addition, a definition of "share premium account" is inserted. The aggregate of these four defined terms now constitutes "company capital", which is defined as "the aggregate value, expressed as a currency amount, of the consideration received by the company in respect of the allotment of shares, and shall include the amounts standing to the credit of the share premium account, the capital redemption reserve fund and the capital conversion reserve fund."

The relevance of this new concept is that under ***Chapter 4*** it will be possible for a company to vary the component parts of company capital by reducing the par value of issued shares and moving the aggregate of the reduction to "undenominated capital", a new definition, which is simply "the amount of the company capital from time to time which is in excess of the nominal value of its shares".

Head 2 deals with shares and reverses a number of defaults:

- shares need not have specified numbers, but a company may number them;

- a company may issue redeemable shares unless prohibited by its constitution.

Chapter 2 contains the general prohibition on the new model company making any offer of securities to the public or listing any shares, debentures or other securities on any stock exchange.

Chapter 3 contains provisions relating to the allotment of shares.

Head 5 sets out the fundamental rules regarding the allotment of shares, drawing from Sections 20 to 24 of the Companies (Amendment) Act, 1983.

Head 6 deals with the payment for shares, providing that the amount paid in excess of the nominal value of a share (i.e. share premium) is credited to undenominated capital.

Chapter 6.3
Shares and Share Capital

Heads 7 to 10 introduce merger relief, enabling the distribution to members of amounts that would otherwise stand to the credit of share premium created by reason of an acquisition. Where shares are issued by an "issuing company" to its 100% holding company (or another wholly owned subsidiary of such holding company) as consideration for the transfer to the issuing company of non-cash assets and where a share premium would otherwise be created (by reason of the actual value of the non-cash assets acquired exceeding their original book value), such amount will now be available for distribution to its holding company, subject to the provisions of the head.

Heads 11 to 14 concerning calls on shares, lien and forfeiture, (subject to a company's right to opt out or vary the provisions) in its constitution re-enact Regulations 11 to 21 and 33 to 39 of Table A, Part 1 of the 1963 Act.

Head 15 sets out the provisions as to financial assistance in connection with the acquisition of shares, by reference to "the validation procedure".

Chapter 4 contains provisions enabling the variation of capital of a company, whether by increase or reduction.

Head 16 gathers together the existing provisions regarding the increase, consolidation, division, cancellation and conversion (to redeemable) of shares. To this is added the ability to increase or reduce the par value of shares using or crediting, as the case may be, undenominated capital. A company is now to be able to convert its shares to redeemable, save where its constitution provides otherwise.

Heads 17 to 19 permit a company to reduce its share capital, again save to the extent that its constitution provides otherwise. This may be effected by the "validation procedure" or by special resolution approved by the Court, as is the case at present.

Head 24 permits three-party share-for-undertaking transactions that is, where a company acquires an asset from another company, with the shareholders of the other company (rather than that other company) receiving consideration shares, to occur without triggering issues as to the adequacy of distributable reserves in that other company.

Chapter 5 deals with the transfer of shares, gathering together provisions found throughout the Companies Acts and Table A of the 1963 Act.

Head 28 provides that, save where the constitution otherwise provides, the directors may decline to register a transfer of shares.

Head 29 permits the new model company to have bearer shares (formerly described as "share warrants") providing now that the bearer shares may restrict the persons who may become entitled to the shares, i.e. although shares may be capable of transfer by delivery of a document, such delivery can be stated to be conditional e.g. on the identity of the intended transferee. Heretofore, there was a presumption, arguably rebuttable, that private companies could not issue bearer shares.

Heads 31 and 32 deal with certification and the issue of share certificates.

Head 33 provides that the deed of transfer of a unit in a development involving a management company can operate to transfer the corresponding share in the management company. This will assist in the simplification of the process of purchase and sale of such units.

Chapter 6.3
Shares and Share Capital

Head 34 re-enacts Section 89 of the 1963 Companies Act, excluding the provision regarding the validation of share buybacks (which renders the existing section inoperable in many cases).

Head 35 re-enacts the existing provision in Section 90 of the 1963 Act in relation to personation of shareholders and the provisions as to the share register in relation to bearer shares respectively.

Chapter 6 deals with the acquisition of own shares.

Heads 36 and 37 gather together the various provisions describing how shares may be acquired by a company – by gift, forfeiture, cancellation, court order, redemption or purchase, with special provisions where the company is a subsidiary of a public company.

Heads 38 to 46 set out the formalities of share purchase by a company, re-enacting existing law more clearly.

Chapter 7 deals with distributions, re-enacting those provisions of the 1983 Act, Part IV, other than those affecting public limited companies, along with provisions of Table A of the 1963 Act concerning dividends and reserves.

Head 51(6) amends the law by effectively allowing distributions in specie at book value rather than requiring application of market value.

Chapter 6.4
Corporate Governance

Part 4 of **PILLAR A** deals with (a) the duties and responsibilities of directors and other officers as regards their appointment and (b) proceedings in relation to the company and its members. In particular **Part 4** provides the means by which the activities of the company on a day-to-day basis are conducted. Other than individual areas of change as further described below, the processes of consolidation and simplification are mainly adhered to by incorporating the procedures for corporate governance formerly contained in the standard articles of association for a private limited company (as set out in the First Schedule to the Companies Act 1963 as Table A, Parts I and II) into the body of the Bill. Provision is made throughout this part for the private company to adopt in its constitution, such additional powers or restrictions as the company may require in so far as these do not conflict with the main body of law.

Chapter 1 sets out an amended and more complete definition of a "director" to include all persons appointed as a director, including where the position is named differently.

Chapter 2 permits a private company limited by shares to have just one director, as recommended by the *First Report* of the CLRG. Although a director will still be permitted to act as secretary to the company, a separate secretary is required if a person is appointed as sole director. The prohibition on the appointment of a corporation to serve as company director remains.

A new age restriction for directors is introduced by *Head 5* and any director under the age of eighteen years will cease to be a director on the commencement of this part of the Act. Undischarged bankrupts will continue to be prohibited from acting as officers. If the Director of Corporate Enforcement is of the opinion that a person acting as director is an undischarged bankrupt in any jurisdiction he may initiate court proceedings to disqualify such a person. The prohibition on a person simultaneously acting as director and secretary in any transaction continues.

Head 11 incorporates the existing law requiring every company to have an Irish resident director or an appropriate bond and *Head 12* contains the exception from the provisions of *Head 11* where a certificate is issued by the Registrar of Companies, confirming that the company has a real and continuous link with economic activity in the State.

The restriction on the number of directorships a person can hold is continued although shadow directors are not included when counting these, as provided by *Head 13*.

Head 16 proposes to incorporate in the General Scheme, provisions regarding rotation of directors formerly contained in the model articles of association of a company or in Table A of the Companies Act, 1963, but allows a company to make its own provisions in its constitution. The provision of Table A regarding rotation of directors has been omitted in keeping with the recommendations of the CLRG's *First Report*.

Each director is required to acknowledge his or her duties as a director and consent to appointment as such.

The provisions in *Head 17* for the removal of directors remain substantially unchanged from the Companies Act, 1963. The provisions formerly contained in Table A regarding vacation of office have been incorporated into *Head 18* including that the absence of a director from meetings for 6 months terminates his office. The constitution of a private company may, of course, make alternative provisions in this regard.

Head 19 essentially re-enacts the existing provisions regarding the maintenance of registers of directors and secretaries.

Chapter 6.4
Corporate Governance

Head 21 separately provides that a person who ceases to be a director must notify the Registrar of his cessation, as clarity is considered necessary on this point (formerly dealt with in subsections (11A) and (11B) of section 195 of the Companies Act 1963).

The provisions of Regulation 76 of Part 1 of Table A (Companies Act 1963) regarding remuneration of directors are incorporated into the Bill by *Head 21,* with provision for private companies to adjust their constitution if additional regulations are required.

Tax-free payments continue to be prohibited by *Head 25* and payments for loss of office for directors will still require member's approval.

The provision of Table A regarding the general powers of management and delegations by directors has been incorporated into *Head 26,* with power to adjust these in the individual company's constitution. Table A provisions regarding managing directors as well as meetings of directors and committees of directors have been incorporated into the body of the Bill, substantively unchanged.

The law on audit committees for large private companies, introduced by Section 42 of the Companies (Auditing and Accounting) Act, 2003, has been incorporated in *Head 29* with small necessary changes such as the omission of references to "relevant undertaking" as this part applies only to private companies limited by shares.

For the same reasons, references to companies other than those having share capital have been omitted in the incorporation of the provisions of Section 116 of the Companies Act 1963, (as amended) in *Head 31*, dealing with register of members. Save for small changes regarding inspection fee increases and the ability to inspect a register of members other than at the registered office, the existing law in this area has been re-enacted.

Head 43 provides for certainty in the transfer of shares in a management company.

The *First Report* of the CLRG recommended simplification of the conditions applying to the holding of a general meeting and that a written procedure, once agreed unanimously by the members, could be an alternative to an AGM. ***Chapter 6*** addresses these points and further simplifies the applicable conditions by allowing a general meeting to be held outside the State or in multiple locations *(Head 47)*. A new power of the court to order meetings at the request of interested parties including personal representatives is included in *Head 50*. In the main, the relevant provisions of Table A concerning meetings have been incorporated into the Bill. It is open to any company to add other provisions to its constitution.

The conditions applying to the appointment of proxies and representatives of corporate members have been incorporated in *Heads 54 and 55,* slightly adjusted from Table A, Regulation 71, and Section 139 of the Companies Act, 1963.

Head 49 removes the existing concept of 'ordinary' and "special" business at AGMs and sets out the matters that shall be included in the AGM agenda, with the freedom to omit or alter same in the constitution of any private company

Chapter 6.4
Corporate Governance

Heads 58 to 61 incorporate into the main body of the law , the regulations regarding the proceedings and voting at a general meeting based on Table A of the Companies Act, 1963. As existing statute law did not define an ordinary resolution as such, *Head 53* addresses this in *Subhead (1)* and proceeds to identify categories of resolution whether passed in general meeting or by written resolution.

Pursuant to the recommendations in the *First Report* of the CLRG, *Head 64* provides for unanimous written resolutions allowing private companies to pass resolutions, including special resolutions, in writing and to file the same.

There may be dissenting members, therefore, majority written resolutions *(Head 65),* although allowed, required new regulations that provide for all members being advised of the contents of such resolutions, notification of when they were passed by the requisite majority and allowing a time lapse before such resolutions are deemed passed to afford dissenting members the opportunity to initiate action if they require.

Head 67 extends the written resolution concept to resolutions to be passed at class meetings.

Because of the need to have a permanent record of resolutions passed, at a meeting or by written resolution, copies are required to be kept in minute books *(Head 69)* and certain resolutions, as set out in *Head 59*, to be filed with the Registrar. As before, minute books must be available for inspection by members *(Head 70)*.

Chapter 7 refers to the provisions that certain transactions under the Companies Act, 1963 (Sections 60, 72 and 256) and the Companies Act, 1990 (Sections 31 and 34) required statutory declarations of directors, special resolutions of members and in certain instances, an independent persons report. The elements of the General Scheme relating to transactions of this nature now refer to the validation procedure set out in **Chapter 7,** *Head 71* of this Part. This gives effect to the CLRG's recommendations that a single validation procedure be introduced, with minor variations depending on the transactions.

Head 71 sets out the basic validation procedure based on the preceding sections with additional requirements for independent persons' reports where previously required in Section 60 of the Companies Act, 1990. New provisions regarding the refinancing of loans, which avoid a duplication of the validation procedure, are contained in *Head 71(7).*

Chapter 6.5

Duties of Directors and Others

PILLAR A, Part 5 of the General Scheme makes provision for the statutory duties of directors and other persons such as company secretaries. The proposals are in the nature of both consolidation and modernising measures.

Chapter 1 of **Part 5** proposes a number of definitions that relate, primarily, to transactions involving companies and their directors. There are also definitions of both *shadow directors* and *de facto* directors. The statutory label *"de facto"* director is new and relates to a person who occupies the position of director but who has not been formally appointed as such. The significance of these definitions is that the persons who fall to be either *shadow directors* or *de facto* directors will be treated for the purposes of **Part 5** as if they were formally appointed (sometimes called *de jure*) directors and will, for example, be subject to the same fiduciary duties as formally appointed directors. One change in the definition of *"shadow director"* is to implicitly acknowledge (in *Head 3(2)*) that a body corporate may be a shadow director but to expressly provide that a body corporate is not to be regarded as a shadow director of its subsidiary companies.

Chapter 2 details the general duties of directors and secretaries.

In *Head 5*, the duty of each director to ensure compliance with the Companies Acts is set out and will apply equally to shadow directors and de facto directors. This head also makes provision for the concept of *'an officer in default'* and requires directors to acknowledge their statutory and common law duties on their appointment.

Head 7 contains the form of Directors' Compliance Statement, recommended in the CLRG's *Report on Directors' Compliance Statements* (2005), which was approved by the Government in November 2005.

Head 8 addresses the duties of a company secretary. In accordance with the CLRG's recommendation in its *First Report,* the office of company secretary as a separate office is retained. This head also seeks to distinguish between directors and secretaries in terms of their ability to achieve compliance with the Companies Acts. This head reflects the fact that the secretary is appointed and can be removed by the Board of Directors and will have such duties (for example, to secure the company's compliance with the Companies Acts) only where delegated this duty by the Board of Directors. Secretaries too, will be required to acknowledge their legal duties and obligations imposed by the Companies Acts.

One of the most significant changes proposed by *Head 9* is the codification of directors' fiduciary duties. ***Subhead (1)*** provides that the duties are owed to the company and are enforceable by the company and ***Subhead (2)*** confirms that the provenance of the duties is the common law and equity and that the statutory duties should be interpreted and applied in the same way as the common law duties and equitable principles. The actual duties are detailed in ***Subhead (3)***. (Codifying existing duties is considerably less prescriptive and more workable than an approach that seeks to impose duties that have never been imposed upon directors by the courts or considered to be common law or equitable duties of company directors.) The requirement to act "honestly and responsibly in relation to the conduct of the affairs of the company" is a positive statement of Section 150 of the Companies Act, 1990 which provides that directors who have not so acted will be restricted in their directorships.

Head 13 is a new provision which concerns directors' liability to account to their companies for gains made and indemnify their companies for losses caused as a result of their breach of duty. This provision is modelled on remedies currently available in Part III of the Companies Act, 1990 where directors act in breach of their duties.

