COMPANY LAW REVIEW GROUP

ANNUAL REPORT 2023

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

Mr Simon Coveney, T.D.,
Minister for Enterprise, Trade and Employment
23 Kildare Street
Dublin 2
D02 TD30

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

7 March 2024

Company Law Review Group

Annual Report 2023

Dear Minister Coveney,

Dear Minister Calleary,

It is my pleasure to present the Company Law Review Group’s Annual Report for 2023.

The Report outlines the progress during 2023 on the Work Programme of the Review Group for 2022-2024, set out at section 3.2 on page 11 together with related activity by the Review Group.

Work Programme Activity during 2023

Report on a Review of Directors’ Compliance Statements under the Companies Acts 2014

As part of the 2022-2024 Work Programme, the Review Group was asked to examine the Directors’ Compliance Statement regime in the interest of good corporate governance. Following controversy as to the scope of the original Directors’ Compliance Statement as provided for in the Companies (Auditing and Accounting) Act 2003, the Review Group had previously examined the issue, publishing majority and minority reports in 2005. The majority report favoured a more limited scope focused on company law and tax law, and that was reflected in the Compliance Statement provided for in the Companies Act 2014.

As the 2014 model of Compliance Statement has now been well embedded into governance practice, and with increased reporting and compliance obligations due to commence in the coming years, it was considered timely to review the objective and scope of the obligations. As part of the review, comparative research was undertaken to ascertain how other common law jurisdictions and European countries sought to address the issue of the directors' role in ensuring compliance with the company's

legal obligations. A survey was also conducted to collate the views and experiences of practitioners and directors of the Directors' Compliance Statement.

I would like to thank the Corporate Governance Committee and particularly its Chair, Mr Salvador Nash, for their work in developing this report for the Review Group.

Report on the Review of Parts 17, 23, and 24 of the Companies Act

The Review Group was tasked with reviewing the appropriateness and utility of locating the provisions of Parts 23 and 24 of the Companies Act in companies legislation when policy responsibility and the corresponding regulatory powers have, over the course of time, moved from the Minister for Enterprise, Trade and Employment to the Minister for Finance. The Parts under consideration relate to and largely govern the activities of listed public limited companies and investment companies. Having examined the legislative history of these provisions along with related provisions in Part 17 of the Companies Act and where current policy responsibility lies, the Review Group recommended that as part of any largescale future consolidation of or the creation of dedicated financial securities legislation, that certain Chapters of Parts 17, 23, and 24 be either revoked, detached from, or retained in companies legislation.

I would like to thank the Public Company Committee for its work on this report.

EU proposal for a Directive on harmonising certain aspects of substantive law on insolvency proceedings.

The Department requested as a priority the technical expertise of the CLRG's Corporate Insolvency Committee to assist the Department in its preparation for negotiations on the European Commission's Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, published on 7 December 2022.[1] The current draft of the proposed Directive raises serious issues as to its compatibility with corporate rescue mechanisms in Irish law, including those most recently amended to accommodate Preventive Restructuring Directive (EU) 2019/1023.

This technical input has taken the form of sharing insight arising from in-depth knowledge and practical experience of insolvency law and an understanding of the implications of the draft proposal. The Committee has met with Department officials on a number of occasions as required and has offered assistance with the drafting of potential alternative texts in order to mitigate the potential adverse effects of the original Proposal. This work will continue into 2024.

I would like to thank Professor Irene Lynch Fannon, the Corporate Insolvency Committee and the additional experts who were brought on to the Committee for their work to date and continuing assistance to the Department.

Law Society of Ireland submission on company incorporations infringing trade marks

The Corporate Governance Committee met with representatives from the Law Society's Intellectual Property and Data Protection Law Committee on foot of receiving their submission seeking changes in the law to deal with the issue of companies being incorporated in Ireland with names that infringe registered trademarks. The submission expressed the perception and experience of intellectual property law practitioners that, in certain instances, such incorporations have been undertaken with

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0702

a view to seek payment from the trademark proprietors. The Committee is considering the submission and exploring potential changes in law, administrative and court procedures.

Related Activity

Meeting with Minister Calleary

On 30 November 2023 I, along with Corporate Governance Committee Chair Mr Salvador Nash, Corporate Insolvency Committee Chair Professor Irene Lynch Fannon, and Review Group Secretary Ms Deirdre Morgan, met with Minister Calleary. At the meeting we were able to highlight issues likely to become of great relevance to company law in the immediate future, including artificial intelligence, harmonisation of insolvency law in the EU, and corporate transparency.

We were particularly pleased that the Minister invited us to establish a practice of meeting him on a half-yearly basis and we look forward to our next such meeting.

Presentation to the Oireachtas

On 1 February 2023 I, along with Corporate Insolvency Committee Chair Professor Irene Lynch Fannon and Review Group Secretary Ms Deirdre Morgan, presented to the Oireachtas Joint Committee on Enterprise, Trade and Employment in relation to the Companies (Protection of Employees' Rights in Liquidations) Bill 2021 (a private member's Bill). In this context, the Review Group's March 2021 report was relevant in that it had considered one of the two proposed provisions in this Bill.

We were treated with great courtesy by the Oireachtas Committee members, and we are happy to assist the Committee as may be required as relevant issues arise.

European Commission Consultation on the Shareholder Rights Directives

The European Commission is undertaking a study on the practical consequences and shortcomings of the Shareholder Rights Directive 2007/36/EC as amended by Directive (EU) 2017/828 (often referred to as SRD2). The study is focusing on how certain provisions of these Directive and the related Commission Implementing Regulation (EU) 2018/1212 are applied in practice in the Member States. The Review Group's Public Company Committee responded to a detailed questionnaire and participated in an interview conducted by the Centre for Strategy and Evaluation Services, the organisation retained by the Commission for the purpose of this consultation. A core theme of the Committee's response to questions related to shareholder rights and shareholder identification was that the absence of a meaningful definition of 'shareholder' means that these Directives do not fulfil their stated intention.

Assistance on Secondary Legislation

Members of the Review Group were pleased to have been able to assist the Department in the preparation of certain statutory instruments in the course of 2023, in particular:

- S.I. No 233/2023 - European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023;
- S.I. No. 322/2023 - European Union (Disclosure of Income Tax Information by Certain undertakings and Branches) Regulations 2023; and
- S.I. No. 353/2023 - European Union (Dematerialised Securities) Regulations 2023.

Review Group and Committee Activity

Details of Review Group and Committee activity is set out in Section 4 on pages 12-13.

100th Plenary Meeting

I was very pleased to have been able to chair what was the 100th plenary meeting of the Review Group on 21 March 2023. This gave us the opportunity to welcome back founding Chair Dr Tom Courtney and the first CLRG Secretary Dr Pat E Nolan, and to reflect on the extensive work that has been undertaken by the Review Group since its establishment.

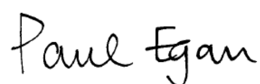
Acknowledgements

I would like to express my sincere thanks to fellow Review Group members and Committee members, both present and those who left the Group in 2023, for all their input into the work of the Group.

I would like to acknowledge the work of the legal researchers who support the work of the Committees, namely, David Allen B.L., Matthew Brady B.L., Shauna Keniry B.L., and Katie Nagle B.L.

Finally, I would particularly like to thank the CLRG Secretariat – CLRG Secretary Deirdre Morgan, and Dan O'Neill, and the Department of Enterprise, Trade and Employment generally for their ongoing support and assistance. This Report is Deirdre's final report as she moves on from her position as CLRG Secretary and I thank her for her dedicated and rigorous work for the Review Group and wish her the very best for the future.

Yours sincerely,



Paul Egan SC
Chairperson
Company Law Review Group

1. Introduction to the Annual Report 2023

1.1 The Company Law Review Group

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

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

1.2 The Role of the CLRG

The CLRG is established to monitor, review and advise the Minister on matters pertaining to company law. In so doing, it is required to "seek to promote enterprise, facilitate commerce, simplify the operation of the Act, enhance corporate governance and encourage commercial probity" as per section 959(2) of the Companies Act 2014. The goal of the Company Law Review Group is that Ireland should have an efficient world-class company law infrastructure.

1.3 Policy Development

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

1.4 Contact Information

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

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

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

Email: clrg@enterprise.gov.ie

2. Company Law Review Group Membership

2.1 Membership of the Company Law Review Group

The membership of the Company Law Review Group on 31 December 2023 is set out in this table.

Member	Nominating body (where applicable)
Paul Egan SC	Ministerial Nominee and Chairperson (Mason Hayes & Curran LLP)
Prof Deirdre Ahern	Ministerial Nominee (School of Law, Trinity College Dublin)
Alan Carey	Revenue Commissioners
Barry Conway	Ministerial Nominee (William Fry LLP)
Margaret Cullen	Institute of Directors in Ireland (IOD)
Richard Curran	Ministerial Nominee (LK Shields LLP)
Emma Doherty	Ministerial Nominee (Matheson LLP)
Ian Drennan	Corporate Enforcement Authority (CEA)
Bernice Evoy	Banking and Payments Federation Ireland
James Finn	Courts Service
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Rosemary Hickey	Office of the Attorney General
Tanya Holly	Department Representative
Neil Keenan	Law Society of Ireland
Eamonn Kennedy	Irish Business and Employers Confederation (IBEC)
Gillian Leeson	Euronext Dublin
Prof Irene Lynch Fannon	Ministerial Nominee (Matheson LLP)
Kathryn Maybury	Small Firms Association
Neil McDonnell	Irish Small and Medium Enterprises Association (ISME)
David McFadden	Companies Registration Office (CRO)
Salvador Nash	The Chartered Governance Institute UK & Ireland (KPMG Law)
Fiona O'Dea	Department Representative
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace LLP)
Maureen O'Sullivan	Companies Registration Office (CRO)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority (IAASA)
Eadaoin Rock	Central Bank of Ireland
Niamh Ryan	Irish Funds Industry Association
Cathy Smith SC	Bar Council of Ireland
Doug Smith	Restructuring & Insolvency Ireland (Addleshaw Goddard (Ireland) LLP)
Tracey Sullivan	Consultative Committee of Accountancy Bodies – Ireland (CCAB-I)

The following members concluded their membership in 2023: Thora Mackey, Institute of Directors, and Rosemary Hickey, Office of the Attorney General.

2.2 Committees of the Company Law Review Group

The memberships of the Review Group's Committees are set out in the following tables.

Corporate Insolvency Committee

Prof. Irene Lynch Fannon	CLRG member and Chairperson
Marie Daly	Covington & Burling LLP
Paul Egan SC	CLRG member
James Finn	CLRG Member
Sarah Flood	Department of Enterprise, Trade and Employment
Michael Halpenny	CLRG member
David Hegarty	Corporate Enforcement Authority (CEA)
Rosemary Hickey	CLRG member
Tanya Holly	CLRG member
Shane McCarthy	KPMG
Neil McDonnell	CLRG member
Tony O'Grady	Matheson LLP
Paddy Purtill	Revenue Commissioners
Niamh Ryan	CLRG Member
Ruari Rynn	William Fry LLP
Amy Reville	Revenue Commissioners
Cathy Shivnan	Corporate Enforcement Authority (CEA)
Cathy Smith SC	CLRG member
Doug Smith	CLRG member

Public Company Committee

Paul Egan SC	Chairperson
Fergus Bolster	Matheson LLP
Nadine Conlon	The Chartered Governance Institute
Margaret Cullen	CLRG Member
Maria Doyle	Revenue Commissioners
Kevin Fee	Central Bank of Ireland
Tanya Holly	CLRG Member
Gillian Leeson	CLRG Member
Liam McCormack	Department of Enterprise, Trade and Employment
Niamh Ryan	CLRG Member
Mark Talbot	William Fry LLP

Corporate Governance Committee

Salvador Nash	CLRG Member and Chairperson (KPMG Law)
Prof Deirdre Ahern	CLRG member
Aisling Byrne	Department of Enterprise, Trade and Employment
Jill Colquhoun	Department of Enterprise, Trade and Employment
Barry Conway	CLRG member
Margaret Cullen	CLRG Member
Richard Curran	CLRG Member
Michael Dillon	Corporate Enforcement Authority
Emma Doherty	CLRG member
Jane Dollard	Department of Enterprise, Trade and Employment
Paul Egan SC	CLRG member
Michael Halpenny	CLRG Member
David Hegarty	Corporate Enforcement Authority (CEA)
Tanya Holly	CLRG Member
Eamonn Kennedy	CLRG Member
Kathryn Maybury	CLRG member
Dr David McFadden	CLRG member
John McGorry	Revenue Commissioners
Susan Monaghan	Irish Auditing and Accounting Supervisory Authority (IAASA)
John P Nolan	Intellectual Property Office of Ireland
Gillian O'Shaughnessy	CLRG member
Niamh Ryan	CLRG member
Tracey Sullivan	CLRG member

3. The Work Programme

3.1 Introduction to the Work Programme

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, in consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items of work to the programme as matters arise. The current work programme began in 2022 and runs until 2024. The work programme is focused on continuing to refine and modernise Irish company law.

3.2 Work Programme 2022-2024

1. Responding to Department requests on an EU proposal of a Directive on harmonising certain aspects of substantive law on insolvency proceedings.

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

3. Reviewing appropriateness and utility of Parts 23 and 24 of the Companies Act 2014 in the context of how the financial markets and their regulation have developed.

4. On the issue of corporate purpose, participating in Departmental public consultations in respect of the Corporate Sustainability Reporting Directive and proposed Corporate Sustainability Due Diligence Directive and considering issues arising as requested.

5. Reviewing examinership law in the context of applying the *optional articles* of the Preventive Restructuring Directive, having regard to developments at domestic, EU and international level.

6. Engagement with Department on relevant legislative proposals concerning Limited Partnerships and Co-operative Societies.

7. Providing ongoing advice to the Department of Enterprise, Trade and Employment in relation to EU, Brexit and international proposals on company law.

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

9. Reviewing enforcement provisions of company law and, if appropriate, make recommendations for change.

4. Review Group and Committee Activity 2023

4.1 Plenary Meetings of the Company Law Review Group

The CLRG meets in plenary session to discuss the progression of the work programme and to formally adopt its recommendations. Four CLRG plenary meetings were held in 2023 on 21 March, 24 May, 25 October, and 6 December. The Review Group was updated on continuing work by its committees.

During the year, the Review Group delivered its Annual Report for 2022 and two other reports, namely: the Report on the Review of Parts 17, 23, and 24 of the Companies Act and Report on a Review of Directors' Compliance Statements under the Companies Acts 2014.

4.2 Committees of the Company Law Review Group

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

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

4.3 Insolvency Technical Committee

An Insolvency Technical Committee was convened during 2023 to provide specialist technical expertise to the Department to assist with its preparations for the negotiations at EU level on proposed legislation on harmonising aspects of insolvency law. The Technical Committee was chaired by Professor Irene Lynch Fannon and met four times in 2023 before it was decided to merge the Technical Committee and the Corporate Insolvency Committee.

4.4 Corporate Insolvency Committee

The Corporate Insolvency Committee is chaired by Professor Irene Lynch Fannon. After the merging of the Technical Committee with the Corporate Insolvency Committee, this committee met four times on the proposal for a Directive on insolvency law. The Committee will continue to work on this topic during 2024 while also examining the new EU proposal for a Regulation on late payments.

4.5 Corporate Governance Committee

The Corporate Governance Committee examines certain aspects of the law related to the governance of companies and is chaired by Mr Salvador Nash. The committee issued a Report on a Review of Directors' Compliance Statements under the Companies Acts 2014. A work programme priority, the committee was asked to review the obligations outlined in relation to the directors' compliance statement and, if appropriate, make recommendations as to how these might be enhanced in the

interest of good corporate governance. In pursuance of this, the committee commissioned a survey of directors and practitioners on their experiences with the directors’ compliance statement.

Provisional agreement on the EU's Artificial Intelligence Act was reached in December 2023. This will set out harmonised rules for the development, placement on the market and use of AI systems in the Union.

The CLRG, which published a report on the impact of AI on company law in the context of corporate governance in 2020, awaits the publication of the text of the Act, and will be available to the Department if it is decided to engage the CLRG further on this topic.

4.6 Public Company Committee

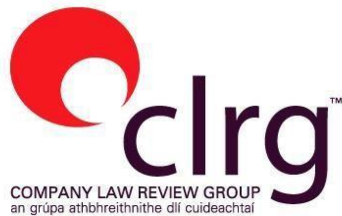
The Public Company Committee is concerned with the law applicable to companies to which Part 23 of the Companies Act applies (primarily public limited companies with listed or traded securities) and is chaired by Mr Paul Egan SC.

The Committee produced a report in 2023 as per item 3 of the Work Programme which reviewed the appropriateness and utility of Parts 17, 23 and 24 of the Companies Act 2014 in the context of how the financial markets and their regulation have developed.

4.7 Corporate Enforcement Committee

The Corporate Enforcement Committee did not meet during 2023 but it is planned that it will reconvene during 2024.