Chapter 6.5
Duties of Directors and Others

A necessary mitigating provision is contained in *Head 14* which is a re-statement of Section 391 of the Companies Act, 1990 and gives the court power to grant relief to officers of the company where satisfied that a director has acted honestly and reasonably.

Chapter 3 substantially reproduces existing statutory regulation of transactions between directors and their companies that involve a conflict of interest.

Head 17 reproduces the prohibition on loans, quasi-loans, credit transactions and guarantees and the provision of security for these made by companies in favour of their directors or persons connected with directors.

Heads 18 to 23 concern exceptions to the prohibition on loans etc to directors and *Heads 24 to 26* concern the civil and criminal consequences of acting in breach of *Head 17.*

Head 27 concerns contracts of employment with directors.

Head 28 requires the approval of a company for making of a payment to a director or a director's dependants for loss of office.

Head 29 requires the approval of a company for the making of a payment, to a director, of compensation in connection with the transfer of property.

Head 30 imposes a duty on directors to disclose to their company, payments to be made in connection with the transfer of shares in a company, to the director.

Head 32 concerns contracts between companies and their sole member.

Chapter 4 substantially reproduces what is currently Part IV of the Companies Act, 1990 and concerns the disclosure of interests in shares and debentures reflecting the reforms recommended by the CLRG in its *First Report.*

Head 33 defines a "disclosable interest". The most significant change in law provided for here is an exception from what is a disclosable interest in a case where the shares held amount to less than 1% of the share capital, or where the shares or debentures do not carry a right to vote at general meetings (save in specified circumstances).

Head 34 contains the duty to disclose "disclosable interests".

Head 35 concerns the mode of disclosure by directors and secretaries.

Head 36 concerns the enforcement of the notification obligation. The most significant change to the existing legislation is contained in *Subhead (4)* which allows a company's members to address a breach of the disclosure obligation by passing a resolution. It also exempts a breach from the unenforceability provisions in *Subhead (2)* where the interests in question are evident from a register which is open to the public.

Head 37 requires all companies to have a register of interests for the purposes of ***Chapter 4.***

All criminal offences contained in **Part A5** are categorised in the interests of transparency and standardisation. The maximum penalties for each category of offence are to be found in **Part A13**.

Chapter 6.6

Financial Statements, Annual Return and Audit

PILLAR A, Part 6 contains provisions relating to the keeping of accounting records and requirements for the preparation of annual and consolidated financial statements, as well as provisions relating to auditors, their functions and provisions governing the auditing process. This Part also deals with the manner in which financial statements are published, whether direct to members or through lodgement in the Companies Registration Office.

In recent years major changes were made in relation to both accounts and audit, in many instances, but not exclusively, arising from EU obligations. These include (in the order in which they were legislated for in Ireland): the Companies (Auditing and Accounting) Act, 2003; the EU Directive on Fair Value Accounting (transposed by S.I. 765/2004); the Modernisation of the 4th and 7th Accounting Directives (which together with the national enabling provisions for the operation of the EU International Accounting Standards Regulations were provided for in Statutory Instrument 116 of 2005); as well as S.I. 840 of 2005 which addressed the issue of comparability in respect of accounts prepared for the first time under International Financial Reporting Standards (IFRS). Finally, in the Investment Funds, Companies and Miscellaneous Provisions Act, 2006, provision is included to significantly raise the exemption for audit thresholds.

Part A6 of the General Scheme reflects all of the changes introduced as a result of the foregoing. Most of the further changes are refinements rather than substantive in nature, but some new innovations are provided for, such as in ***Chapter 15*** which provides for the revision of defective statutory financial statements where significant change is proposed in the structure and layout of the provisions. In all of this proposed restructuring, the content of the revised legislation complies with the relevant EU Directive.

Chapter 1 contains a number of definitions specific to **Part A6.**

Significant among these are the new definitions in *Head 1* of 'financial statements', 'entity financial statements', 'group financial statements', 'statutory financial statements' and 'non-statutory financial statements'. The key change from the present law is to differentiate between 'accounts', which is a commonly used term and applies to any summary of or extract from the accounting records and 'the financial statements' which meets the criterion of 'true and fair' which is a much higher standard than mere 'accounts'.

The definitions have been split between ***Heads*** *1, 2 and 3* to permit a reader to read logically through the meaning of balance sheet and profit and loss account in order to help understand the definitions and the interaction with the financial reporting frameworks.

Chapter 2 deals with the keeping of what are now termed 'accounting records'.

Chapter 3 is a new provision defining 'financial year' in a concise manner.

Chapter 4 contains provisions which in the first instance require financial statements to give a true and fair view. The individual or 'entity financial statements' required to be prepared, will be known as the statutory financial statements. As provided for in S.I. 116 of 2005, they can be prepared as Companies Act entity financial statements or IFRS (International Financial Reporting Standards) financial statements. They must comply with specified principles, format and content.[15] Where a company is a holding company, it is required to prepare financial statements for the company and all of its subsidiaries and the combined statements constitute the statutory financial statements of the company.

[15] Given the revised the manner of specifying matters that must be disclosed in all financial statements, particularly in Chapters 6 and 7 of this PART A6, it is no longer necessary to specifically identify matters that must be included in IFRS financial statements, as had been done in SI 116.

Chapter 6.6

Financial Statements, Annual Return and Audit

Chapter 5 deals with exemptions and exclusions from the necessity to prepare Group Financial Statements.

Chapter 6 deals with matters that must be disclosed under the present law, bringing them together under broad themes. ***Chapter 6*** requires disclosure of directors' remuneration as well as loans, quasi loans and other such assistance they may have received, as well as directors' interests in other transactions. While much of the presentation and language of the provisions in this Chapter has been reworded to reflect the revised framework of the Chapter, as well as using more current terminology, the actual disclosures required of directors remain substantially the same.

Chapter 7 also brings together provisions relating to matters to be disclosed in notes to the financial statements. A number of these matters were formerly included in the Schedule to the Companies (Amendment) Act, 1986 but their inclusion in this Chapter, in this manner, will ensure that such disclosures have to be made whether the financial statements are prepared as Companies Act or IFRS statements.

Chapter 8 stipulates the manner in which the financial statements are to be signed and is a slightly amended re-enactment of the present law in this matter.

Chapter 9 sets out, in a new and logical sequence, the various matters that must be addressed in the Directors' Report that accompanies the financial statements. The matters that must be reported on have been added to over the years and their presentation in the manner now set out will facilitate the directors in fulfilling their obligations in this regard.

Head 42 is a new head designed to ensure that auditors are provided with the information they need to undertake their functions.

Chapter 10 contains the basic obligation on the directors to have the financial statements audited. It also gives members of a company, holding at least 10% of the voting rights, an effective veto over the company availing of the audit exemption provided for in *Head 66.*

Chapter 11 is a slightly modified restatement of the present law in relation to the matters that must be covered in the report of an auditor on the financial statements of a company, as well as the manner of their signature.

Chapter 12 deals with the circulation of the financial statements and the ability of specified parties to demand copies of same and essentially reflects the existing law in this regard.

Chapter 13 deals with the requirement to make annual returns to the Companies Registration Office and the matters that must accompany the return, particularly as regards financial information. As with previous chapters, the provisions reflect amendments made since the original provisions were enacted but that are now being presented in a more logical sequence which more accurately reflects the requirements as they impact on companies.

Chapter 14 contains provisions originally contained in the Companies Act, 1986 which transposed the EU 4th Company Law Directive. This introduced, *inter alia,* the requirement for private companies to file their accounts (financial statements) in the Companies Registration Office as part of their annual return. However, private companies that fall under thresholds as defined can avail of specified exemptions as regards the actual detailed information that must be filed.

On the basis of the recommendations in the CLRG's Second Report, the thresholds of balance sheet total and turnover for small and medium sized companies are being increased in *Head 58,* in line with inflation since they were last adjusted in 1993.

Chapter 6.6

Financial Statements, Annual Return and Audit

The appropriate refinements to enable companies preparing their financial statements in accordance with IFRS standards, as provided for in S.I. 116, are also reflected in ***Heads 61 and 62.***

This Chapter also contains the provisions regulating the manner in which companies can avail of the audit exemption. The thresholds provided for in *Head 66,* as well as the detailed provisions, will be subject to the modifications finally agreed and provided for in the Investment Funds, Companies and Miscellaneous Provisions Act, 2006.

Chapter 15 provides for the introduction for the first time in Irish company law, of a mechanism for the revision of defective financial statements, other than on the direction of the court. The heads specify, *inter alia*, the circumstances in which the revised financial statements may be prepared, their content, the manner in which they must be approved, how the accompanying directors' report must be revised, the way in which they must be audited (as well as what happens where the audit exemption has been availed of) and how the revised statements must be laid before the company as well as being delivered to the Companies Registration Office.

Chapter 16 contains all provisions relating to the appointment of auditors, their powers to access all accounting records and their ability to seek information and explanations on any relevant transactions conducted by or on behalf of the company or its subsidiaries.

Head 93 repeats the obligation on auditors to report certain matters to the ODCE.

Head 94 deals with the categories of offences which are reportable under *Head 93.*

Chapter 17 deals with the removal of an auditor and details the steps that must be followed as well as the opportunity that must be given to the outgoing auditor to bring any matters of concern to attention. The Chapter also deals with the resignation of auditors and essentially restates the existing law in this regard.

Chapter 19 deals with qualifications of auditors, and likewise, apart from some changes to layout and presentation, reflects existing law.

Chapter 20 reflects the changes to the recognition process for bodies of accountants, whose members are qualified to act as auditors, which were made in the Companies (Auditing and Accounting) Act, 2003.

Chapter 21 likewise repeats, with only minor adjustments, the existing provisions relating to the registers of persons qualified to act as auditors and the manner in which these are updated.

Chapter 22 is designed as a general enabling power for the Minister to make provisions for specified matters by Regulations.

The *First Schedule* to **Part A6** details the accounting principles that must be applied to, as well as the form and content of, entity financial statements which derive from the EU Accounting Directives. While repeating in large substance the Schedule to the Companies (Amendment) Act, 1986, it will be noted that a number of paragraphs from that schedule are now included in the heads.

The *Second Schedule* applies to the preparation of Group Financial Statements and has been prepared, as far as possible, on the basis of and requiring compliance with, the same accounting principles and valuation rules and disclosure as for entity financial statements.

Chapter 6.7

Debentures and Charges

PILLAR A, Part 7 deals with debentures and charges. The thrust of the changes is to simplify the registration and de-registration of charges while improving the priority rules.

Head 1 is new and is intended to give effect to recommendations of the CLRG in its *Second Report* (Chapter 8). The expression "charge" (which includes a "mortgage" as is currently the position) is now expressly stated not to include a mortgage or charge over an interest in cash, accounts in financial institutions or any other deposits, shares or other financial instruments. This is in accordance with the exception to the registration requirement envisaged under Directive 2002/47/EC on Financial Collateral Arrangements.

Head 7 is a substantially amended re-enactment of Section 99 of the Companies Act, 1963 (as amended by Section 122 of the Companies Act 1990). In the interests of simplicity, transparency and consistency many subsections of Section 99 have been repealed and/or replaced in accordance with the CLRG's recommendations in its *Second Report*. ***Subhead (1)*** is an amended re-enactment of Section 99(1) of the Companies Act, 1963. It has been amended insofar as the charge is now said to be void unless Sections 99(2) and 99(3) have been complied with. ***Subhead (2)*** is new and sets out the manner in which registration of the charge with the Registrar is to be effected i.e. by delivering a statement of the particulars of a charge in the prescribed form within 21 days of the creation of the charge. ***Subhead (3)*** is new and it provides for a system of preliminary filing of notice of charges in accordance with the CLRG's recommendations. The CLRG identified anomalies within the system of registration of charges owing to the fact that charges acquire their priority from the date of their creation as opposed to the date of their registration, provided that they are filed within the 21 day period. The CLRG recommended that priority be given to the creditor who files first in time.[16]

Head 8 is an amended re-enactment of Section 100 of the Companies Act, 1963. The CLRG noted that although it is the duty of the company creating a charge to register particulars of the charge, in practice most particulars are filed by the chargee or its solicitor. The CLRG acknowledged that such practice might warrant the repeal of Section 100 of the Companies Act, 1963. However, it considered the requirement that the officers of the company ensure that its file contains up-to-date, correct information for inspection by the public, to be of overriding importance. The reference to the registration of the particulars of any debentures issued by the company has also been removed from ***Subhead (1)*** given that Sections 91 and 92 of the Companies Act, 1963 (which required the company to keep a register of debenture holders and make it available to the public for inspection) have now been repealed.

Head 10 is new and sets out the priority of charges in accordance with the CLRG's recommendations in its *Second Report*. This priority will be subject to any overriding priority applicable to certain assets, under already established principles applicable to Registry of Deeds, the Land Registry, the Shipping Registry, the International Registry (implementing the Cape Town Convention) or the Trade Marks Registry. In ***Subhead (2),*** priority as to charges would also be subject to any contrary agreement between the creditors, such as an inter-lender or priority agreement often entered into by financial institutions where more than one such institution lends to a particular company. ***Subhead (3)*** is also new and restricts the particulars which are capable of being delivered for registration to the

[16] To ensure that another charge is not filed in the period between a clear search and the filing of the charge for registration, the Review Group recommended that a filing could be submitted prior to the completion of the transaction, provided a further filing evidencing the actual creation of a charge was filed with the Registrar within 21 days of the first filing of the intention to create a charge. In such circumstances a charge would take effect as to priority from the date of the first preliminary filing. In the absence of a second filing within 21 days of the preliminary filing, the preliminary filing of intention to create a charge would lapse. Such a notice filing system has been applied in the U.S., Canada and New Zealand and has been recommended in the UK.

Chapter 6.7

Debentures and Charges

Registrar. *Subhead (4)* defines a negative pledge for the purpose of *Subhead (3).*

Head 11 is an amended re-enactment of Section 102 of the Companies Act, 1963*. Subhead (1)* is an amended re-enactment of Section 102(1) of the Companies Act, 1963. The obligation on the judgment debtor-company to file details of the judgment mortgage with the Registrar has been removed and replaced by a requirement on the judgment creditor to deliver one certified copy of the affidavit to the Registrar. *Subhead (2)* is new. It provides that priority would be governed by the filing date. The CLRG recommended that the priority of judgment mortgages, subject to the priority of other registries (where appropriate), would arise from that date as is the case for the delivery of charges for registration to the Registrar under the previous head.

Head 12 (1) retains the requirement for the Register of Charges to be kept by the CRO and for it to be open to public inspection as it serves a useful purpose for the provision of relevant information on companies registered in the State. Section 103(1)(b)(iv) of the Companies Act, 1963, which referred to the amount secured by the charge, has not been included as the information relating to the amount of the charge, as filed, has little practical significance.