ANNEX 1: CLRG REPORT ON THE DIRECTORS' COMPLIANCE STATEMENT



COMPANY LAW REVIEW GROUP

REPORT ON A REVIEW OF DIRECTORS' COMPLIANCE STATEMENTS UNDER THE COMPANIES ACT 2014

DECEMBER 2023

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

Mr Simon Coveney T.D.,
Minister for Enterprise, Trade and Employment
23 Kildare Street
Dublin 2
D02 TD30

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

21 December 2023

Dear Ministers,

I am pleased to present to you a Report of the Company Law Review Group (**CLRG**) on Directors' Compliance Statements under the Companies Act 2014.

I would like to extend my sincere thanks to the members of the CLRG's Corporate Governance Committee and in particular Committee Chairperson Salvador Nash for their engagement and input in examining these issues.

I would also like to thank the Department of Enterprise, Trade and Employment for their support, in particular, the Secretariat to the Review Group, Deirdre Morgan and Dan O'Neill.

Yours sincerely,

____

Paul Egan SC
Chairperson
Company Law Review Group

1. Introduction

1.1. The Company Law Review Group

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

The CLRG consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and trade unions), regulators (implementation and enforcement bodies) and representatives from Government Departments and Agencies including the Department of Enterprise, Trade and Employment (**the Department**) and the Revenue Commissioners. The Secretariat to the CLRG is provided by the Company Law Review Unit of the Department. Full lists of members of the Company Law Review Group and of the Corporate Governance Committee are set out in Section 2.

1.2. The Role of the CLRG

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

1.3. Policy Development

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

1.4. Contact information

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

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

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

2. The Company Law Review Group Membership

2.1. Membership of the Company Law Review Group

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

Paul Egan SC	Chairperson (Mason Hayes & Curran LLP)
Prof Deirdre Ahern	Ministerial Nominee (School of Law, Trinity College Dublin)
Alan Carey	The Revenue Commissioners
Barry Conway	Ministerial Nominee (William Fry LLP)
Dr Margaret Cullen	Institute of Directors in Ireland
Richard Curran	Ministerial Nominee (LK Shields LLP)
Emma Doherty	Ministerial Nominee (Matheson)
Ian Drennan	Corporate Enforcement Authority
Bernice Evoy	Banking and Payments Federation Ireland CLG
James Finn	The Courts Service
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Rosemary Hickey	Office of the Attorney General
Tanya Holly	Ministerial Nominee (DETE)
Neil Keenan	Law Society of Ireland (Beauchamps LLP)
Eamonn Kennedy	Irish Business and Employers' Confederation (IBEC)
Gillian Leeson	Euronext Dublin (The Irish Stock Exchange PLC)
Prof Irene Lynch Fannon	Ministerial Nominee (Matheson)
Kathryn Maybury	Small Firms Association LTD (KomSec LTD)
Neil McDonnell	Irish Small and Medium Enterprises Association CLG (ISME)
Dr David McFadden	Ministerial Nominee (Companies Registration Office)
Salvador Nash	The Chartered Governance Institute (KPMG Law)
Fiona O'Dea	Ministerial Nominee (DETE)
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace LLP)
Maureen O'Sullivan	Ministerial Nominee (Registrar of Companies)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Eadaoin Rock	Central Bank of Ireland

Niamh Ryan	Irish Funds Industry Association CLG (Dechert LLP)
Cathy Smith	Bar Council of Ireland
Doug Smith	Restructuring and Insolvency Ireland (Addleshaw Goddard (Ireland LLP)
Tracey Sullivan	Consultative Committee of Accountancy Bodies-Ireland (CCAB-I) (Grant Thornton Ireland)

2.2. Corporate Governance Committee

The membership of the Review Group's Corporate Governance Committee is set out in this table.

Salvador Nash	Chairperson
Deirdre Ahern	CLRG member
Barry Conway	CLRG member
Dr Margaret Cullen	CLRG Member
Richard Curran	CLRG member
Emma Doherty	CLRG member
Jane Dollard	DETE Nominee
Paul Egan SC	CLRG member
Michael Halpenny	CLRG member
David Hegarty	Corporate Enforcement Authority
Tanya Holly	CLRG member
Eamonn Kennedy	CLRG member
Dr David McFadden	CLRG member
John McGorry	Revenue
Kathryn Maybury	CLRG member
Susan Monaghan	IAASA
Gillian O'Shaughnessy	CLRG member
Niamh Ryan	CLRG member
Tracey Sullivan	CLRG Member

3. The Work Programme

3.1. Introduction to the Work Programme

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, in consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items of work to the programme as matters arise. The current work programme began in November 2022 and runs until mid-2024. The work programme is focused on continuing to refine and modernise Irish company law.

3.2. Company Law Review Group Work Programme 2022-2024

The Review Group's Work Programme during the currency of which this Report was prepared included the mandate to review the obligations outlined in relation to the directors' compliance statement in the Companies Act 2014, and, if appropriate, make recommendations as to how these might be enhanced in the interest of good corporate governance." This Report is delivered in fulfilment of the Review Group's mandate under this heading.

3.3. Decision-making process of the Company Law Review Group

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

3.4. Committees of the Company Law Review Group

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

The Committee met three times (both in person and using video conferencing facilities) to consider these issues, as well as circulating draft text of its proposed conclusions several times between meetings.

4. Report on a review of Directors' Compliance Statements

4.1. Introduction

The Committee was asked to review the directors' compliance statements regime and how any improvements might be made in the interest of good corporate governance.

4.2. Defined terms

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

1963 Act	Companies Act 1963
1990 Act	Companies Act 1990
2001 Act	Company Law Enforcement Act 2001
2003 Act	Companies (Auditing and Accounting) Act 2003
2014 Act	Companies Act 2014
CEA	Corporate Enforcement Authority
Committee	the Review Group's Corporate Governance Committee
Report	CLRG 2005 Report on Directors' Compliance Statement

In this Report, references to sections, Chapters, Parts and Schedules are to sections, Chapters and Parts of and Schedules to the 2014 Act unless otherwise stated.

4.3. Background to and scope of Directors' Compliance Statements

Pursuant to section 225 of the 2014 Act, directors of in-scope companies are required to complete a directors' compliance statement in which they acknowledge their responsibility for securing the company's compliance with relevant obligations listed in the Act and to set out their policies for securing such compliance.

The directors' compliance statement was first introduced by Section 45 of the 2003 Act, although the section was never commenced. Its introduction was set against the backdrop of the 1998 McDowell Working Group on Company Law Compliance and Enforcement which identified a "culture of non-compliance" in Irish Company law[2] and also the Review Group on Auditing's 2000 DIRT report[3], which recommended the introduction of the directors' compliance statement owing to its finding that non-compliance by Irish companies was more widespread than had been thought.

The objective of the directors' compliance statement was to foster a culture of compliance within Irish companies by ensuring appropriate procedures were in place and to emphasise to directors their responsibility in ensuring the company's compliance with its statutory obligations.

[2] *Parliamentary Inquiry into DIRT*, First Report by the Committee of Public Accounts (Stationery Office, Pn 7963, 1999)

[3] See *The Report of the Review Group on Auditing* (Stationery Office Pn 8683, 2000)

4.3.1. Section 45 Companies (Auditing and Accounting) Act, 2003

Under section 45 of the 2003 Act, directors of qualifying companies would have been required to prepare a compliance statement setting out the company's policies for ensuring compliance with its statutory obligations, its internal control procedures for securing compliance and the arrangements for implementing and reviewing the effectiveness of its policies. They would also have been required to include an annual compliance statement in their annual report to the shareholders in which they were to acknowledge that they were responsible for securing the company's compliance with its relevant obligations and confirm the necessary procedures were in place to ensure such compliance. If this was not done, they would be required to explain why not – "comply or explain".

Any failure to prepare a compliance statement under the Act was a criminal offence carrying up to a 12-month sentence on summary conviction or up to 5 years on indictment. Making a false statement was also an offence under the Act.

Section 45 was to apply to all public companies and to private limited companies with a turnover exceeding €15,236,853 and a balance sheet exceeding €7,618,428.

The relevant obligations under section 45 were to include any obligations under the Companies Acts, Tax Acts, and any other enactments that may materially affect the company's financial statements.

The Act also created a role for audit committees who would have been required to review the compliance statement and make a recommendation to the board prior to its approval. Auditors would have also been required to state in the auditor's report whether the assertions in the directors' compliance statement were fair and reasonable in their opinion and to report any deficiencies to the Director of Corporate Enforcement. It would also be a criminal offence under the Act if an auditor failed to comply with these obligations.

4.3.2. CLRG 2005 Report on Directors' Compliance Statements

Following opposition from the business community,[4] many of whom believed the requirement for a directors' compliance statement would create a significant burden for companies, the compliance statement was referred to the CLRG for consideration and to prepare a report.