Head 13 provides that the Registrar shall issue a Certificate of Registration of Charge and this shall be conclusive evidence that the requirements pertaining to any charges for which prescribed particulars have been filed as to registration, have been complied with.

Head 14 is an amended re-enactment of Section 105 of the Companies Act, 1963. *Subhead (1)* is an amended re-enactment of Section 105(1) of the Companies Act, 1963. It has been amended insofar as the requirement for the Registrar to give notice to the chargee is expressed to apply in a situation “where the satisfaction or release has not been signed by or on behalf of the chargee”. *Subhead (2)* is also new and it gives effect to the recommendations of the CLRG in relation to the signing of the release in the prescribed form. *Subhead (3)* is new. It creates an offence for someone to sign a false release statement knowingly. *Subhead (4)* imposes personal liability on the signor in certain circumstances. Personal liability may be imposed for all the debts of the company, or as the court deems just and equitable. In addition, such action must have contributed to the insolvency of the company, prevented or impeded the orderly winding up of the company or facilitated the defrauding of the creditors of the company.

Head 17 is an amended re-enactment of Section 110 of the Companies Act, 1963 (in accordance with the CLRG’s recommendations in its *Second Report*). *Subhead (1)* has been amended insofar as copies of instruments creating charges are no longer open to creditors or members of a company without charge. Provision has now been made for a fee to be charged for such inspection by creditors or members, although this fee is not allowed to exceed the nominal fee as defined in **Part A1**.

Chapter 6.7
Debentures and Charges

Head 19 is new and reflects the recommendations of the CLRG in its *Second Report.* The Netting of Financial Contracts Act, 1995 was implemented in response to international bodies wishing to do business in Ireland. The effect of the "Netting Act" has been to enable persons to enter into financial contracts with Irish incorporated counterparties without the risk that an examiner appointed to the counterparty would put a stay on the enforcement of the financial contracts. The terms of the Netting Act are so broad that particulars of security, created over a company's assets to secure its obligations under a "financial contract", may not require to be filed under Section 99 of the Companies Act, 1963. The absence of a requirement to register can give a distorted picture to a person inspecting a company's file at the CRO. Accordingly, the CLRG recommended the Netting Act be amended by specifying that particulars of such a charge be filed in accordance with ***Head 7*** of this Part. The CLRG believes the foregoing recommendation will have no adverse effect on companies registered in the State which conclude financial contracts.

Chapter 6.8

Receivers

Head 1, Subhead (2) is new and makes explicit the current position whereby "insolvency proceedings" are interpreted as including receiverships.

Heads 2, 3 and 4 propose respectively to amend Section 317 of the Companies Act, 1963, Section 319 of the Companies Act, 1963 as amended by Section 52 of the Company Law Enforcement Act, 2001, and Section 320 of the Companies Act, 1963 as amended by Section 173 of the Companies Act, 1990. The existing provisions are amended to reflect the overall approach to offences set out later in the General Scheme.

Head 6 governs the disqualification of certain persons from acting as a receiver and is a slightly amended version of the equivalent provision in the 1963 Act (section 315), as amended by Section 170 of the 1990 Act.

Head 7 provides for the resignation of a receiver and is an amended re-enactment of section 332C of the Companies Act, 1963, as inserted by Section 177 of the Companies Act, 1990. The CLRG noted that there was no reason to distinguish between holders of fixed and floating charges for the purpose of the receipt of a notice in relation to the resignation of a receiver. The offence in this head is now categorised as a category four offence.

Head 8, on the removal of a receiver, re-enacts Section 322A of the Companies Act, 1963, as inserted by Section 175 of the Companies Act, 1990. *Head 9* concerns the requirement to give notice to the Registrar of the appointment of a receiver and of a receiver ceasing to act and is a slightly amended re-enactment of Section 107 of the Companies Act, 1963. The previous requirement to publish a notice in at least one daily newspaper in the district in which the registered office is located, has been replaced by a requirement simply to publish the notice in the CRO Gazette. This will remove the cost involved and increase the efficiency of the notice reaching the intended recipients.

Head 10 sets out the powers of the receiver and is a new head, introduced in accordance with the views of the CLRG. It is modelled on Section 430 of the Australian Corporations Law. Conferring statutory powers on receivers is intended to alleviate problems which can arise from poorly drafted debentures.

Head 11 deals with the power of the receiver to apply to the court for directions and his liability on contracts. It largely re-enacts Section 316 of the Companies Act, 1990, as amended by Section 171 of the Companies Act, 1990. *Head 12* imposes a duty on a receiver selling property to get the best price reasonably obtainable and in this regard re-enacts Section 316A of the 1963 Act, as inserted by Section 172 of the 1990 Act.

Head 13 addresses the issue of preferential payments when the receiver is appointed under a floating charge and re-enacts Section 98 of the 1963 Act. *Head 14* re-enacts Section 321 of the 1963 Act regarding the delivery to the Registrar of the accounts of the receiver.

Head 15 provides for the enforcement of the receiver's duty to make returns and re-enacts, in substance, Section 322 of the Companies Act,1963. *Head 16* confers a power on the court to order the return of assets which have been improperly transferred, thus re-enacting Section 139 of the Companies Act, 1990. The court is granted a power to fix the remuneration of the receiver under *Head 17*, in a re-enactment of Section 318 of the 1963 Act.

Under *Head 18*, the court may end or limit a receivership on the application of a liquidator. This re-enacts Section 322B of the Companies Act, 1963, as inserted by Section 176 of the Companies Act, 1990.

Chapter 6.8
Receivers

Head 19 empowers the Director of Corporate Enforcement to request the production of the receiver's books, re-enacting Section 53 of the Company Law Enforcement Act, 2001. ***Head 20*** concerns the prosecution of criminal offences committed by officers and members of the company. It is a new head which draws on various existing provisions of the 1963, 1990 and 2001 Acts.

Chapter 6.9

Reorganisations and Takeovers

PILLAR A, Part 9 is concerned with various forms of reconstruction of companies.

Chapter 1 is concerned with interpretation provisions, which apply for the purposes of ***Chapter 2***. ***Chapter 2*** deals with takeover effects. ***Chapters 3*** *and* ***4*** contain their own localised defined terms and it was felt more practical not to deconsolidate the defined terms and expressions from those Chapters. There are no new concepts involved in the definitions, but several new defined terms have been devised, with a view to enabling users of the law to navigate these complex sections more easily.

Chapter 1 re-enacts, with amendments, Section 201 of the 1963 Companies Act. The directors of a company (or the liquidator) may now convene a meeting to approve a scheme of arrangement without the need to apply to court for permission to do so. The court's discretion to convene a meeting on the application of the company, a member or creditor is retained also. The requirement to apply to court for approval for the mode of advertising of the passing of a resolution approving a scheme is now removed also, with a requirement that it be advertised in two locally circulating newspapers. This provision now facilitates a State Authority agreeing to be bound by a scheme so approved, as is provided in examinerships under the present Section 23(5) of the 1990 Companies Act.

Chapter 2, *Head 6* re-enacts, with amendments and extensive use of new defined terms, Section 204 of the Companies Act, 1963. Simply put, this section enables the acquisition by an offeror of all the shares of an offeree (i.e. target) company, where the offeror has obtained acceptances of its offer in respect of 80% or more of the shares of the offeree company (or where the offeror and/or its subsidiaries already own shares in the target company, 80% of the shares in the target company not owned by the offeror).

This head will not apply where the offeree company has its voting securities admitted to trading on a "regulated market" (i.e. a market regulated under a transposition in an EU Member State or EEA State of the Investment Services Directive 93/22/EC, to be superseded by the Directive 2004/39/EC on Markets in Financial Instruments) where a separate threshold of 90% applies.

Key changes introduced in *Head 6* are the following:

- Shares held by a holding company or fellow subsidiary of a holding company of the offeror will now be deemed to be owned by the offeror (and not just shares held by the offeror or subsidiary of an offeror, as at present).

- Shares in the offeree company held by a 33%+ shareholder of an offeror are deemed owned by the offeror.

- Offers can be communicated by advertisement in the CRO Gazette, where to post them or otherwise communicate them might fall foul of overseas laws.

- The right to acquire the shares compulsorily applies, regardless of the legal status of the offeror (body corporate, individual or partnership), rather than being limited to bodies corporate as at present.

- Shares subject to an undertaking to accept the offer are not to be considered to be owned by the offeror. This is not a substantive change, but declaratory of the present position and inserted for clarity.

Chapter 6.9

Reorganisations and Takeovers

Chapter 3 contains new provisions facilitating the merger of all companies, modelled on those at present available for public limited companies under the European Communities (Mergers and Divisions of Companies) Regulations, 1987.

Chapter 4 contains new provisions facilitating the division of all companies, modelled on those at present available for public limited companies 1987 Regulations.

In the case of ***Chapters 3*** *and* ***4***, the 1987 Regulations' provisions have been faithfully repeated with one significant change: the merger or division, as the case may be, can now be approved by the validation procedure, as provided for in ***Chapter 7*** of **Part A4**, as well as being approved by court order.

Chapter 6.10

Examinership

Head 1 is new. ***Subhead (1)*** is taken in substance from Section 1 of the Companies (Amendment) Act, 1990. New definitions have been added in order to create a comprehensive list of the defined terms in accordance with the recommendation of the CLRG in its *First Report*. The newly inserted definitions include the definition of a "director" to include a shadow director. Shadow directors are also treated as directors for the purpose of ***Chapter 6.5*** (Duties of Directors) and a definition of an "officer" of a company has been newly inserted. ***Subhead (2)*** is a slightly amended re-enactment of Section 4(5) of the Companies (Amendment) Act, 1990, as amended by Section 180(1)(b) of the Companies Act, 1990 and Section 12 of the Companies (Amendment) (No.2) Act, 1999.

Head 2, Subhead (3) is new. It applies the provisions of S.I. No.333 of 2002, EC (Corporate Insolvency) Regulations 2002 to reconstructions under which "insolvency proceedings" are interpreted as including reconstructions for the purpose of the Regulations. ***Head 3, Subhead (11)*** is an amended re-enactment of Section 3(9) of the Companies (Amendment) Act, 1990, where the CLRG decided to retain the Circuit Court jurisdiction. Although it is rarely, if ever, used, it is seen as a facilitatory jurisdiction and in the view of the CLRG, should be retained for that reason.

Head 5 is an amended re-enactment of Section 3B of the Companies (Amendment) Act, 1990, as inserted by Section 10 of the Companies (Amendment) (No.2) Act, 1999. Section 3B(2) of the Companies (Amendment) Act, 1990 has been amended insofar as the appointment of an interim examiner is now expressly provided for. ***Head 7, Subhead (1)*** includes Section 4(5) of the Companies (Amendment) Act, 1990 which defines a 'related company' for the purpose of this part.

Head 13 is a slightly amended re-enactment of Section 6A of the Companies (Amendment) Act, 1990, as inserted by Section 17 of the Companies (Amendment) (No.2) Act, 1999. ***Head 14, Subhead (11)*** has been newly inserted. This provides that no liability will result from compliance with this head where the examiners are subject to a professional or legal duty.

Head 18 is a slightly amended re-enactment of Section 10 of the Companies (Amendment) Act, 1990, as amended by Section 180(1)(f) of the Companies Act, 1990. ***Head 18, Subhead (2)*** has been amended insofar as the examiner is now required to certify his expenses "in writing".

Head 22 is an amended re-enactment of Section 13A of the Companies (Amendment) Act, 1990, as inserted by Section 21 of the Companies (Amendment) (No.2) Act, 1999. ***Head 22, Subhead (8)*** amends Section 13 A (8) insofar as the Director of Corporate Enforcement is now entitled to appear and be heard at a hearing under this head.

Head 23 is an amended re-enactment of Section 18 of the Companies (Amendment) Act, 1990, as amended by Section 10 of the Companies (Amendment) (No.2) Act, 1999. ***Subhead 6(c)*** has been newly inserted. This requires the examiner to furnish the Director of Corporate Enforcement with a copy of his report prepared under this head.

Head 27 is a slightly amended re-enactment of Section 22 of the Companies (Amendment) Act, 1990. All references have been updated in accordance with the structure of the Bill and references to the nominal value of share capital have been replaced by references to par value of the share capital of the company.

Chapter 6.10
Examinership

Head 29 is an amended re-enactment of Section 24 of the Companies (Amendment) Act, 1990, as amended by Section 180(1)(i) of the Companies Act, 1990 and Section 24 of the Companies (Amendment) (No.2) Act, 1999. ***Head 29, Subhead (5)*** is an amended re-enactment of Section 24(4A) of the Companies (Amendment) Act, 1990. The proposals must now have the effect of impairing the interests of the creditors of the company in such a manner as to "unfairly" favour the interests of the creditors or members of any company to which the company is related.

Head 34 is an amended re-enactment of Section 27 of the Companies (Amendment) Act, 1990, as amended by Section 27 of the Companies (Amendment) (No.2) Act, 1999. Subsection (2) has been amended insofar as a copy of the order made by the court is now required to be delivered to the Director of Corporate Enforcement.

Head 38 is new. It is taken from Section 139 of the Companies Act, 1963, as applied to examiners by Section 180(2) of the Companies Act, 1990.

Head 39 is a slightly amended re-enactment of Section 36A of the Companies (Amendment) Act, 1990, as inserted by Section 181(1)(e) of the Companies Act, 1990.

Head 40 is new. It applies the Cross Border Insolvency Regulations (Council Regulation (EC) No. 1346/2000 of 29 May 2000) to this Part. Once insolvency litigation is commenced in the appropriate Member State, that State's courts direct the proceedings, wheresoever in the EU the other assets are located. Examinerships are included in the definition of "insolvency proceedings" for the purposes of the Regulation.

Head 41 is an amended re-enactment of Section 58 of the Company Law Enforcement Act, 2001. It has been amended in accordance with the recommendation of the CLRG in its *First Report* that examiners should be made accountable to the Director of Corporate Enforcement.

Chapter 6.11
Winding-Up

Part 11 of **PILLAR A** seeks to achieve a number of objectives, *viz*. to reorganise the provisions as to liquidation in a more coherent and accessible fashion, to harmonise processes as between the various modes of winding-up and to effect reform both of the substantive and procedural law in this area.

Provisions of subordinate legislation have been assimilated where considered appropriate. Thus, various rules of court regulating liquidations have been incorporated into **Part A11** (see, in particular, ***Chapter 13*** concerning meetings procedure), as have provisions of the European Communities (Corporate Insolvency) Regulations 2002 (S.I. No. 333 of 2002).

Reorganisation of the layout of the winding-up chapters

This involved: (a) grouping the provisions by chapter in a sequence which follows, as far as is feasible, the stages of a winding-up from initiation to completion and (b) providing for each mode of winding-up (court ordered, members' voluntary and creditors' voluntary) in the chapter covering the stage of the winding-up concerned. The new sequence, after the interpretation and preliminary provisions, is:

- ***Chapter 1*** covers preliminary issues and definitions.
- ***Chapters 2, 3*** and ***4*** *(Heads 9 – 28)* deal with initiation of windings-up.
- ***Chapters 5 to 13*** *(Heads 29 - 129)* deal with the conduct of winding-up (including provisions as to liquidators and court's powers).
- ***Chapter 14*** *(Heads 130 – 135)* covers the completion of the winding-up.
- ***Chapter 15*** *(Heads 136 – 150)* covers insolvency proceedings outside the State.
- ***Chapter 16*** *(Heads 151 – 155)* deals with offences.

Harmonisation of processes as between the different modes of winding-up

The CLRG has sought to introduce consistency between the different means of winding-up as to the consequences of winding-up. This is most evident in the proposed changes to the court-initiated mode of winding-up (compulsory liquidation). Broadly, the approach has been to place court-ordered windings-up as far as possible on the same footing as creditors' voluntary windings-up once the order for winding-up is made, reducing the court's supervisory role in favour of greater involvement for creditors. This should in turn reduce the significant costs associated with compulsory liquidations and increase the funds available for distribution among creditors while at the same time affording creditors a more direct influence upon important decisions in the conduct of such liquidations.

Head 66(3) provides that following the making of the winding-up order and initial appointment of a liquidator, the court's function would, in general, be restricted to the giving of directions and making of orders in respect of the exercise or proposed exercise of powers by a liquidator, where requested to do so. The court would no longer direct the fixing of a liquidator's security, this being replaced by a requirement that a liquidator hold professional indemnity insurance.

Chapter 6.11

Winding-Up

In *Head 79* the court would only have a role in fixing a liquidator's remuneration in circumstances where the committee of inspection, creditors or (in the event of a company liquidated other than on grounds of insolvency) the members, as the case may be, could not agree the remuneration with the liquidator.

The liquidator would be given the power that a voluntary liquidator currently enjoys to adjudicate on debts and liabilities ***(Head 63(1)(i))*** and settle a list of contributories ***(Head 87)***, displacing the role of the Examiner of the High Court in these respects.

Head 96 provides that a committee of inspection in a court-ordered winding-up would be appointed by the creditors, on being summoned to a meeting by the liquidator, either on the liquidator's initiative or at the request of 10% in value of the creditors. A court order would not, as is the case at present, be required either to summon the meeting or appoint the committee.

Head 104 provides that the power currently exercisable by the court to fix times within which creditors may prove claims (under Section 241 of the 1963 Companies Act) would be exercisable by the liquidator, subject to a creditor being entitled to apply to the court on notice to extend the time so fixed

In *Head 111,* liquidators' accounts would no longer be vouched by the Examiner's Office. Annual accounts would require to be laid before a meeting of the creditors in similar manner to a creditors' voluntary winding-up.

Aside from changes specifically affecting the compulsory liquidation process, harmonisation has been introduced in various areas, of which the following are the more significant:

- *Head 41* merges Section 218 (voluntary windings-up) and Section 255 (windings-up by the court) of the 1963 Act. The provisions for avoidance of dispositions of property and transfers of shares after commencement of winding-up for the various modes of winding-up have been merged.

- In *Head 42,* avoidance of executions against property of a company in liquidation has been extended from court-initiated windings-up to cover creditors' voluntary windings-up, the court's discretion to admit exceptions being retained.

- Under *Head 52* the provision which currently allows the court to vest property in a liquidator in a compulsory winding-up (Section 230 of the 1963 Companies Act) would now apply to all windings-up.

- *Head 54* applies a common provision as to priority of costs, charges and expenses in the winding-up, including liquidator's remuneration, to all modes of winding-up.

- In *Head 59,* a common process for dealing with unclaimed dividends is provided for all modes of winding-up.

- *Heads 68* (see below) and *69*, and *Heads 72 to 78* propose common provisions concerning qualifications, appointment, removal, replacement and retirement of liquidators.

- *Head 79* introduces a common approach to the determination of a liquidator's remuneration for the various modes of winding-up.

Chapter 6.11
Winding-Up

Reform of substantive and procedural requirements of the winding-up regime

The opportunity has been taken to introduce a number of changes in substantive entitlements and duties and in the winding-up process itself, the following being particularly noteworthy:

- *Head 9(g)* is a new ground for winding-up by the court, *viz*. that the Director of Corporate Enforcement has established to the court's satisfaction that it is in the public interest that a company be wound up.

- *Head 11* provides that the minimum amount of indebtedness to entitle a creditor to serve a statutory demand would be increased to €10,000 and a petition for winding-up could be brought by two or more creditors who are owed in aggregate €20,000.

- In ***Head 68,*** new qualification requirements have been introduced for liquidators. To qualify for appointment as a liquidator, irrespective of the mode of winding-up, a person would require (a) to be a member of a prescribed accountancy body within the meaning of the Companies (Auditing and Accounting) Act 2003, the Law Society, or such other body as the Irish Auditing and Accounting Supervisory Authority (IAASA) may recognise for the purpose, (b) not be prohibited by the professional body concerned from acting as a liquidator and (c) have in force, indemnity insurance to cover in such amount and on such terms as may be prescribed by IAASA. Within 2 years of the operative date, other persons not being members of the professional bodies concerned, could be authorised by IAASA to be appointed as liquidators on the basis that they had acquired adequate relevant experience and knowledge of the law applicable to winding-up of companies and were in IAASA's opinion, after consultation with the Director of Corporate Enforcement, fit and proper to act as a liquidator.

- *Head 60* introduces a new provision expressly laying out the statutory duty of a liquidator irrespective of the mode of winding-up, *viz*. a new duty to "administer the property of the company". This definition is not exhaustive. "Administer" includes ascertaining the extent of the property of the company and where appropriate, the collection and gathering in of the company's property, its realisation and distribution in accordance with law.

- Under ***Head 62(1),*** where a provisional liquidator is appointed, the court would be required to specify the powers and duties of a provisional liquidator upon his appointment (in contrast to Section 226(2) of the 1963 Companies Act, which gives the court discretion to limit and restrict a provisional liquidator's powers). Under ***Head 62(2),*** the court may also place restrictions on the continuing powers of company officers during a provisional liquidation.

- *Heads 63* and *64* grant greater discretion to liquidators in the conduct of the liquidation, subject to certain safeguards. Sections 231 and 276 of the 1963 Companies Act, as amended, have been significantly revised and far greater autonomy is accorded to liquidators across the different modes of winding-up. The need for prior sanction, subject to a requirement to furnish notice to the committee of inspection (in the case of a court ordered or creditors' voluntary winding-up) and to the members (in a members' voluntary winding up) of having

exercised certain powers within 14 days of their exercise, is dispensed with.

- Recourse to the court for directions, as is at present available to a liquidator, creditor or contributory under Section 280 of the 1963 Companies Act, is retained and significantly expanded. ***Head 66 (1)*** and ***(2)*** enable the court, on the application of such parties as well as the Director of Corporate Enforcement, to determine any question arising in a winding-up. ***Head 66 (3)*** enables the court to make orders in relation to the exercise or proposed exercise by a liquidator of his or her powers.

- In ***Head 79,*** a new approach to the fixing of a liquidator's remuneration (other than for provisional liquidators) has been adopted which:

  a) splits up the process, enabling the terms on which remuneration is payable to be fixed at the outset before fees are invoiced, and requiring a liquidator to furnish in advance, particulars of the terms he or she seeks;
  b) assigns to the creditors or members, depending on the type of winding-up, primary responsibility for (i) the determination, at the outset, of the basis for charges and (ii) approval of the amount(s) subsequently payable;
  c) allows for reference to arbitration of a dispute as to the amount of remuneration payable - ***Head 79(8);***
  d) introduces criteria to be applied both in fixing the terms and the amount of remuneration along the lines of those recommended by the Ferris Working Party recommendations in England - ***Head 79(14)***

  The court would continue to fix the remuneration of a provisional liquidator ***(Head 79(1))*** and would have a residual role in determining remuneration of other liquidators in the absence of agreement being reached - ***Head 79(2)(d)*** and ***Head 79 (6)(b)(iv).***

- ***Head 54(3)*** provides that those who fund costs, charges or expenses in the winding-up will be entitled, with some exceptions, to reimbursement in the same order of priority as attaches to the costs, charges or expenses concerned.

- Under ***Head 111,*** the report on progress in a liquidation, required to be provided to the Registrar of Companies periodically where the liquidation has not been completed within two years, will require to be furnished if the liquidation is not completed at the end of one year.

- ***Head 117*** provides that a liquidator would be entitled (as the court currently may do under Section 309 of the 1963 Companies Act) to have regard to any directions given by resolution of the creditors or contributories at any general meeting, or by the committee of inspection, and in case of conflict, any such directions given by the creditors or contributories would override any directions given by the committee of inspection. The liquidator would be empowered to convene general meetings of the creditors or contributories for the purpose and would be obliged to do so if so requested in writing by at least 10% in value of the creditors or 10% in number of the contributories.

Chapter 6.11
Winding-Up

- In *Head 130* a new dissolution provision is proposed for windings-up initiated by the court, which would apply the current procedure in a creditors' voluntary winding-up to such cases, the court being given a discretion to require referral back to it of the decision as to dissolution.

Requirements for the service of notices have been revised and some inconsistencies between the types have been removed. *Head 77* provides that notification of appointment or removal of a liquidator would require to be given forthwith to the Registrar of Companies.

- *Head 33* requires that a statement of affairs in a winding-up by the court be filed with the Registrar of Companies rather than the court and served on the liquidator. Additional requirements as to service of notices on the Registrar of Companies have been added, e.g.
    - > Notice of removal of a liquidator – *Head 77(3).*
    - > Notice of annulment orders – *Head 99(2).*

In consequence of the reduction in the extent of the court's involvement in the supervision of the conduct of a winding-up following the making of a winding-up order and appointment of a liquidator, *Head 5* provides that the rule-making function in respect of windings-up would, with the exception of matters of court procedure which fall within the remit of the Superior Courts Rules Committee, be assigned to the Minister for Enterprise, Trade and Employment.

The provisions of **Part A11** will apply to winding-up proceedings commenced after the coming into operation of **Part A11**. Winding-up proceedings already commenced at that date will, with some minor exceptions, continue to be governed by the pre-existing law.

Chapter 6.12

Strike-Off and Restoration

PILLAR A, Part 12 combines into one part the many diverse provisions regarding the strike-off and restoration of companies. The new provisions set out in one place, all of the reasons why a company may be struck from the register and in another, the procedures for restoration. The Director of Corporate Enforcement (the Director) is given power to require a company to furnish a statement of affairs if it has been struck off involuntarily. The voluntary strike-off process is placed on a statutory footing and the Minister for Finance is given additional powers to take control of property vested in him on the dissolution of a company.

Chapter 1 contains the definitions of terms used in **Part 12,** *Head 1.*

Head 2 establishes the power of the Registrar of Companies to strike off companies pursuant to the part.

Chapter 2, *Head 3* sets out the various circumstances under which the Registrar may initiate a strike-off *(Head 3)*. For the most part, these provisions reiterate existing law. There is, however, provision whereby a modified form of the existing voluntary strike-off procedure is placed on a statutory footing.

Head 4 establishes that a notice is to be sent to a company being considered for strike-off, providing it with an opportunity to avert the strike-off by responding in a manner appropriate to the reason for its initiation. The notice will remind directors that the Director is empowered to apply to court to have them disqualified in the event that their company is struck off. *Head 4* does not apply to a voluntary strike-off.

Head 5 provides that in the event that the Registrar does not receive the appropriate response, he may continue the strike-off process by placing a notice in the CRO Gazette. *Subhead (2)* makes provision for voluntary strike-off cases to be included at this stage.

Head 6 provides that if the appropriate response is not received within one month, the company may be struck from the register and dissolved. *Subhead (5)* empowers the Director to require such a company to produce a statement of affairs. *Subhead (6)* empowers the court, on an application made by the Director, to require a director of a company to appear before it and to answer questions pertaining to the statement.

Head 7 creates a statutory voluntary strike-off process. Certain conditions are established before the process can commence. In particular the company must pass a special resolution to seek the strike-off of the company. The other provisions follow the main outline of the current non-statutory voluntary strike-off process.

Head 8 provides that a company that has been struck off shall have the capacity necessary to apply for a restoration.

Chapter 3 governs the process of restoration that will apply in all cases.

Head 9 reiterates the current procedure for administrative restoration which must be applied for within one year of dissolution. There is a new provision, however, that an extra three months will be available for all of the documentation necessary for the restoration to be prepared and filed.

Chapter 6.12
Strike Off and Restoration

Head 10 provides for the restoration of a company by the courts. It contains a new provision that the court may order the company to change its name. This is to cater for the possibility that a new company may have been incorporated while the company was struck off, with a name that is the same as or similar to the name of the company. The head strengthens the power of the court to ensure that all outstanding legal provisions are complied with.

Head 11 provides that companies struck off under earlier legislation may be restored under the new provisions.

Head 13 re-states existing law that the property of a company when it is dissolved becomes vested in the Minister for Finance.

Chapter 6.13

Compliance, Investigation and Enforcement

PILLAR A, Part 13 brings together the provisions of the Bill dealing with—

- company investigations;
- compliance and protective orders;
- disclosure orders;
- disqualification and restriction of directors; and
- prosecution, offences and evidential matters.

In ***Chapter 1***, *Head 1(1)* provides for a new definition of *"share capital"* and *"relevant share capital".* In essence, the meaning of the terms in relation to a company is limited by the question of whether there exists a related entitlement to vote, in all circumstances, at general meetings of the company. Furthermore, for the purposes of ***Chapters 2*** *and* ***3***, *Head 1(2),* the terms *"shares", "share capital", "shareholding"* and *"interest in shares"* are extended to include membership and resulting rights/obligations.

Chapter 2, *Heads 2 to 20* substantially re-enact the existing provisions which regulate investigations under the Companies Acts.