Following a detailed review, in a special report published in 2005[5], a majority of the CLRG recommended against the commencement of section 45 of the 2003 Act, considering the benefits to be outweighed by the potential adverse effects which had been identified. The Irish Congress of Trade Unions (ICTU) the Office of the Director of Corporate Enforcement (ODCE, the precursor of the CEA), and the Revenue Commissioners each expressed reservations as to the majority recommendation, set out in Appendices A, B and C, respectively of the 2005 Report. The Report concluded that the commencement of this section would place a disproportionate and unnecessary burden on companies in return for what it considered to be 'intangible' benefits and considered it difficult to point to any 'particular mischief' that it would remedy.[6] It found that the additional procedures, policies, monitoring and ultimately expenditure that would be required of companies was excessive and could have a disproportionate effect on national competitiveness, reduce foreign direct investment and could lead to companies registering outside the state and the remit of the

[4] Deirdre Ahern *Directors' Compliance Statements under the microscope,* Commercial Law Practitioner 2006, 13(5), 137-145

[5] *Company Law Review Group, Report on Directors' Compliance Statement (2005)*

[6] *Ibid* at Appendix 1

Irish authorities. It also considered that the burdens created by requiring the statement would have a greater impact on smaller companies.

The Report also concluded that the objectives for the introduction of the directors' compliance statement had already been substantively met through the introduction of various other corporate governance initiatives, such as:

- The establishment of the Office of the Director of Corporate Enforcement, the Irish Financial Regulatory Authority and the Irish Auditing and Accounting Supervisory Authority
- Section 383(3) of the 1963 Act (inserted by section 100 of the 2001 Act), which stated that it was the duty of each director and secretary of a company to ensure that the requirements of the Companies Acts are complied with by the company
- Section 194(5) of the 1990 Act (inserted by section 74 of the 2001 Act), which required auditors to report the reasonable suspicion of indictable offences under the Companies Acts to the Director of Corporate Enforcement

The Review Group also thought section 45 represented a materially significant departure from international developments on corporate governance[7] in circumstances where no other common law jurisdiction had introduced a compliance statement regime of such reach. They noted that the prevailing global view was that corporate governance should be based on complying with a code of best practice principles rather than prescriptive legislation and indicated that a 'wait and see' approach would be preferable, especially given the fact that the European Commission had recognised the importance of global coherence and a light regulatory touch in corporate governance matters.[8] The Review Group further noted that listed companies in Ireland and the UK were already bound to the best practice code and that the directors' compliance statement regime would mark a considerable addition to this requirement.

The majority of the CLRG therefore favoured the repeal of section 45 entirely but were conscious of this being interpreted negatively as a win for 'business v regulators' as well as noting that it was the clear intention of the Oireachtas to put in place a form of directors' compliance statement requirement. Consequently, the Review Group opted to put forward an alternative proposal for consideration.

4.3.3. The CLRG Proposal

As a compromise, the CLRG drafted a revised proposal which sought to minimise the burden to businesses while achieving the same aims as the original section 45 of the 2003 Act. The CLRG's draft text was ultimately adopted, almost verbatim, as section 225 of the 2014 Act.

4.3.4. Section 225 Companies Act 2014

Directors' compliance statements were reintroduced under the 2014 Act in a more moderate form than had previously been provided for under the 2003 Act and were made a requirement for affected companies for the financial year ending in 2016.

In their statement, directors must still acknowledge their responsibility for securing compliance with the relevant obligations listed in the 2014 Act and must confirm that a compliance policy has been

[7] *Ibid* at 94

[8] Ahern, *op. cit*, 137-145

prepared which sets out the company's policies in relation to compliance with its obligations. If a policy had not been prepared, then the statement must explain why not. They must also confirm that, in their opinion, there are appropriate structures in place for securing material compliance and that they have undertaken a review of these structures within the financial year. These structures may include reliance on advice from external advisors or employees, but such persons must have the necessary experience to advise the company on compliance with the relevant obligation.

The 2014 Act, however, only requires directors' compliance statements from directors of larger scale companies than would have been the case under the 2003 Act. It applies to public limited companies (other than investment companies), limited companies, designated activity companies, and companies limited by guarantee with a balance sheet exceeding €12.5 million and a turnover of greater than €12.5 million, although the amounts may be altered by the Minister. It does not apply to unlimited companies.

The number of relevant obligations which must be covered by the compliance statement have also been reduced under the 2014 Act which now requires a statement of compliance with only the more serious obligations of which a breach would constitute a category 1 or 2 offence, tax obligations, and serious market abuse and prospectus and transparency offences.

4.4. Corporate Governance Reporting: Overview of other Jurisdictions

Comparative research was undertaken to ascertain how other common law jurisdictions and European countries addressed corporate governance. The full text of the memorandum can be found at Appendix 3.

The research considered a number of jurisdictions including the United Kingdom, Australia, Belgium, Singapore and investigated whether a comparator for the directors' compliance statement could be located. Corporate governance in other jurisdictions comprises a set of principles, usually legislation akin to the 2014 Act or in the form of a code. Generally, in-scope companies were large listed companies. Most jurisdictions had a similar "comply or explain" provision in their respective codes.

The research also addressed the position generally within the European Union in relation to corporate governance and the Corporate Sustainability Reporting Directive (CSRD)[9].

The conclusion reached was that there are no comparable provisions to section 225 of the 2014 Act. While other jurisdictions are of relevance and bear some similarity, the obligation imposed on directors, in for example Singapore and the United Kingdom, is not as onerous as the obligation imposed in this jurisdiction. Furthermore, in countries which have an applicable code (and which applies to listed companies), most contain the "comply or explain" provision similar to section 225.

4.5. CLRG Survey to assess views and experience of directors and practitioners

The Committee elected to conduct a survey on the effectiveness and usability of the directors' compliance statement to ascertain the views of those who interact with it. Two surveys were

[9] Directive (EU) 2022/2464 of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU as regards corporate sustainability reporting (the 'Corporate Sustainability Reporting Directive' or 'CSRD') L 322/15.

created, similar in nature, with one designed for practitioners and the second for directors. The directors' survey was included in the Institute of Directors' monthly ezine which issued to in excess of 3000 directors and 1700 stakeholders (which has an open rate of over 45%). In addition, both surveys were disseminated by members of the Committee and the CLRG to relevant contacts and were publicised on the websites of the Department and the Corporate Enforcement Authority and their respective social media platforms. The surveys were live for a period of 3 weeks from 7 February until 28 February 2023.

The surveys sought feedback from the participants on the following general areas: the value, relevancy and their overall impression of the directors' compliance statement as currently provided for; the perceived benefits and challenges; whether the directors' compliance statement is achieving its objectives; process and costs; the impact on a company's competitiveness; the scope, content and degree of prescription; verification; consequences of non-compliance; and suggestions for improvement.

4.5.1. Survey results

The response rate was disappointing for both surveys, with only 31 responses received for each survey. Although it is difficult to determine the number of companies in scope of the directors' compliance statements, limited research indicates that there is anywhere between 1,000 and 3,000 companies in scope of the directors' compliance statements. If one assumes that each had 2 directors, and each is likely to have more due to their size, the number of directors affected is in the region of 2,000 to 6,000. Consequently, the results cannot be regarded as being representative of the views of either directors or practitioners. The results and comments were therefore viewed by the Committee as providing a small sample of diverse opinions on the directors' compliance statement. From those responses received, the results varied significantly between both surveys and within each survey.

Overall, the results suggest the practitioners support the directors' compliance statement while there appears to be a lack of understanding on the part of the directors. 52% of practitioners and 45% of directors agreed that the directors' compliance statement should continue to apply to all companies to which it currently applies. Of all participants, 48% voted for the option to retain the DCS as it currently applies, which means 52% voted to reduce the scope in some way. A summary of the findings of the surveys is set out in a working paper at Appendix 4, but as referenced above, it is important to emphasise that given the very small number of responses received, the responses cannot be taken to be representative of the views of in-scope companies.

4.6. Committee Analysis

Noting that the findings of the surveys could not be used to reliably determine the views of directors or practitioners on the directors' compliance statement, the Committee considered several other factors in its review.

There have been no complaints or submissions received by the CLRG, the Department or the CEA concerning the directors' compliance statement. The request for the CLRG to review the directors' compliance statement was a general request in the interests of good corporate governance. The Committee considered that if there was a substantial issue with the directors' compliance statement, more practitioners and directors would have completed the survey. There appears to be no evidence to indicate that the directors' compliance statement, as is currently set out in section 225 of the 2014 Act, is causing concern.

The Committee considered that the low response rate could be interpreted as a general acceptance of the requirements of the directors' compliance statement. If this is the case, it would support the conclusion that there is no widespread issue with the directors' compliance statement.