Head 2 deals with the appointment of inspectors by the High Court to investigate the affairs of a company, where the investigation is sought by the company itself or any of its directors or creditors or at least 100 of its members or any one or more of its members who control at least one-tenth of its paid up share capital.

Head 3 deals with the appointment of inspectors by the High Court on the application of the Director of Corporate Enforcement.

Head 4(1) provides for the power of the High Court to give appropriate directions to inspectors, with a view to ensuring that the investigation is carried out as quickly and as inexpensively as possible. *Subhead (2)* confirms that these powers of investigation may be exercised in relation to a company that is being wound up.

Head 5 provides for the power of inspectors (subject to the approval of the High Court) to extend their investigation into the affairs of related companies.

Head 6 deals with the process of investigation by High Court inspectors – including the duty of all officers and agents of the company (or any related body), together with persons whom the inspectors consider may be in possession of relevant information, to give all reasonable assistance in connection with the investigation. Likewise, the inspectors may require information in relation to bank accounts and may examine persons on oath. Furthermore, the inspectors may refer persons to the High Court who refuse or fail to cooperate with them to the extent that is required by law.

Head 7 deals with the reports which inspectors must make to the court and the extent to which the High Court may cause the report to be published and/or furnished to specified persons and authorities.

Head 9(1) empowers the High Court to make appropriate orders in relation to matters arising from the reports of inspectors. *Subhead (2)* deals with the power of the Director of Corporate Enforcement to seek to have a company wound up, arising from the report.

Head 11 substantially re-enacts the existing law under which the Director of Corporate Enforcement may, in appropriate circumstances, appoint inspectors to investigate and report on the membership of any company and otherwise, for the purpose of determining the true persons involved in the company.

Chapter 6.13

Compliance, Investigation and Enforcement

Head 13 re-enacts the powers of the Director of Corporate Enforcement, ancillary to an investigation or enquiry under *Head 11 or 12,* to impose restrictions on shares or debentures of a company, subject however, to the entitlement of an aggrieved person to apply to the High Court to have such restrictions lifted.

Head 14 reproduces the existing powers of the Director of Corporate Enforcement to require the production of company documents in certain defined circumstances, including as a precursor to a possible appointment of an inspector. *Head 17* re-enacts the existing provision making it an offence for a person to falsify, conceal, destroy or otherwise dispose of documents or records which he knows or suspects are, or may be, relevant to an investigation by the Director of Corporate Enforcement.

Head 18 substantially re-enacts the existing provisions under which the Director of Public Prosecutions, the Director of Corporate Enforcement or a Superintendent of An Garda Síochána may seek an order from the High Court authorising the inspection of books or papers of a company or requiring their production.

Head 19 re-enacts the existing provisions clarifying that the powers under this Chapter are subject to any person's entitlement to legal professional privilege and limiting to certain defined circumstances, the instances in which the Director of Corporate Enforcement may exercise his powers under *Head 14,* to access banking records. Similarly, it is confirmed that the publication of reports, information, books or documents in pursuance of this Chapter, are privileged.

In ***Chapter 3***, *Head 22* re-enacts the provision under which members or creditors of a company, together with the Director of Corporate Enforcement and the Registrar of Companies, may serve a notice on a company or its officers to remedy any default in complying with any provision of the Companies Acts or otherwise, to apply to the High Court for an order directing that the default be made good.

Subhead (1) of *Head 23* deals with the circumstances in which the High Court can grant a statutory injunction requiring a director or other officer of a company not to remove his or her assets from the State or to reduce them below an amount specified by the court. *Subhead (2)* provides that causes of action against a director or officer that do not either (i) relate to their role as such or (ii) arise due to the rights and obligations arising from the company or company law, are not covered by the *head*.

In ***Chapter 4***, *Heads 24 to 30* re-enact, with slight amendments, existing provisions under which persons who have a financial interest in a company may apply to the High Court for an order compelling the disclosure of certain information about interests held by other persons in shares (or debentures) of a company.

Chapter 5 deals with the disqualification and restriction of company directors and other officers.

Head 31 applies the provisions on restriction to certain companies and directors and defines certain terms used elsewhere in connection with restriction orders.

Head 32 deals with restriction orders, the matters relevant to the court's determination as to whether/when they ought to be made and the consequences which follow when they are made. The existing provisions have been substantially re-enacted with some changes. A notable change introduced here is to provide that a director, defending himself against an application for restriction, will now have to show, not only that he has acted honestly and responsibly in relation to the conduct of the company's affairs and that

there is no other reason why it would be just and equitable that he be subject to restriction, but also that he has, when requested to do so by the liquidator, cooperated with the liquidator insofar as he may reasonably be expected to do so in connection with the conduct of the winding-up. This will provide a strong added incentive for all directors of insolvent companies to cooperate fully with liquidators.

Head 34 substantially re-enacts the existing provisions dealing with applications for relief from restriction order and the procedure governing them. However, there are two significant changes.

Firstly, it is provided that in addition to such proceedings being served on the liquidator of the company, they should also be served on the Director of Corporate Enforcement.[17]

Secondly, as a consequence, it is proposed to remove the existing limitation under which a relief application may only be brought within one year of the person having been restricted. Current law allows for applications from disqualification orders to be brought at any time during which the disqualification order is subsisting and the CLRG considers that a similar regime should operate also in so far as restriction orders are concerned.

Heads 37 and 38 re-enact the existing provision (i) imposing restrictions on companies in relation to which restricted persons are appointed or act as a director or secretary (or are concerned in the promotion or formation of that company) and (ii) imposing an obligation on a restricted person not to become so involved without first notifying the company of the fact that he is a restricted person.

Head 39 provides for the possibility that, by application to the High Court, a company can be given relief for any contraventions of these restrictions.

Head 40 deals with existing law allowing the Minister to vary the threshold amounts for allotted share capital in the case of companies with which a restricted person was involved. *Head 39* preserves the powers of the Minister to increase the limits but on a non-retrospective basis as was provided for in the Company Law Enforcement Act, 2001.

Head 51 is a new provision allowing for persons to give and for the Director of Corporate Enforcement to accept, *restrictions undertakings* or *disqualification undertakings*. Disqualification undertakings will be for a period ranging between two and fifteen years while restriction undertakings will, as in the case of all restriction declarations, be for a period of five years. A restriction undertaking will have the same legal consequences as if the person who gives it had been the subject of a declaration of restriction made by the High Court while a disqualification undertaking will have the same effect as if the High Court had made a disqualification order against the person who gave it.

In ***Chapter 6***, *Head 52(1)* re-enacts the existing provision under which *all* summary prosecutions under the Companies Acts may be brought by either the Director of Corporate Enforcement or the Director of Public Prosecutions. *Subhead (2)* itemises a number of specific offences which can also be prosecuted by the Registrar of Companies. The number of offences which can be prosecuted by the Registrar has been reduced so as to include *only* those which can be prosecuted on the basis of evidence obtained directly from internal CRO records, or on the production of a

[17] Although this is a change in the statutory expression of the law, it is based on a principle which, even under the existing law, has found favour. Although the Director of Corporate Enforcement is not currently a *statutory* notice party, the High Court has, on occasions, allowed him to participate in a relief application. The court has recognised, *inter alia*, that for a liquidator to participate in relief applications is costly. The High Court has noted that, even if there are funds in the liquidation, it is doubtful whether the creditors would appreciate such funds being expended in response to an application for relief by one or more of

Chapter 6.13
Compliance, Investigation and Enforcement

court order. The remaining offences, which require evidence that can be obtained only following a more comprehensive investigation will, however, remain prosecutable by the Director of Corporate Enforcement.

Head 55 re-enacts most of the existing law as deals with procedural matters concerning the representation of companies when charged with an indictable offence and the entering of pleas.

Head 57 is a new initiative by the CLRG in respect of the categorisation of offences. It is now proposed that subject to a very small number of exceptions in the case of the most serious offences (such as fraudulent trading and market abuse), the vast majority of offences under the Companies Acts should be classified according to a four-fold scheme. Category 4 offences will be prosecutable *only* on a summary basis and on conviction, will give rise a fine of no more than €5,000. Category 3 offences will likewise be prosecutable only summarily but on conviction, may give rise to a prison sentence (of up to 12 months duration) and/or a fine of no more than €5,000. Both Categories 2 and 1 offences will attract those same consequences (as Category 3) when prosecuted summarily, but will also be capable of being prosecuted on indictment where the judge will be able to penalise any person convicted of a Category 2 offence by a fine of up to €50,000 and/or imprisonment for up to 5 years and in the case of a Category 1 offence, a fine of up to €500,000 and/or imprisonment for up to 10 years.

Moreover, the duty of auditors to report their suspicion that an indictable offence has been commited will be made easier to comply with, as the new provisions will mean only Category 1 and 2 offences (as well as the other handful of offences) are reportable.

This four-fold system will allow for an appropriately graduated system of penalties as between different offence provisions. In preparing these Heads, the CLRG has undertaken a comprehensive exercise, in conjunction with ODCE officials, of classifying the offences on what is thought to be the appropriate basis. In addition, it leads to the law being more easily understood because in each of the many provisions throughout the Bill creating offences, it is now possible to simply add a phrase along the lines of “which will be a Category 2 offence”.

A further novelty is introduced by ***Head 57(3)*** under which it is proposed that following conviction for a Category 1, 2, 3 or 4 offence, the trial court may order that the convicted person should remedy any breach of the Companies Acts in respect of which they were convicted.

Head 58 deals with what “daily default fines” may be imposed where a provision permits such penalties to be imposed. It also clarifies that where a person has been convicted of such an offence following a trial on indictment, it will be possible for the prosecution to opt to proceed summarily when prosecuting the offences which give rise to any resulting daily defaults.

In ***Chapter* 7,** *Head 61* re-enacts the existing provision dealing with the improper use of the words “limited” or “teoranta”.

Heads 64 to *67* deal with how answers given to inspectors may be used in evidence, how certain documentation may be given to a jury and presumptions as to signature, content and admissibility of documentation.

Head 68 re-enacts the existing provision which clarifies that *Head 153* of **Part A11** does not require any person who has acted as solicitor for a company to disclose any privileged communication made to him otherwise than as such solicitor.

Chapter 6.14

Powers and Duties of the Minister and of Regulatory and Advisory Bodies

PILLAR A, Part 14 of the General Scheme concerns the powers and duties of the Minister for Enterprise, Trade and Employment in relation to company law matters and also the powers and duties of regulatory and advisory bodies in the field of company law in Ireland. The bodies include the Registrar of Companies, the Irish Auditing and Accounting Supervisory Authority, the Director of Corporate Enforcement and the CLRG. For the first time, the powers and duties of both the Minister and these bodies are brought together in one coherent group of legislative provisions.

Chapter 1 deals with the powers and duties of the Minister and essentially re-enacts Sections 392 to 396 of the 1963 Act and also gives effect (at *Head 5*) to the recommendations of the CLRG in its *First Report,* regarding the use of electronic communications.

Chapter 2 re-enacts a number of provisions contained in existing legislation (including the 1963, 1990 and 1999 Acts) concerning the powers and duties of the Registrar of Companies.

Chapter 3 is concerned with the Irish Auditing and Accounting Supervisory Authority and in this regard largely re-enacts the provisions of the Companies (Auditing and Accounting) Act, 2003 which govern the powers and duties of the Authority.

Chapter 4 effectively re-enacts Sections 7 to 18 of the Company Law Enforcement Act, 2001, which outline the powers and duties of the Director of Corporate Enforcement.

Finally, ***Chapter 5*** addresses the CLRG and re-enacts Sections 67 to 71 of the 2001 Act which confer powers and duties on the CLRG.

Chapter 7

Exposition of PILLAR B of the General Scheme: Other Companies

Chapter 7.1

Definition and Interpretation

This Chapter sets out some definitions for the purposes of company types covered by **PILLAR B** i.e. other than the private company limited by shares catered for in **PILLAR A**.

PILLAR B, Part 1 is concerned with the application of **PILLAR A** provisions to those companies which are specially regulated by the succeeding Parts of **PILLAR B**, i.e.:

- public limited companies;
- *societas europae* or European Company;
- designated activity company;
- company limited by guarantee (without a share capital);
- private unlimited company (having a share capital);
- public unlimited company (having a share capital);
- public unlimited company not having a share capital; and
- limited partnership.

Chapter 7.2
Public Limited Companies

PILLAR B, Part 2 is concerned with public limited companies (*plcs*), the public offer of securities and related matters.

Many of the provisions of **Part B2** are underpinned by EU Directives – the *Second Directive* 77/91/EEC (recently amended by Directive 2006/68/EC) on maintenance of capital, the *Prospectus Directive* 2003/71/EC, the *Market Abuse Directive* 2003/6/EC and the *Transparency Directive* 2004/109/EC.

The CLRG's aim has therefore not been to reform this law, but rather to gather it from its dispersed sources and to set it out with more clarity of presentation and wording.

Chapter 1 is concerned with interpretation of provisions, which apply for the purposes of **Part B2**.

Head 1 contains defined terms.

Head 2 provides that the law in **PILLAR A, Parts 1** to **14** applies to *PLCs* as it does to the new model company, the private company limited by shares, subject to the exceptions set out in that ***head.***

Chapter 2 deals with incorporation and consequential matters and is notionally "twinned" with **Part A2**, which deals with the incorporation of the private limited company.

Head 3 provides that a *PLC* may be formed as such, but may otherwise be registered as such by reason of a re-registration of another body corporate (including another form of company), a European Company or *Societas Europae,* a merger or division, within the State. It should be noted that the provisions of the European Communities (European Public Limited Liability Company) Regulations 2007 (S.I. No. 21 of 2007), dealing with the ***Societas Europae***, will be incorporated into the General Scheme. A merger across EU Member State borders will be possible from December 2007 with the transposition and implementation of Directive 2005/56/EC on cross-border mergers of limited liability companies, but this Part does not contain transposing legislation, pending the actual transposition which is anticipated to take place during 2007.

Head 4, regulating the content of a *PLC's* constitution, requires it to state its objects and its share capital, in view of *Second Directive* requirements to provide this.

Heads 5 to 7 deal with the names of *PLCs* and the requirement to have a trading certificate.

Heads 8 to 10 deal with objects clauses and provide for a substantive difference between the new model company and *PLCs*. *PLCs* (in keeping with the *Second Directive)* must have an objects clause whereas the new model company does not have an objects clause. A *PLC* has the power to do anything in its objects clause.

The potential strictness of this requirement is mitigated in ***Head 9*** whereby the validity of an act done by a *PLC* shall not be called into question by reason of anything contained in the *PLC's* objects. However, directors are personally liable for disobedience of the objects clause. A substantive change in the law is contained in ***Subhead (3),*** whereby an act beyond the capacity of a *PLC* may be validated after the event by special resolution.