Additionally, given the request to the various bodies to partake in the survey and ultimately only 62 people responding to the survey, it is reasonable to deduce that there is no evidence of any concern with the directors' compliance statement. In that regard, given its requirements and offences, if there was any issue and or if improvements could be made in the interests of good corporate governance, feedback could have been provided from:

- **Auditors:** relaying their experiences of directors' compliance statement not being made, procedures and policies not being in place and/or less than ideal explanations for not completing the directors' compliance statement

- **Directors:** commenting on additional costs to comply and or the obligations imposed on directors

- **CEA and its predecessor:** receiving complaints regarding the directors' compliance statement

The Committee noted that none of the foregoing bodies have expressed any concerns with the directors' compliance statement (although the CEA did suggest that consideration could perhaps be given to revisiting the role of the auditor from an assurance perspective) nor have the auditors or directors suggested any improvements to it. Indeed, no complaints have ever been received by the CEA or its predecessor in relation to the director's compliance statement.

Whether or not there is a public benefit to the directors' compliance statement was discussed by the Committee, with a number of members expressing their doubt over the value added as it is currently formulated. The Committee considered that a broad and imposing directors' compliance statement was originally proposed by the legislator in section 45 of the 2003 Act which received opposition from the business community. The 2005 Report recommended a version of the directors' compliance statement to assuage public concern at the time (and which was ultimately adopted in the 2014 Act). The rationale at that time for what is now the directors' compliance statement remains valid today.

4.6.1. Other Factors

The Committee gave consideration to the reporting requirements for in-scope companies in three different circumstances. First, in scope companies for the directors' compliance statement. Second, in scope companies for the CSRD and third, the companies in scope for the purposes of establishing an audit committee pursuant to section 167 of the 2014 Act. The thresholds of each are set out below:

In-scope companies for the **directors' compliance statement** are companies that have both:

- Balance Sheet Total – greater than €12.5 million; and
- Turnover – greater than €25 million

In-scope companies for the **CSRD** are companies with two or more of the following:

- Balance Sheet Total – greater than €20 million
- Turnover – greater than €40 million
- More than 250 employees

In-scope companies for establishing **an audit committee** are companies that have both:

- Balance Sheet Total – greater than €25,000,000; and
- Turnover – greater than €50,000,000

Other matters the Committee took account of during the course of deliberations were:

- Whether or not the directors' compliance statement imposed an unjustified burden on in-scope companies
- Whether there was a need to educate directors and practitioners about the directors' compliance statement
- Verification of the directors' compliance statement
- When the directors' compliance statement was first introduced there was a flurry of activity, but the Committee considered whether the directors' compliance statement has now become "boilerplate"
- The Committee took account of the "comply or explain" provision in section 225 of the 2014 Act

Additionally, it should be noted that both the CLRG recommendation in the Report and section 225 of the 2014 Act as enacted focus primarily on a director acknowledging his or her responsibility for securing the company's compliance with its relevant obligations and either confirming that certain measures have been complied with or explaining why they have not.

Understanding the foregoing is critical to comprehending the legal obligations imposed on directors pursuant to the directors' compliance statement. The introduction of the original directors' compliance statement was in the context of the 1998 McDowell Working Group on Company Law Compliance and Enforcement and a culture at that time of noncompliance. Its objective to foster a culture of compliance within Irish companies was identified in the Report as having been substantially met, resulting in the alternative and less onerous directors' compliance statement as enacted in section 225 of the 2014 Act. The foregoing and the overriding duty of directors under section 223(1) of the 2014 Act to ensure compliance with the Companies Act may provide some explanation as to why legislature enacted section 225 of the 2014 Act and designated non-compliance with section 225 of the 2014 Act as a category 3 offence.

The Committee concluded that, overall, the director's compliance statement appeared to fulfil the intention of the Oireachtas. The ICTU member suggested expanding the obligations to include both environmental law obligations as well as duties to employees. However, the prevailing view was that the CSRD will impose sufficient reporting obligations on companies in the area of environmental law, to include the involvement of auditors. It was noted by the Committee Chair that duties to employees already exist in legislation, and it would not be appropriate to single out this fiduciary duty for inclusion over all others. It was also noted that a similar proposal in 2017 did not find support[10]. The low response to the survey, the lack of any suggestions for improvements or amendments, the absence of

[10] Company Law Review Group Report on the Protection of Employees and Unsecured Creditors, page 33.

any complaints in respect of the directors' compliance statement and no evidence being presented to the Committee that the directors' compliance statement should be enhanced in any way in the interests of corporate governance supported the Committee's conclusion that the directors' compliance statement was operating for its intended purpose.

However, the Committee proposed that consideration should be given to reviewing the thresholds for in-scope companies for the directors' compliance statement in the context of the thresholds applicable for in-scope companies for establishing an audit committee and the in-scope companies for the CSRD. The Committee believed that this would streamline the reporting requirements of companies in scope and be in the interest of good corporate governance. The Committee also considered that a proportionate, standardised approach would reduce the burden on companies, particularly small companies, and would provide greater consistency to businesses generally in relation to their statutory obligations.

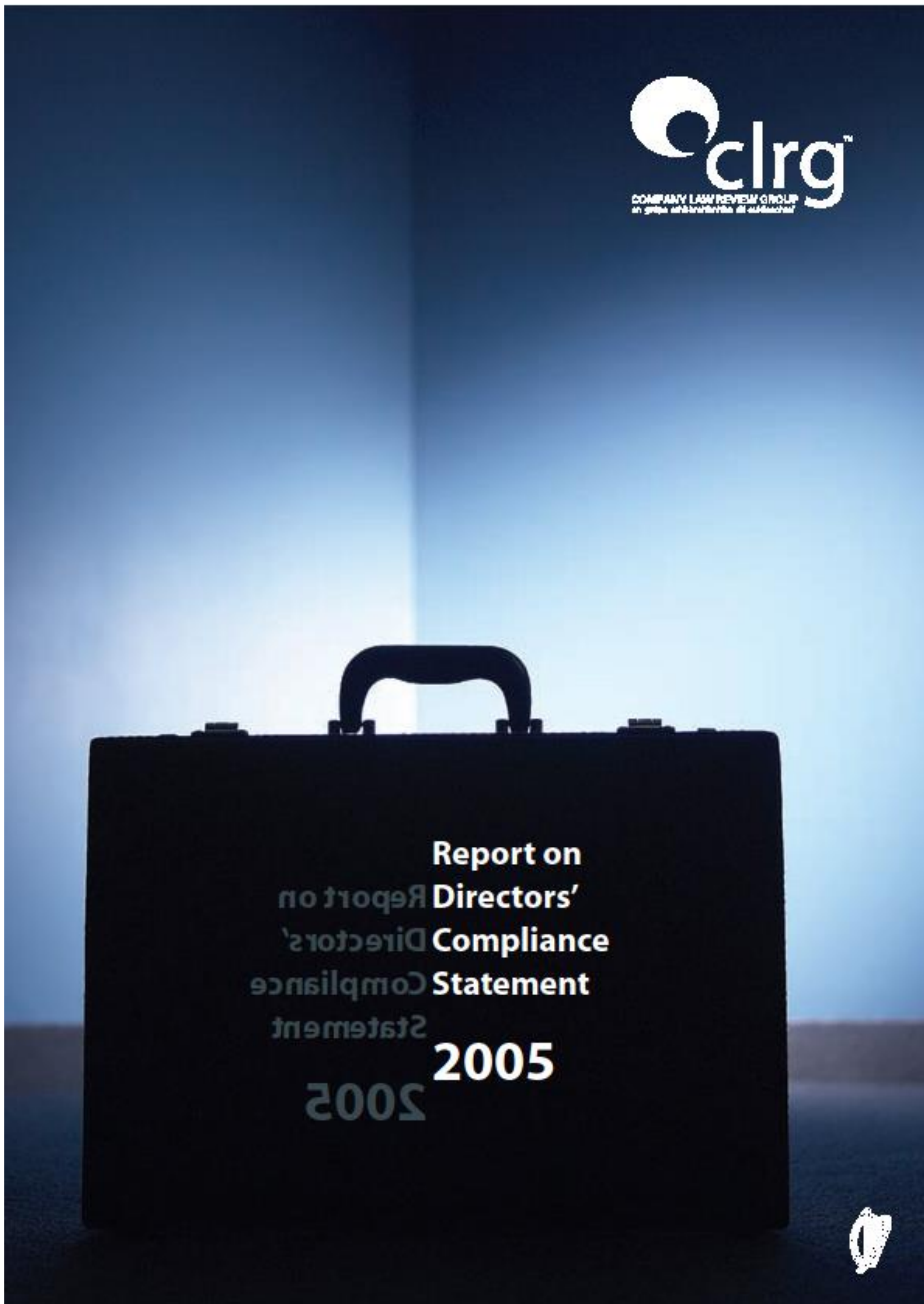
4.7. Recommendation

The Committee's brief was to review the directors' compliance statement with a view to making recommendations for improvements in the interests of good corporate governance. Research was undertaken on equivalent obligations in other jurisdictions, a survey was conducted of stakeholders', views obtained from members of the Committee, and feedback and input provided by the CEA.

While some themes emerged from the surveys, no reliance can be placed on the results due to the small number of responses. Other than some members of the Committee querying the directors' compliance statement as it is currently formulated and suggesting potential sources of assurance, no member of the committee, director or auditor profession identified any area of concern or areas to improve or enhance the directors' compliance statement.

The Review Group therefore concludes that the directors' compliance statement is achieving the desired objective of the Oireachtas as enacted in section 225 of the Act 2014 and was provided with no evidence to warrant a recommendation for any substantive change.

Appendix 1 CLRG 2005 Report on Directors' Compliance Statements



Report available at: https://www.clrg.org/publications/clrg_report_on_dcs.pdf

Appendix 2 Section 225 Companies Act 2014

Directors' compliance statement and related statement

225. (1) In this section—

"amount of turnover" and "balance sheet total" have the same meanings as they have in F73[*section 275*];

"relevant obligations", in relation to a company, means the company's obligations under—

(a) this Act, where a failure to comply with any such obligation would (were it to occur) be—

(i) a category 1 offence or a category 2 offence; or

(ii) a serious Market Abuse offence or a serious Prospectus offence;

and

(b) tax law;

"serious Market Abuse offence" means an offence referred to in ***section 1368***;

"serious Prospectus offence" means an offence referred to in ***section 1356***;

"tax law" means—

(a) the Customs Acts;

(b) the statutes relating to the duties of excise and to the management of those duties;

(c) the Tax Acts;

(d) the Capital Gains Tax Acts;

(e) the Value-Added Tax Acts;

(f) the **Capital Acquisitions Tax Consolidation Act 2003** and the enactments amending or extending that Act;

(g) the **Stamp Duties Consolidation Act 1999** and the enactments amending or extending that Act; and

(h) any instruments made under an enactment referred to in any of *paragraphs (a)* to *(g)* or made under any other enactment and relating to tax.

(2) The directors of a company to which this section applies shall also include in their report under ***section 325*** a statement—

(a) acknowledging that they are responsible for securing the company's compliance with its relevant obligations; and

(b) with respect to each of the things specified in *subsection (3)*, confirming that the thing has been done or, if it has not been done, specifying the reasons why it has not been done.

(3) The things mentioned in *subsection (2)(b)* are—

(a) the drawing up of a statement (to be known, and in this Act referred to as, a “compliance policy statement”) setting out the company’s policies (that, in the directors’ opinion, are appropriate to the company) respecting compliance by the company with its relevant obligations;

(b) the putting in place of appropriate arrangements or structures that are, in the directors’ opinion, designed to secure material compliance with the company’s relevant obligations; and

(c) the conducting of a review, during the financial year to which the report referred to in *subsection (2)* relates, of any arrangements or structures referred to in *paragraph (b)* that have been put in place.

(4) The arrangements or structures referred to in *subsection (3)(b)* may, if the directors of the company in their discretion so decide, include reliance on the advice of one or more than one person employed by the company or retained by it under a contract for services, being a person who appears to the directors to have the requisite knowledge and experience to advise the company on compliance with its relevant obligations.

(5) For the purposes of this section, the arrangements or structures referred to in *subsection (3)(b)* shall be regarded as being designed to secure material compliance by the company concerned with its relevant obligations if they provide a reasonable assurance of compliance in all material respects with those obligations.

(6) If default is made in complying with *subsection (2)*, each director to whom the default is attributable shall be guilty of a category 3 offence.

(7) Subject to *subsection (8)*, this section shall apply to a company if, in respect of the financial year of the company to which the report referred to in *subsection (2)* relates—

(a) its balance sheet total for the year exceeds—

(i) subject to *subparagraph (ii)*, €12,500,000; or

(ii) if an amount is prescribed under ***section 943****(1)(i)*, the prescribed amount;

and

(b) the amount of its turnover for the year exceeds—

(i) subject to *subparagraph (ii)*, €25,000,000; or

(ii) if an amount is prescribed under ***section 943****(1)(i)*, the prescribed amount.

(8) This section does not apply to any company that is of a class exempted under ***section 943****(1)(g)* from this section.

Appendix 3 Corporate Governance Reporting in other jurisdictions

MEMORANDUM

To: Corporate Governance Committee, Company Law Review Group

From: Katie Nagle BL

Re: Corporate Governance Reporting: an overview

INTRODUCTION

1. Section 225 of the Companies Act 2014 ("**the 2014 Act**") provides that the directors of a company shall include in their report under s 325, a statement acknowledging that they are responsible for securing the company's compliance with its relevant obligations and with respect to the matters in s 225(3), confirming that the thing has been done or, if it has not been done, specifying the reasons why it has not been done.

2. The matters listed in s 225(3) are:

   - The drawing up of a compliance policy statement setting out the company's policies that in the director's opinions are appropriate to the company, respecting compliance by the company with its relevant obligations;

   - The putting in place of appropriate arrangements or structures that are, in the director's opinion, designed to secure material compliance with the company's relevant obligations; and

   - The conducting of a review during the financial year to which the report relates of any arrangements or structures, referred to in the foregoing paragraph, that have been put in place.

3. This memorandum will explore the position of various European countries and other common law jurisdictions to ascertain the position taken in respect of the directors' compliance statement, general corporate government and other issues which may be of interest.

4. For the purposes of this memorandum, I have not provided detailed information on the position in Ireland.

THE UNITED KINGDOM

5. Corporate governance in the United Kingdom is covered by the Companies Act 2006 ("**the UK Companies Act**") which sets out the requirements for corporate decision making and the consequences of getting it wrong.

6. The UK have also implemented the Corporate Governance Code ("**the Code**"); an updated set of Principles that emphasise the value of good corporate governance for long-term sustainable success. The introduction to the Code helpfully sets out how, through effective use of the Code, good governance of the company can contribute to its long- term sustainable success and achieves wider objectives.

7. The Code does not set out a rigid set of rules; instead, it offers flexibility through the application of the Principles through "*comply or explain*" provisions and supporting guidance.

8. The effective application of the Provisions in the Code should be supported by high quality reporting on the Provisions. The Code encourages companies to avoid a 'tick box' approach in their compliance.

9. An alternative to complying with a Provision may be justified in particular circumstances based on a range of factors, including the size, complexity, history and ownership structure of a company.

10. Explanations should set out the background, provide a clear rationale for the action the company is taking, and explain the impact that the action has had. Where a departure from a Provision is intended to be limited in time, the explanation should indicate when the company expects to conform to the Provision. Explanations are a positive opportunity to communicate, not an onerous obligation.

11. Corporate governance reporting should also relate coherently to other parts of the annual report – particularly the Strategic Report and other complementary information – so that shareholders can effectively assess the quality of the company's governance arrangements, and the board's activities and contributions. This should include providing information that enables shareholders to assess how the directors have performed their duty under s 172 of the UK Companies Act to promote the success of the company.

12. The Code is monitored by the Financial Reporting Council who publishes an annual report on its impact and implementation.

Application of the Code

13. The Code is applicable to all companies with a premium listing, whether incorporated in the UK or elsewhere. The new Code applies to accounting periods beginning on or after 1 January 2019.

14. For parent companies with a premium listing, the board should ensure that there is adequate co-operation within the group to enable it to discharge its governance responsibilities under the Code effectively. This includes the communication of the parent company's purpose, values and strategy.

15. Externally managed investment companies (which typically have a different board and company structure that may affect the relevance of particular Principles) may wish to use the Association of Investment Companies' Corporate Governance Code to meet

their obligations under the Code.

16. A Premium Listing means that a company must meet standards that are over and above (often described as 'super-equivalent') those set forth in the EU legislation, including the Code. Investors trust the super-equivalent standards as they provide them with additional protections. By virtue of these higher standards, companies may have access to a broader range of investors and may enjoy a lower cost of capital owing to heightened shareholder confidence. A Premium Listing is only available to equity shares issued by commercial trading companies.[11]

AUSTRALIA

17. Corporate governance in Australia is shaped by a framework of legal rules, soft law and market expectations. It does not have a general corporate governance code that all companies must comply with.

18. The Corporations Act 2001 ("**Corporations Act**") regulates the affairs of the internal companies which includes, as one would expect, the nature and form of a company's constituent document, the roles and powers of the board of directors and the shareholder, shareholder meetings and shareholder remedies.