A party to a transaction with a *PLC* is not bound to look at the *PLC's* objects.

Head 9 is concerned with corporate capacity.

Head 10 is concerned with the power of the directors (or a person registered with the Registrar of Companies) to bind the company, providing, in favour of third parties dealing in good faith, that such power is deemed to be free of any limitation in the *PLC's* constitution.

Chapter 7.2

Public Limited Companies

Head 11 is based on Sections 9 and 10 of the 1963 Companies Act and regulates the change of objects clause. It also re-enacts the present provisions enabling the holders of 15% or more of the company's share capital, or of a class of shares or 15% or the company's debt securities, to apply to court to cancel a resolution to change the objects of the company.

Head 12 re-enacts Section 15 of the 1963 Companies Act, enabling *PLCs* to alter their articles by special resolution.

Head 12 provides for *PLCs* to have a securities seal for sealing documents, creating or evidencing securities. This seal is in addition to the common seal and the official seal for use outside the State. ***Chapter 3,*** *Heads 14 to 32*, deals with the special share capital requirements for *PLCs*, all of which are taken from the Companies (Amendment) Act, 1983, without any amendment of substance. These include the requirement for a *PLC's* shares to be paid up as to 25% of their par value and all of their premium, the requirements for experts' reports for non-cash consideration for the allotment of shares and the general prohibition on financial assistance by the *PLC* in connection with the acquisition of shares in itself or its holding company. It should be noted however, that the minimum capital for a *PLC* will be reduced to €25,000.

Heads 36 to 51 re-enact *Chapter 2* of Part 4 of the Companies Act, 1990 without amendment, under which persons (either individually or in concert) who have acquired a 5%+ interest in the voting share capital ("relevant share capital") of a *PLC* must notify the *PLC* of that acquisition as well as any movements up or down through whole percentage levels above 5%.

These provisions do not apply where the *PLC's* securities are admitted to trading on a "regulated market" (i.e. a market regulated under a transposition, in an EU Member State or EEA State, of the *Investment Services Directive* 93/22/EC, to be superseded by the *Directive 2004/39/EC on Markets in Financial Instruments*) where a separate regime of disclosure applies.

Chapter 4 regulates the making of distributions by *PLCs*, again re-enacting the relevant provisions from Part IV, of the 1983 Act, without amendment.

Chapter 5 provides the statutory basis for uncertificated securities. While there is nothing to prevent uncertificated securities in a private limited company, the CLRG took the view that the most logical home for such a provision was in the Part concerning *PLCs*. The substantive difference in the underlying statutory provision is the ability to require all *PLCs* to procure the creation of shares and the registration of transfer of shares in electronic form, in line with the amendments to Section 239 of the Companies Act, 1990, effected by Section 12 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2006.

Chapter 6 is concerned with corporate governance and includes the provisions distinguishing the *PLC* from the private limited company.

Head 62 requires that all *PLCs* have at least 2 directors, rather than one only, as is the case with the private limited company.

Heads 64 and 65 replace provisions found in the 1996 Uncertificated Securities Regulations relating to entitlement to attend at general meetings.

Head 66 contains the requirement to have an audit committee. Whilst a modified version of this provision applies to large private limited companies, the CLRG was of the opinion that it would be clearer to state the entire law applicable to *PLCs* on the subject.

Chapter 7 is concerned with duties of directors and other officers.

Head 67 contains the existing requirement to convene an extraordinary general meeting where

there has been a serious loss of capital. This provision will now apply to *PLCs* only.

Head 68 disapplies ***Chapter 4*** of **Part A5** regarding the disclosure of interests in shares of directors where those shares are admitted to trading on a regulated market[18], in which case a separate regime applies, under Regulations made to transpose the Market Abuse Directive 2003/6/EC.

Head 69 is concerned with the qualifications of a secretary of a *PLC*, re-enacting existing law.

Chapter 8 is concerned with financial statements, audit and annual return, applying supplementary requirements originally enacted by the Companies (Auditing and Accounting) Act, 2003.

Chapter 9 contains provisions concerning registers of debenture holders, where the debentures are of a series, re-enacting Sections 91 and 92 of the 1963 Companies Act.

Chapter 10 concerning reorganisations, requires a court order for a merger or division, and has special provisions for service of notices where shares are registered in electronic form. It also disapplies *Head 6* of **Part A9**, which is the general provision permitting the squeeze-out by an offeror that has obtained acceptances in respect of over 80% of the shares of a company. Instead, where the company's voting securities are admitted to trading on a market regulated under a transposition in an EU Member State or EEA State of the *Investment Services Directive* 93/22/EC (to be superseded by the Directive 2004/39/EC on *Markets in Financial Instruments*), a separate threshold of 90% applies.

Chapter 11 deals with particular aspects of strike-off and restoration referable to a *PLC* not obtaining its trading certificate.

Chapter 12 provides the statutory basis for the making, by the Minister, of Regulations to transpose the *Market Abuse Directive* 2003/6/EC. This Chapter re-enacts Part 4 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005 without amendment.

Chapter 13, concerning public offers of securities, provides the statutory basis for the making, by the Minister, of Regulations to transpose the *Prospectus Directive* 2003/71/EC. This Chapter re-enacts Part 5 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005 with the amendments made by the Investment Funds, Companies and Miscellaneous Provisions Act, 2006.

Chapter 14, concerning the transparency obligations of publicly quoted companies, provides the statutory basis for the making, by the Minister, of Regulations to transpose the *Transparency Directive* 2004/109/EC. This Chapter re-enacts Part 3 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2006.

The ***Schedule*** to **Part B2** contains the form of memorandum of association of a *PLC* and articles of association containing regulations for management of a *PLC*.

[18] "regulated market" means a market regulated under a transposition in an EU Member State or EEA State of the *Investment Services Directive* 93/22/EC, to be superseded by the Directive 2004/39/EC on Markets in Financial Instruments.

Chapter 7.3

Designated Activity Companies

PILLAR B, Part 3 makes provision for a type of private company to be known as a *designated activity company* or "DAC", which will be a private company limited by shares or by guarantee, its primary defining feature being the continued existence of an objects clause.

The DAC will be the closest type of company to what is currently the existing private company under the Companies Acts, and during the transition period,[19] existing private companies will be required to elect whether or not to opt into the new regime for private companies or alternatively, to retain their objects clause by converting to a DAC. The CLRG is very conscious of the regulatory impact of implementing the recommendation on the primacy of the private company limited by shares and the CLRG has consequently tried to ensure that the new regime for companies does not impose significant burdens on existing private companies. Accordingly, an existing private company that does not want to opt-in to the new and simplified regime, can opt-out and will not be obliged to do any more than change its name to replace "Limited" or "Ltd" with "Designated Activity Company" or "DAC".

The CLRG in its *First Report* recognised the desire among business people and other company law users, that company law would continue to meet their legitimate expectations by allowing them to incorporate private companies that have an objects clause.[20] Entities which would welcome the continued availability of a 'private company with an objects clause' are special purpose companies, i.e. incorporated for a special purpose such as a joint venture or a financing company used in a single specific financing transaction. Although the needs of such companies caused the CLRG originally to make provision for the DAC, the proposed Heads of Bill do not restrict the availability of DACs to persons engaged in such activities and it is open to anyone to incorporate or convert to a DAC.

The key features of a DAC in company law are:

- It is to be a private company that is limited by shares or by guarantee, which has a share capital.
- It is to have an objects clause.[21]
- It is to have a two-document constitution, *viz.*, a memorandum of association and articles of association.[22]
- It is to have a limit of 99 members, provided that there will be a carve-out from this for property management companies that are formed as DACs so that such companies may have an unlimited number of members provided that they are all co-owners in the same development.
- It is to be permitted to list debentures and other debt instruments (but not its shares) on a recognised stock exchange but subject to that exception, it is otherwise prohibited from making an invitation or offer of securities to the public if to do so would give rise to the necessity to publish a prospectus under Irish prospectus law.
- It must have a minimum of two directors and will continue to be required to have a company secretary.

[19] See Chapter 7.2, *Incorporation and Registration*.

[20] See *First Report* at 10.9.10.

[21] As in the case of a PLC, see Chapter 8.2, the effects of the doctrine of *ultra vires* will be mitigated for outsiders dealing with the DAC.

[22] Many of the provisions contained in an existing private company's articles of association will be rendered redundant by Part 4 of Pillar A where many of the provisions of Table A are stated in statute to apply unless a company's constitution pro
companies) and articles of association in the case of all other company types, including DACs.

- It can have just one member.
- If it has only one member, that member can waive the requirement to hold an Annual General Meeting, otherwise a DAC must hold an Annual General Meeting.
- In the case of a multi-member DAC the only form of permitted written resolution of the members is a unanimous resolution.
- It will be eligible for audit exemption, provided it meets the requirements for availing of the exemption.

All criminal offences contained in **Part B3** are, in the interests of transparency and standardisation, categorised and the maximum penalties for each category of offence are to be found in **Part A13**.

Chapter 7.4
Guarantee Companies

Part 4 of **PILLAR B** deals only with companies limited by guarantee, not having a share capital. Guarantee companies with a share capital will be private companies and as such will be considered to be designated activity companies (DAC) under the new Bill.

Chapter 1, *Head 1* establishes the formal definition of a company limited by guarantee and its constitution and members.

Head 2 sets out the provisions of **Part A** that will not apply to a company limited by guarantee and identifies the alternate provisions being adopted and their designated head.

Chapter 2, *Head 4* sets out the means of becoming a company limited by guarantee, which must have a minimum of two members whether by incorporation, conversion, merger or division. This is a reduction from the minimum of 7 members under current law. The law on conversion is dealt with in **Part 9** of **PILLAR A.**

Although referred to collectively as its constitution, a guarantee company will still have a two document constitution, in the form of a memorandum and articles of association.

Although *Head 6* sets out the required name ending for a company limited by guarantee, it does not prevent a company limited by guarantee from having or obtaining a licence to dispense with the words "Guarantee Company" in its name under the equivalent of Section 24 of the Companies Act, 1963, which allows such companies now to dispense with the word "Limited' in its name. How this licence can be obtained is set out in *Head 8*.

Head 10 allows the alteration of the objects of a company limited by guarantee but allows 15% of members or debenture holders to object to any such change.

Head 13 clarifies the matter of *ultra vires* (mitigated by Section 8 of the Companies Act, 1963) to protect persons dealing with a company limited by guarantee while holding directors to account.

Head 14 allows shareholders to injunct transactions undertaken which are beyond the powers of the directors.

Head 15 sets out the transition period during which an existing guarantee company without share capital must change its name or be sanctioned.

Chapter 3 provides that a company limited by guarantee must not have a share capital. If it wishes to have capital or has capital as an existing company it will become a DAC. A company limited by guarantee may, however, offer debenture stock to the public and if it does, it must comply with ***Chapter 13*** of **Part 2** of **PILLAR B**. Although the provisions regarding holding of shares shall not apply, the provision applies in a manner similar to an interest/membership by guarantee in a holding company by its subsidiary.

Chapter 4. Unlike a private company, a company limited by guarantee must have two directors *(Head 24*). Termination of directorship is as in a private company except for share qualification, which does not arise. The existing law allowing the removal of a director by ordinary resolution is retained but the new head omits the provision for having life directors.

Head 27 sets out the provisions for an audit committee as for other relevant companies but extends the 'comply or explain' requirement to an audit committee for all guarantee companies or any subsidiaries of a guarantee company. Table C of the First Schedule to the Companies Act, 1963 is incorporated into the Bill to set out admission and termination of membership criteria and the voting power of members, as per the constitution.

Chapter 7.4
Guarantee Companies

Head 29 is similar to other provisions regarding the register of members, excluding the provision for shareholding, as none will exist.

Head 30 is a new concept intended to meet the perceived need for regulation of a company limited by guarantee in which the members have an estate or interest in land.

Head 31 restates the existing law on annual general meetings, but excludes the power of a company limited by guarantee to dispense with holding an AGM.

Head 32 modifies the normal provisions in regard to requisitioning a general meeting only to the extent of not recognising paid up capital as a means of entitlement.

Head 34 restates the power to appoint a proxy as default, being a change from existing law where proxies were only allowed where the articles of a guarantee company provided for it. As a company limited by guarantee does not have capital, voting is related directly to membership, joint holders having only one vote in person or by proxy.

The right to demand a poll (*Head 36*) is also related to voting membership (as distinct from shareholding) and requires 10% of total voting rights unless the constitution provides otherwise.

With the exception of appointment and remuneration of auditors or removal of directors, *Head 37* allows unanimous written resolutions. It is not possible for companies limited by guarantee to pass majority written resolutions.

Any resolution passed at general meeting or in writing, of the type set out in *Head 38,* is required to be filed with the Registrar.

Under *Head 41* of ***Chapter 5***, directors of a company limited by guarantee are not required to complete a directors' compliance statement. It is the opinion of the CLRG that a declaration of interest by directors is important for guarantee companies and it has therefore reinstated the provisions of *Head 42* (formerly Section 194(5)(b) and 194(6) of Companies Act, 1963) in the public interest.

In addition to the requirements of **Part 6** of **PILLAR A**, provisions regarding the accounts of companies limited by guarantee are included in ***Chapter 6.***

Heads 43 to 45 concern exemptions from the obligation to prepare consolidated accounts, to be known as 'group accounts', under the Companies Act and/or IFRS in due course. Exemptions are to be extended to companies to which the Group Accounts Regulations, Credit Institution Regulations or Insurance Undertaking Regulations apply.

Companies limited by guarantee will not be permitted to enjoy this exemption relating to small and medium sized companies.

Companies limited by guarantee will not be entitled to dispense with an annual general meeting *(Head 31)* or to file abridged accounts as for small or medium sized companies limited by shares.

Chapter 9. Reconstruction, merger and divisions are normally related only to companies with a share capital and are not therefore considered relevant to the new proposed company limited by guarantee.

Chapter 11. On a winding-up, there being no share capital, the liability of members is confined to the guarantee sum provided for in the constitution, and as before, includes former members whose membership ceased within one year of the winding-up.

Chapter 7.5
Unlimited Companies

PILLAR B, Part 5 makes provision for unlimited companies.

Part B5 is structured in such a way that it covers both private unlimited and public unlimited companies. In this regard, a number of different types of unlimited company are being catered for in **Part B5**, including private unlimited company (ULC), public unlimited company (PUC) and a public unlimited company that has no share capital (PULC), and provisions may or may not apply depending on the category type into which the company falls.