19. Section 180 deals with the general duties in civil proceedings (and are fully detailed therein). The duties which apply to a company director are those which are generally provided by company directors; a duty to act with care and diligence[12]; make business judgment decisions in good faith and for a proper purpose, ensuring they do not have a material personal interest in the subject matter of the judgment, and to inform themselves about the subject matter of the judgment and to the extent they reasonably believe to be appropriate and rationally believe that the judgment is in the best interests of the judgment[13]; a general duty to act in good faith is also contained therein.[14]

The Directors report

20. Section 298 deals with the annual directors' report. Section 299 provides some general information which ought to be contained in the Annual directors' report; s 299A provides the additional requirements for listed entities; the specific information is contained in s 300.

21. Section 302 deals with the directors' report and the half year financial report. The contents of the half year report are dealt with in section 303 generally and interestingly, at section 303(4) entitled "*Director's declaration*" provides:

> *(4) The directors' declaration is a declaration by the directors:*

[11] A Guide to Listing on the London Stock Exchange (London Stock Exchange, November 2010) https://docs.londonstockexchange.com/sites/default/files/documents/guide-main-market-pdf.pdf p 8
[12] Corporations Act 2001, Section 180(1)
[13] Corporations Act 2001, Section 180(2)(a) – (d)
[14] Corporations Act 2001, Section 181

(c) whether, in the directors' opinion, there are reasonable grounds to believe that the disclosing entity will be able to pay its debts as and when they become due and payable; and

(d) whether, in the directors' opinion, the financial statement and notes are in accordance with this Act, including:

(i) section 304 (compliance with accounting standards); and
(ii) section 305 (true and fair view).

(5) The declaration must:

(a) be made in accordance with a resolution of the directors; and
(b) specify the day on which the declaration is made; and
(c) be signed by a director.

22. In particular, the requirements with which the director must declare compliance are ss 304 and 305, which provide:

304 Compliance with accounting standards and regulations

The financial report for a half-year must comply with the accounting standards and any further requirements in the regulations.

305 True and fair view

The financial statements and notes for a half-year must give a true and fair view of:

(a) the financial position and performance of the disclosing entity; or
(b) if consolidated financial statements are required—the financial position and performance of the consolidated entity.

This section does not affect the obligation under section 304 for financial reports to comply with accounting standards.

23. One will note that the requirements of a director in his/her declaration is not as onerous as the Irish provisions, and a director must only declare that the report is in compliance with the aforementioned sections of the Corporation Act. Moreover, the requirement for a directors' declaration would appear to only apply to the half year financial report.

Corporate governance generally

24. The Australian Securities Exchange ("**ASX**") is the principal securities exchange for listed equities in Australia. Companies listed on the ASX must comply with the listing rules ("**the Rules**"). These are similar in nature to the Code in the United Kingdom. The Rules supplements the Corporation Act.

25. Similar to the Code, it operates on an “*if not, why not*” basis. Essentially, the Rules require listed entities to report annually on the extent to which they follow the recommendation in the code. If a listed entity does not follow a recommendation, it must identify that fact in its report and explain why.

26. The corporate governance environment in Australia is currently going through a period of significant transformation raising the question of whether in this fluid and shifting environment company and board performance can still be assessed largely on the basis of profit, share price and dividends generated over the short term.[15]

BELGIUM

27. In Belgium, the main principles of corporate governance are enshrined in the Belgian Companies and Associations Code (“**CAC**”). Listed companies are subject to the Belgian Corporate Governance Code (“**the Belgian Code**”). The EU requirements are also applicable and are discussed hereunder.

28. The Belgian Code supplements the CAC and operates on the same “*comply or explain*” basis, as we have previously seen. The Belgian Code, however, acknowledges that compliance with a number of the provisions, provided that there is justification for same. The introduction to the Belgian Code notes:

> *This requires board members to reflect on the objective of the provision and the underlying idea.* ***A deviation is not a problem as such, provided that the reasons are adequately motivated and reported****. The 2020 Code provides guidance on how to do this. The Committee will continue to monitor the quality of the reported explanations on an annual basis.* ***Where explanations are given that are insufficiently convincing, the Committee will take this up directly with the company in question.*** (emphasis added)

29. The CAC sets out some of the requirements of directors’ duties, although it should be noted that there is no exhaustive list laid down in Belgian law of the key duties of directors.[16] The duties are those we commonly see including a duty of care and the duty of loyalty; decision making with respect to the general strategy of the company and acting as a reasonable, prudent and diligent person; and the convening of and reporting to the general shareholders’ meeting, amongst others.

30. I have not found any similar provisions to the directors’ compliance statement, or any requirement of a company director of a similar nature to the Irish legislation. Although I am confident that no such provision exists in Belgian Law, I have had to use online translations tools to translate the matters to English and there is a possibility that some of the translations are not accurate. All efforts have been made to ensure accuracy.

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[15] Rix, *The new Australian system of corporate governance: Board governance and company performance in a changing corporate governance environment*, January 2019

[16] Global Guide to Directors’ Duties, Belgium, (DLA Piper, 31 January 2022) <https://www.dlapiperintelligence.com/directorsduties/countries/index.html?t=duties-and-obligations&s=03-transactions&c=BE>

SINGAPORE

31. Singapore is an oft forgotten common law jurisdiction which models its law on the Common Law system of the United Kingdom. Company Law is governed by the Companies Act 1967, as amended ("**the Singapore Companies Act**"). The Act largely resembles the UK Companies Act in form and substance.

32. Part 5 'Management and Administration', Division 2 deals with directors. The normal provisions applicable to directors are contained therein; who can act as a director[17]; resignation of a director[18]; and the qualifications of a director.[19]

33. Directors' declarations (where a company has only one director), are provided for in s 157B:

> *157B. Where a company only has one director, that director may make a declaration required or authorised to be made under this Act by recording the declaration and signing the record; and such recording and signing of the declaration satisfies any requirement in this Act that the declaration be made at a meeting of the directors.*

34. Directors' duties in relation to financial reporting are provided for in ss201(2) and 201(5) of the Singapore Companies Act. Essentially, the directors are responsible to lay before the company at the annual general meeting, financial statements that "**must comply with**"[20] the applicable accounting standards and which give a true and fair view of the financial position and performance of the company. Non-compliance with the standards is dealt with in ss 201(12) and (15), and notes that if a company has obtained the approval of the Registrar to such non-compliance or the Minister may by order in the Gazette, substitute other accounting standards for applicable companies.[21]

35. One will note the mandatory requirements imposed on a director to comply with the applicable accounting standards, however I am of the view that this mandatory duty falls short of the rigorous compliance statement as is required in this jurisdiction.

ESG (Singapore)

36. Directors of companies in Singapore as under a general duty to act in the best interests of the company, which could possibly extend to ESG related matters.

37. Corporate governance is provided for in the Code of Corporate Governance ("**the Singapore Code")** which is applicable to listed companies. Similar to other jurisdictions, the Singapore Code operates on a "*comply or explain basis*" and aims to promote high levels of corporate governance. The emphasis of the Code is for companies to provide

[17] Section 145(1), Companies Act 1967
[18] Section 145(4A), Companies Act 1967
[19] Section 147, Companies Act 1967
[20] Section 201(2), Companies Act 1967
[21] The Minister is not defined in the Singapore Companies Act generally, nor specifically as it relates to this section. One would assume this is reference to the Minister for Finance.

thoughtful and meaningful explanations around their practices, and for investors to carefully consider these discussions as part of their engagements with companies.

38. I have reviewed the Singapore Code and there is no analogous provision to that contained in the Irish legislation. The closest to this, which one will note does not place the same task on a director as in this jurisdiction, is Principle 9 and the accompanying Provisions, which provide:

> ***Principle:***
>
> *9 The Board is responsible for the governance of risk and ensures that Management maintains a sound system of risk management and internal controls, to safeguard the interests of the company and its shareholders17.*
>
> ***Provisions:***
>
> *9.1 The Board determines the nature and extent of the significant risks which the company is willing to take in achieving its strategic objectives and value creation. The Board sets up a Board Risk Committee to specifically address this, if appropriate.*
>
> *9.2 **The Board requires and discloses** in the company's annual report **that it has received assurance from**:*
>
> > *(a) the CEO and the Chief Financial Officer ("CFO") that the financial records have been properly maintained and the financial statements give a true and fair view of the company's operations and finances; and*
> >
> > *(b) the CEO and other key management personnel who are responsible, regarding the adequacy and effectiveness of the company's risk management and internal control systems.* (emphasis added)

39. Following a public consultation in 2021 by Task Force on Climate-related Financial Disclosures, mandatory climate reporting on a comply or explain basis is being introduced on a phased basis set to commence in 2023.[22] It would appear that some form of board statement is required, although the text of this is not available, however a guidance note prepared by SGX[23] records:

> *The sustainability report should contain a statement of the Board that it has considered sustainability issues in the issuer's business and strategy, determined the material ESG factors and overseen the management and monitoring of the material ESG factors. In addition, the sustainability report should describe the roles of the Board and the management in the governance of sustainability issues.*

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[22] Consultation Paper on Climate and Diversity, 26 August 2021, <https://www.sgx.com/regulation/public-consultations/20210826-consultation-paper-climate-and-diversity>

[23] Sustainability Reporting, <https://www.sgx.com/regulation/sustainability-reporting>

EUROPEAN UNION REQUIREMENTS

40. I have also considered other European countries individually which operate a civil law system, but to little avail e.g. Germany and The Netherlands. Most civil countries operate in a manner similar to Belgium, i.e. listed companies are required to comply with a given code or set of standards on a comply or explain basis.