Chapter 1 contains the definitions specific to unlimited companies and a table that sets out the provisions of **PILLAR A** that do *not* apply to unlimited companies, or that apply subject to modifications.

Chapter 2 sets out the manner in which unlimited companies may be formed and registered and distinguishes between an unlimited company with or without a share capital. In both instances the unlimited nature of the liability of the members is provided for.

Chapter 3 makes provision for the share capital of unlimited companies and essentially mirrors current law.

Perhaps the biggest change provided for in **Part B5** is in ***Chapter 6*** and relates to the preparation of accounts for unlimited companies which have at least one unlimited member. Whereas heretofore, such unlimited companies, whether public or private, had to prepare their accounts in accordance with the provisions of the Companies Act, 1963 (in particular the formats specified in the Sixth Schedule to the Companies Act, 1963), in future such unlimited companies will be required to prepare their accounts in accordance with the requirements of and the Schedules to, **Part A6** (subject however to the refinements specified in ***Chapter 6***).

Separately, arising from EU requirements in relation to accounts, unlimited companies, all of whose members have effective limited liability, are essentially subject to the same requirements as are applicable to comparable type limited companies. This is provided for by ***Head 30.***

As regards the filing of accounts with the annual return to the Companies Registration Office, no change in procedures is proposed. This means that while public unlimited companies, including those mentioned in the previous paragraph, will be required to attach copies of their accounts with their annual returns, private unlimited companies with at least one member with unlimited liability will still only be required to attach a copy of the auditor's certification as introduced by Section 47 of the Companies (Auditing and Accounting) Act, 2003.

Other than in respect of ***Chapter 11***, where the specific nature of the unlimited liability of members of unlimited companies has to be factored into the winding-up provisions being provided for in **PILLAR A**, the remaining provisions of **PILLAR A** apply to unlimited companies.

Chapter 7.6

Re-registration and Conversion of Companies

At present, conversion and re-registration provisions are principally located in various Parts of the Companies (Amendment) Act, 1983. **PILLAR B, Part 6** proposes a new approach to re-registration of companies, while consolidating the existing provisions on re-registration.

Chapter 1 sets out the interpretation of terms used throughout the Part.

Chapter 2 contains the general provisions applicable to all re-registrations. The proposed new approach permits a registered company to re-register as any other company type, the formation of which is provided for under the Companies Acts. Under existing law, a company may re-register as another company type only if there is an express provision in the Acts authorising the re-registration of that particular company type as the other company type. This means that certain company types (for instance, companies limited by guarantee without a share capital) cannot convert, as provision is not made for such company types to re-register as any other company type. Neither can any other company type re-register itself as a company limited by guarantee.

Part B6 proposes that a company be entitled to re-register as any other company type by passing a special resolution to re-register as the 'destination company type'. The resolution must alter the company's constitution so that it conforms with the requirements of the Companies Acts with respect to the constitution of the destination company type. A copy of the resolution, with an application in the prescribed form, must be delivered to the Registrar of Companies, together with a statement of compliance from a director or secretary of the company. Such company will also have to comply with the requirements contained in ***Chapter 3*** of this Part as to the destination company type. The focus will, for the first time, be on what the company is becoming, i.e. the destination company type, and on complying with the requirements applicable to the destination company type.

A certificate of incorporation on re-registration, issued by the Registrar of Companies to the applicant company, shall be conclusive evidence that the requirements of **Part B6** have been complied with.

Head 3 introduces the concept of a statement of initial shareholdings and a statement of share capital in respect of re-registration. It provides that statements are required to be delivered to the Registrar of Companies by a company which is re-registering, which company does not have a share capital but is to have a share capital on re-registration.

Head 4 provides for an application to court by dissenting members to cancel a special resolution of a *PLC* to re-register as a private company limited by shares or Designated Activity Company (DAC), which is a restatement of Section 15 of the Companies (Amendment) Act, 1983.

Head 5 deals with re-registration upon reduction of share capital of a *PLC*, which is a restatement of Section 17 of the Companies (Amendment) Act, 1983.

Chapter 3 contains the particular requirements to be complied with, depending on the destination company type in question.

Head 6 sets out the particular requirements for conversion to a private company limited by shares and includes a restatement of Section 14 of the Companies (Amendment) Act, 1983.

Head 7 contains the particular requirements for conversion to *PLC* and is, in substance, Section 9 of the Companies (Amendment) Act, 1983, applied to companies generally.

Head 8 sets out the requirements as to share capital of a company applying to re-register as a *PLC* and is a restatement of Section 10 of the Companies (Amendment) Act,1983.

Chapter 7.6

Re-registration and Conversion of Companies

Head 11 deals with the particular requirements for conversion of a limited to an unlimited company. Under existing law, it is not open to a company which re-registers as unlimited, under Section 52 of the Companies (Amendment) Act, 1983, to re-register as limited, pursuant to Section 53 of the 1983 Act, and vice versa. It is not proposed to continue this restriction. A new requirement is being proposed, however, that a limited company re-registering as unlimited has to file an up-to-date annual return with annexed accounts with its application to re-register as unlimited.

Head 12 sets out the requirements for conversion to a company limited by guarantee (CLG). This is a new provision, as existing law does not provide for such re-registration. The proposal is that all shareholders in a company limited by shares must consent to the conversion to CLG. In addition, it is proposed that the High Court must sanction the re-registration and the consequent reduction in share capital and give directions as to what is to happen with the issued share capital of which the company is divesting itself, save and except where the issued shares are not paid up and the liability of the members of the CLG to contribute to the company's liabilities on a winding-up is to remain the same as if the shares were still in issue. [23]

Head 13 sets out the requirements for conversion to a DAC.

[23] For instance, if a company has two €1 shares, neither of which is paid-up, and it wishes to convert to a CLG, and the liability of the members under the statement of guarantee is to be €1 each, it is proposed that there ought to be no requirement for court approval of this conversion, as there is no capital to be repaid and each member's statement of guarantee will replace

Chapter 7.7

External Companies

PILLAR B, Part 7 makes provision for the registration and disclosure requirements of external companies (also referred to as foreign companies or overseas companies) which have been formed and registered outside of the State but which come to have a connection with Ireland. The CLRG proposes that the two separate regimes currently found in Part XI of the Companies Act, 1963 and the European Communities (Branch Disclosure) Regulations, 1993 (S.I. 393 of 1993), be merged.

Chapter 1 sets out certain proposed new defined terms.

Head 2(1) provides that **Part B7** will apply to all *external companies* that set-up or already have an *establishment* in the State.

"External company" is defined in *Head 1* as being either an EU Company or a Non-EU Company, and an *EU Company* as being a limited liability body corporate, incorporated in a state other than Ireland, that is a contracting party to the EEA Agreement. A *Non-EU Company* is defined as a limited liability body corporate, incorporated in a state that is not a member of the EU or a contracting party to the EEA Agreement. Just as in the case of the provisions of the Companies Act, 1963 and of the Branch Regulations, the obligation to register is confined to limited liability bodies corporate that establish themselves in Ireland and does not affect bodies corporate where the members have unlimited liability.

Establishment is defined to mean a place where, with the intention or fact of permanency, business is transacted under delegated management and includes a "branch" within the meaning of the 1989 Directive. The effect of this proposal is to move away from the old "branch" or "place of business" distinction and replace them with "establishment" which will include everything that is currently a "branch" but which will more than likely relieve some foreign entities that have already registered their place of business from having to do so. The definition being proposed for "establishment" is intended to display the traits of a "branch" identified by the European Court of Justice in *Etablissements Somafer v Saar Ferngas Ag Case 33/78* [1979] 1 CMLR 490.

Head 2(2) expressly applies certain provisions in **PILLAR A** to external companies – (a) applies **Part A7** dealing with charges and re-enacts Section 111 of the Companies Act, 1963; (b) ***Chapters 7 and 8*** of **Part A13** deal with prosecution of companies and includes, in ***Head 55,*** the prosecution of companies on indictment, which re-enacts Section 382(7) of the Companies Act, 1963.

Chapter 2 of **PILLAR B, Part 7**, contains the provisions that detail the filing obligations of all External Companies.

In ***Head 3,*** the filing obligations of EU companies are detailed in a manner compatible with the 11th EU Company Law Directive, 89/666.

Chapter 7.7
External Companies

Head 4 details the accounting documents that are required to be filed by EU Companies. This provision seeks to create an obligation on EU companies that establish a branch or place of business in Ireland to disclose their accounting documents (by registration with the Registrar) to no more or no less an extent than that to which they are so required to disclose their accounts to the public in their home Member State. Moreover, it is proposed that the obligation to file in Ireland will be not later than one month following the date the obligation to file arises in the company's home Member State.

Heads 5 and 6 make provision for the filing obligations and disclosure of accounting documents in the case of non-EU Companies.

Most significant are the changes proposed in *Head 6* which seek to address the essential difficulties with the current law, whereby some non-EU companies seek to avoid registration as the branch of an External Company because to do so means that they must file accounts in circumstances where their home country does not require them to be filed. This provision seeks to distinguish and to discriminate between non-EU States that have no filing requirements at all, that may be simply jurisdictions of convenience to avoid disclosure, from those other non-EU states that do have reasonable requirements. The CLRG believes that it is reasonable that an entity that establishes itself in Ireland with limited liability, should disclose to the Irish public, the accounting documentation available to the public where it was incorporated, but that if that country has no requirement to publish any accounts whatsoever, then it is also reasonable to require a minimum disclosure of that information in Ireland.

Chapter 3 concerns disclosure and translation. *Head 7* provides that all External Companies must disclose certain particulars, including their place of registration, on their business letters and order forms, making appropriate distinction between EU and non-EU Companies, to conform to the 11th Directive.

Head 8 deals with translations of documents required to be delivered to the CRO.

Chapter 4 concerns the obligation to file a statement in lieu of a full filing under *Heads 3 or 5* and thereby seeks to make provision for existing External Companies already registered under either the Branch Disclosure Regulations or Part XI of the Companies Act, 1963.

Chapter 5, *Head 10* makes provision for the service of process or notices on External Companies.

Chapter 6, *Head 12* imposes a duty on all external companies to comply with **Part B7**.

All criminal offences contained in **Part B7** are categorised in the interests of transparency and standardisation and the maximum penalties for each category of offence are to be found in **Part A13**.

Chapter 7.8
Unregistered Companies

Part 8 of **PILLAR B** deals with unregistered companies and joint stock companies and the application of the Bill to companies formed or registered under former Acts. It also provides a mechanism for an unregistered company to register as a public limited company under the new Bill.

Head 1 deals with defined terms for the purposes of this Part.

Head 2 is a re-enactment of Section 377 of the Companies Act, 1963 (as amended[24]), which applied the provisions of the Companies Acts that are listed in the Ninth Schedule of the 1963 Act to "all bodies corporate, incorporated in and having a principal place of business in the State" other than those set out in Subsection (2) of Section 377.

Head 3 concerns the Minister's power to make regulations and is a re-enactment of Section 250 of the Companies Act, 1990.

The specific provisions covered by this application are listed in the Table in ***Head 4.*** This Table sets out the originating provisions in existing company law and the general intention is to replicate the applications which are given effect to by the Ninth Schedule of the Companies Act, 1963.

Head 5 is new. It and the Heads which follow it are based on the procedure in Part IX of the Companies Act, 1963 under which unregistered companies may register as limited companies under the Companies Acts. The procedure includes the possibility of registering as a *PLC* subject to compliance with the additional conditions and formalities set out in Section 18 of the Companies (Amendment) Act, 1983. The wording follows, with modification, the wording of Section 328 of the Companies Act, 1963.

The requirements for the registration of an unregistered company are specified in ***Head 6. Subhead (1)*** of this head draws upon Section 328(6) and (9) of the Companies Act, 1963, while ***Subheads (2) and (3)*** are new. The requirements in ***Subhead (4)*** are largely drawn from those in Section 330 of the 1963 Act. ***Subhead (5)*** is a re-enactment of Section 336(1) of the Companies Act, 1963[25]. ***Subhead (6)*** is an amended re-enactment of Section 336(2) of the Companies Act 1963, which has been modified to take account of constitutional issues raised by *Maher v Attorney General*[26].

Head 7 is new and provides for the registration of an unregistered company as a public limited company. Section 18 of the Companies (Amendment) Act, 1983 allows a company not formed under the Companies Acts, which is using the Part IX registration procedure to register as a limited company, to be so registered as a public limited company. Section 18 modifies the 1963 Act's requirements for re-registration of private companies as public companies for this purpose. As a consequence, a joint stock company registering as a *PLC* must prepare a re-registration balance sheet and provide to the Registrar an auditor's statement as to its net asset position and a statutory declaration of the directors as to the net asset position between the balance sheet date and the date of re-registration etc. In contrast, the procedure for conversion of a building society into a public limited company, set out in the Building Societies Act, 1989 (as amended), has no such requirements.

The effect of such re-registration as a public limited company is dealt with by ***Head 8,*** which is also new. The head's constituent parts, however, are drawn from the Companies Act, 1963 and Section 107 of the Building Societies Act, 1989. ***Subhead (1)(a)*** represents an edited version of Section 340 of the Companies Act, 1963. ***Subhead (1)(b)*** is new.

[24] Section 377 of the 1963 Act was amended by section 250 of the Companies Act 1990, section 15 of the Companies (Amendment) Act 1982 and section 57 and Schedule 2 of the Companies (Auditing and Accounting) Act 2003

[25] Section 336 of the Companies Act was inserted by Schedule 1 of the Companies (Amendment) Act 1983

[26] [1973] IR 146

Chapter 7.8
Unregistered Companies

A proposed mechanism that will synchronise repeals of existing law with the registration of an unregistered company as a *PLC* under this Part is set out in *Head 9.*

Head 10 concerns the commencement of **Part B8** and a power for the Minister to make supplemental regulations.

Chapter 4 concerns the winding-up of an unregistered company and is composed of *Heads 11 to 16*, which re-enact Sections 344 to 349 of the Companies Act, 1963 respectively.

Chapter 5, which addresses the application of the Bill to companies formed or registered under former Acts, restates the provisions of Part VIII of the 1963 Act.

Similarly, ***Chapter 6***, dealing with the registration of joint stock companies under the Bill, broadly restates the provisions of Part IX of the Companies Act 1963, but has been amended slightly so as to apply primarily to joint stock companies.

Chapter 7.9

Investment Companies

Part 9 of **PILLAR B** makes provision for the establishment of companies as investment companies, currently provided for under Part XIII of the Companies Act, 1990 ("Part XIII Companies"). Part XIII Companies are commonly referred to as non-UCITS investment companies, in distinction from those established under the EU UCITS Directives regime. In order to be permitted to operate, Part XIII Companies must be authorised by the Irish Financial Services Regulatory Authority (the "Financial Regulator"). Part XIII Companies are a key constituent of the set of legal structures under which the international investment funds industry operates in Ireland.

Part B9 is concerned primarily with Part XIII Companies, i.e. with non-UCITS investment companies. However, a number of the proposed amendments to existing legislation apply to both UCITS and non-UCITS investment companies and to a lesser extent, non-corporate investment funds, *viz*, unit trust, common contractual funds and investment limited partnerships.

Part B9 is the first step towards 'hiving off' Part XIII Companies from the general body of company law. It is envisaged that this will be followed, as soon as is practicable, by the consolidation in one piece of legislation, of all legislation relating to investment funds, irrespective of their legal form.

Part B9 brings within one part of the Bill, all of the existing provisions of the Companies Acts which apply to Part XIII Companies. With a small number of exceptions described below, **Part B9** is therefore, a re-statement of the existing law as it applies to Part XIII Companies.

The CLRG's *First Report* (Section 16.8 to 16.10 of Chapter 16) sets out a number of detailed proposals for amendments to the Companies Acts in relation to matters affecting investment funds. In some cases, these proposals have been overtaken by events since publication of the report:

- UCITS Regulations (16.8.1): No further amendments to the UCITS Regulations are currently required.
- Cross-investment by umbrella investment companies (16.9): The necessary provisions were enacted in the Investment Funds, Companies and Miscellaneous Provisions Act, 2005 (Part 3).
- Protected cell companies (16.10): The necessary provisions were enacted in the 2005 Act (Part 3).

The position in relation to the other recommendations is as follows:

- Limited duration companies (16.8.2): The current view is that an amendment to the facility for voluntary strike-off would meet the industry's concerns on this issue. The proposal is that the current twenty-year period within which a court can reinstate a company which has been struck off should be reduced to two years in the case of investment companies, both UCITS companies and Part XIII Companies. This is being provided for in *Head 50* of **Part B9**

- 1986 Companies (Amendment) Act (16.8.6): The CLRG's *First Report* recognised that a number of provisions of the 1986 Act relating to the format and content of company accounts are not appropriate for investment companies and recommended that open-ended investment companies be exempted from the 1986 Act. It is proposed to provide for the exemption of both UCITS companies and Part XIII Companies from the 1986 Act.

- Section 53 of the Companies Act, 1990 (16.8.7): The disapplication of this provision in the case of Part XIII Companies is being provided for at *Head 32(4)(b)* of **Part A5,** to bring Part XIII Companies into line with UCITS investment companies.

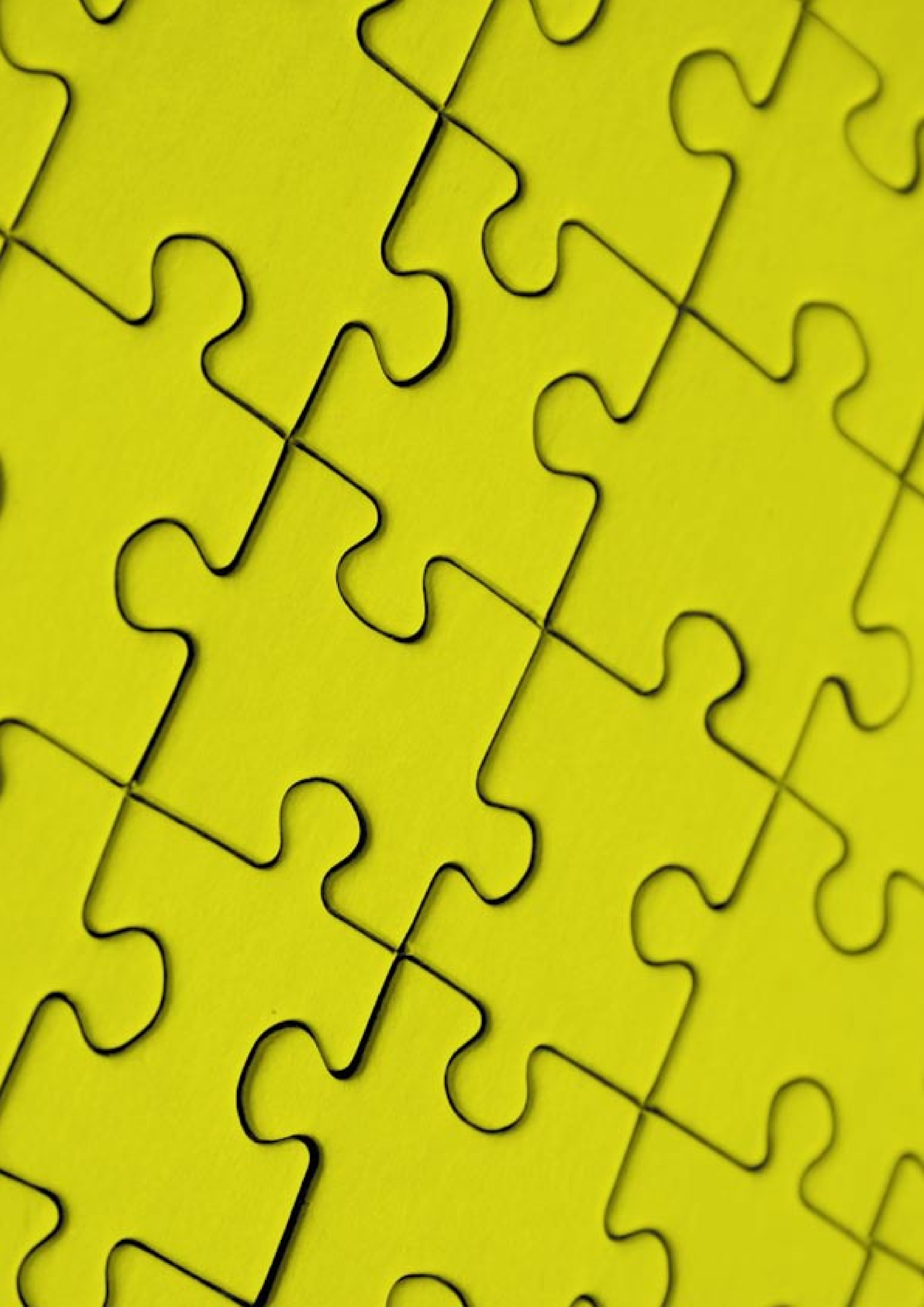
In addition, the following technical amendments are being provided for to facilitate the efficient operation of the international investment funds industry in Ireland.

Marketing Foreign Investment Funds in Ireland

Section 256 (8) of the Companies Act, 1990 provides that foreign investment companies which are equivalent to Part XIII Companies are prohibited from marketing their shares in Ireland without the approval of the Financial Regulator. This provision is being amended at *Head 7 (8),* to first of all, take account of changes affecting closed-ended investment companies by virtue of the implementation of the EU Prospectus Directive and secondly, to give more certainty as to what entities are covered and what activities are and are not, permitted. The proposed provision mirrors, with appropriate modification, a similar provision in Section 9 of the Unit Trusts Act, 1990.

Netting Arrangements

An extension of netting legislation is proposed to encompass netting agreements to which Common Contractual Funds are party and clarify the position regarding certain other netting agreements, with a view to facilitating the participation of Common Contractual Funds and certain other structures in the financial markets on an equivalent basis with other collective investment undertaking structures. This is being provided for at *Head 60* of **Part B9.**



Appendix 1
Functions of the CLRG

Part 7, Company Law Enforcement Act, 2001

Section 67

Establishment of CLRG
There is hereby established a body to be known as the CLRG.

Section 68

Functions of the Review Group
(1) The Review Group shall monitor, review and advise the Minister on matters concerning—

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

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

Section 69

Membership of Review Group
(1) The Review Group shall consist of such and so many persons as the Minister from time to time appoints to be members of the Review Group.
(2) The Minister shall from time to time appoint a member of the Review Group to be its chairperson.

(3) Members of the Review Group shall be paid such remuneration and allowances for expenses as the Minister, with the consent of the Minister for Finance, may from time to time determine.

(4) A member of the Review Group may at any time resign his or her membership of the Review Group by letter addressed to the Minister.

(5) The Minister may at any time, for stated reasons, terminate a person's membership of the Review Group.

Section 70

Meetings and business of Review Group
(1) The Minister shall, at least once in every 2 years, after consultation with the Review Group, determine the programme of work to be undertaken by the Review Group over the ensuing specified period.

(2) Notwithstanding *Subsection (1)*, the Minister may, from time to time, amend the Review Group's work programme, including the period to which it relates.

(3) The Review Group shall hold such and so many meetings as may be necessary for the performance of its functions and the achievement of its work programme and may make such arrangements for the conduct of its meetings and business (including by the establishment of sub-committees and the fixing of a quorum for a meeting) as it considers appropriate.

Appendix 1
Functions of the CLRG

(4) In the absence of the chairperson from a meeting of the Review Group, the members present shall elect one of their numbers to be chairperson for that meeting.

(5) A member of the Review Group, other than the chairperson, who is unable to attend a meeting of the Review Group, may nominate a deputy to attend in his or her place.

Section 71

Annual Report and provision of information to

Minister

(1) No later than 3 months after the end of each calendar year, the Review Group shall make a report to the Minister on its activities during that year and the Minister shall cause copies of the report to be laid before each House of the Oireachtas within a period of 2 months from the receipt of the report.

(2) A report under *Subsection (1)* shall include information in such form and regarding such matters as the Minister may direct.

(3) The Review Group shall, if so requested by the Minister, provide a report to the Minister on any matter—

(*a*) concerning the functions or activities of the Review Group, or

(*b*) referred by the Minister to the Review Group for its advice.

Appendix 2

Negotiation and Transposition of the EU Financial Services Action Plan Measures

Prospectus (Directive 2003/71/EC) Regulations 2005 (S.I. No. 324 of 2005)

A prospectus is a disclosure document containing all the necessary information to enable investors to make an accurate evaluation of the financial position and prospects of the issuer and of the rights derived from the securities being offered. The primary objective of the new legislation is to enhance investor protection through the production of high quality prospectuses and to improve the efficiency of raising capital by issuers through the issue of a single approved prospectus, which will be valid for use across the EU.

These Regulations transposed EU Directive 2003/71/EC and the implementing Commission Regulation 809/2004 which together set down new rules for the drawing up, approval and distribution of prospectuses when securities are offered to the public or admitted to trading on a regulated market. The new legislation took effect on 1 July 2005 and updated and upgraded earlier requirements in this area.

Market Abuse (Directive 2003/6/EC) Regulations 2005

These Regulations transposed the Market Abuse Directive (MAD) which provides for the prevention, detection, investigation and sanctioning of insider dealing and market manipulation. The MAD consists of four EU Directives - the principal 'framework' Directive 2003/6/EC on insider dealing and market manipulation (Market Abuse) and detailed implementing Directives, 2003/124/EC, 2003/125/EC and 2004/72/EC. (Another related instrument, EU Regulation 2273/2003, which has direct application, implements Directive 2003/6/EEC as regards exemption for buy-back programmes and stabilisation of financial instruments.)

The new legislation applies to any financial instrument admitted to trading on a regulated market (or where a request for admission to trading has been made). It introduced a new offence in Irish law, namely, market manipulation.

The new legislation largely replaces Part V of the Companies Act, 1990, which hitherto provided for insider dealing and the Companies (Amendment) Act, 1999 which provided for stabilising activity in relation to the issue or sale of securities.

The Financial Regulator (formerly Irish Financial Services Regulatory Authority (IFSRA) has been designated as the competent authority for carrying out the obligations provided for in the legislation in each case.

The legislation in each case provides for administrative sanctions, in addition to criminal and civil sanctions. The earlier legislation was limited to criminal and civil sanctions only.

Directive of the European Parliament and of the Council of 21 April 2004 on takeover bids

The Directive sets out to establish minimum guidelines for the conduct of takeover bids involving the securities of companies where all or some of those securities are admitted to trading on a regulated market. Given the differences existing between legal systems in the Member States, the European Council decided to limit this Directive to a framework of certain common principles and a limited number of general requirements which Member States will be required to respect through detailed implementing rules.

Appendix 2

Negotiation and Transposition of the EU Financial Services Action Plan Measures

The Directive is viewed as being an essential step towards the objective of fully integrating European capital markets and was transposed into Irish law by the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006 (S.I. No. 255 of 2006) on 20 May, 2006.

Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC

The aim of the Directive is to upgrade the information available to investors, thus helping them to allocate their funds on the basis of a more informed assessment. It seeks to ensure that investors receive interim management statements from those share issuers who do not publish quarterly reports, and half yearly financial reports from issuers of shares or debt securities. In addition, all securities issuers will have to provide annual financial reports within four months after the end of the financial year. The Directive will also improve dissemination of a range of information on issuers, in particular concerning changes in major shareholdings.

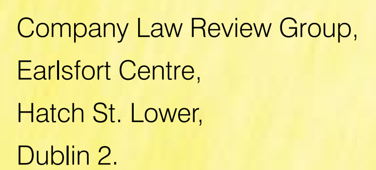
The Directive which was due to be implemented not later than 20th January 2007, is expected to be implemented during the second quarter of 2007. Implementation had to be deferred mainly because the level 2 measures, which form an integral part of this Directive, were not approved by the Commission until the 8th March, 2007.

Proposal to simplify the formation, maintenance and alteration of companies' capital

On 21 September 2004, the European Commission presented a proposal for a Directive to make it easier for public limited liability companies to take certain measures affecting the size, structure and ownership of their capital. The proposal would amend the parts of the 1976 Second Company Law Directive covering the formation, maintenance and alteration of capital. The Amending Directive (2006/68/EC) was formally adopted in 2006 and is due to be implemented in the Member States, not later than 15th April, 2008.

Proposal for a Directive of the European Parliament and of the Council on the exercise of voting rights by shareholders of companies having their registered office in a Member State and whose shares are admitted to trading on a regulated market and amending Directive 2004/109/EC.

This proposal, which arises from the European Commission's "Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union", is for a minimum harmonisation Directive. It seeks to achieve effective simplification of the cross-border voting process and reduction in the disparities between Member States and focuses on selected rights of shareholders in the general meeting. It would introduce minimum standards to ensure that company shareholders have a timely access to complete information in relation to general meetings of the company and have simplified ways of voting without attending the general meeting. Member States are left free to maintain or introduce provisions that are more favourable to shareholders.



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