41. It is not proposed to examine other civil law jurisdictions in detail during this memorandum.

42. EU countries are, of course, subject to Directive 2014/95/EU[24] as it amended Directive 2013/34/EU ("**the Accounting Directive**"). This provides for a "*comply or explain*" approach in relation to non-financial statements of large companies.

43. In the wake of calls for greater transparency and consistency in sustainability reporting, on 21 April 2021, the European Commission adopted a proposal for a Corporate Sustainability Reporting Directive ("**CRSD**").

44. The European Parliament formally adopted the CSRD on 10 November 2022 and the Council is expected to adopt the proposal on 28 November 2022, after which it will be signed and published in the EU Official Journal. It will enter into source 20 days after publication. EU Member States will have 18 months to transpose the CSRD into national law, including Ireland.

45. We await the final text of the CSRD, but the proposed text can be considered at present.

46. CSRD changes will mean that large companies must publicly disclose information on how they engage with environmental and social issues, human rights and governance facts and under a new concept "*double materiality*", will also have to disclose how those issues impact the company.

47. The CSRD mainstreams sustainability reporting and puts it on equal footing to traditional financial reporting and based non common EU standards. It amends a number of existing directives, the Accounting Directive, Directive 2006/43/EU[25] and Directive 2004/109/EC[26].

48. It will apply to all large companies[27] with some exemptions to subsidiaries if the parent

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[24] Directive 2014/95/EE of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups

[25] Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC

[26] 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

[27] A large company is one which meets two out of the three criteria, as follows:

1) At least 250 employees;

company's consolidated management report complies with EU reporting standards. The SCRD will also apply to listed Small and Medium Enterprises ("**SMEs**"), but with an opt out provision during the transitional period (meaning they will be exempted from the CSRD until 2028.)

49. It will require more detailed reporting requirements than those provided for in the Accounting Directives. Such reporting must be certified by an accredited independent auditor and certifier, who must ensure that the sustainability information complies with the certification standards that have been adopted by the EU.

50. It also introduces the "*double materiality*" concept which means Companies must not only disclose how sustainability issues impact the company (impacts inward), but also how the company impacts society and the environment (impacts outward).

51. Companies will be obliged to report on issues such as sustainability targets and the progress made to achieve those targets; roles and responsibility of management and adverse impacts connected with the company's value chain.

52. Once the final text is published, this issue can be re-examined further. It would appear that this will be a helpful comparator as it will impose strict obligations on a company which ought to be complied with and could be of relevance to the obligations imposed on a company director in his/her compliance statement.

CONCLUSION

53. As has been outlined herein, there is no comparative provisions to s 225 of the Companies Act 2014. While other jurisdictions are of relevance and bear some similarity, the obligation imposed on directors in, for example Singapore and the United Kingdom, is not as onerous as the obligation imposed in this jurisdiction.

54. It was also useful to look at the Directors report in other jurisdictions, namely Australia and Singapore, to compare their requirements to this jurisdiction. One notes the absence of any director compliance statement as known here.

55. This memorandum has also focused on corporate governance and in particular, a focus on corporate sustainability reporting. Most countries have an applicable code which operates on a "*comply or explain basis*" which applies to listed companies only.

56. The CSRD, once adopted, may prove a helpful comparator as it proposes requirements on companies in their sustainability reporting requirements which ought to be complied with. The CSRD will ensure good corporate governance on sustainability reporting once adopted and transposed.

57. Further review may be required on particular issues herein, namely the CSRD.

58. Nothing further occurs.

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2) annual turnover exceeds €40m;
3) assets in excess of €20m.

Appendix 4 Analysis of the common themes drawn from the surveys

Draft Working Paper on Common Themes drawn from the Results of the CLRG Surveys on the effectiveness and usability of the Directors' Compliance Statement (DCS)

August 2023

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CONTEXT FOR THIS PAPER

The Corporate Governance Committee ("**the Committee**") of the Company Law Review Group ("**CLRG**") produced two surveys to assist in its review of the Directors' Compliance Statement ("**DCS**"). The Committee sought responses on the effectiveness and usability of the DCS.

Two surveys were created, similar in nature, with one issued to practitioners via members of the Committee, and the second to directors through the Institute of Directors' monthly ezine. Both surveys were also advertised on the websites of the Department of Enterprise, Trade and Employment and the Corporate Enforcement Authority and their respective social media platforms.

This paper looks at the issues that emerge from the results of both practitioners and directors. In so doing, reference is made to the "*practitioners' survey*" and the "*directors' survey*" respectively.

A separate document provides the breakdown of the responses to all questions in both surveys. There were 31 responses to each of the surveys. For ease of reference a table setting out the responses from both groups to the common questions in both surveys is included at Appendix 1.

EXECUTIVE SUMMARY

As will be seen herein, the results varied greatly between both surveys. Overall, the results suggest that the practitioners support the DCS, while the directors display a lack of understanding of the DCS. 52% of practitioners and 45% of directors agreed that the DCS should continue to apply to all companies to which it currently applies. Of all participants, 48% voted for the option to retain the DCS as it currently applies, which means 52% voted to reduce the scope in some way.

When asked if the DCS was worthwhile, the results were varied. 45% of practitioners agreed while 26% did not agree. The directors on the other hand had the largest percentage of "don't know" and "undecided" at 52%. Only 32% of participants in the Directors' survey agreed the DCS was worthwhile.

The majority of the practitioners (65%) agreed the DCS was relevant with 19% disputing its relevance. Just under half the directors accepted the DCS was relevant but nearly the same number again voted "don't know" or "undecided". It is promising that only 3 of 31 directors thought it not relevant.

The following table highlights the top positive and negative results from both surveys:

Top Positives	1) Compliance has a tangible value (37/62) 2) The DCS is relevant (34/62) 3) Biggest perceived benefits are wider/greater awareness of legal obligations within the company (31/62) and contributes to a planned and systematic approach to compliance (27/62)
Top Negatives	1) 38/62 respondents voted No/Don't know/Undecided on whether the DCS is worthwhile 2) 33/62 respondents voted No/Don't know/Undecided on whether the DCS contributes towards a company's compliance structures

	3) The biggest perceived challenges are disproportionate costs to the company as compared with perceived benefits and unnecessary duplication of existing corporate governance standards which together accounted for 44 out of 61 votes

SUMMARY OF THE PRINCIPAL THEMES THAT EMERGE FROM THE SURVEYS

A number of issues that featured in respondents' answers to survey questions are summarised in the table below, with greater detail provided (where possible) thereafter. Some of the main issues that emerge from respondents' survey responses include:

for potential improvements	of concern	stions
1. Scope for providing additional guidance to directors	1. Seen by some as a "*tick box*" exercise	1. Expand the current definition of "*relevant obligations*"
	2. Concerns as to the perceived costs of implementation and compliance	2. Mirror the SAO regime in the UK, i.e., appoint a Compliance Officer
	3. Perceptions as to duplication, through the DCS process, of existing corporate governance measures	3. Consider a role for the auditor in opining in some form on the DCS
		4. Increase current penalties for non-compliance

1. Knowledge levels, enhanced guidance and practical advice

It is apparent, from both surveys, that some respondents – both company directors and, somewhat surprisingly, professional advisors – do not understand what is required by s 225 or what is, and what is not, a criminal offence under the provision.

Some respondents suggested that additional information and guidance should be provided regarding directors' obligations.

2. Potential for success but is now a "*tick box*" exercise

The results of the survey highlighted that when the DCS was first introduced, there was a flurry of activity to implement processes and protocols. Now, however, some respondents are of the view that the DCS is a "*tick box*" exercise. It was suggested that the level of scrutiny afforded to the DCS by directors appears to be "*light touch*" in nature. There is an apparent correlation between the size (turnover) of the company and the level of engagement by, and/or knowledge of, the director of the DCS – which is perhaps unsurprising.

3. Costs to the smaller company

Concern was expressed by directors of, and advisors to, smaller companies about the perceived costs associated with the DCS. Concerns were expressed about both the establishment and implementation of the DCS system (which is optional under the provision, a point that is expanded on below in section entitled The Legislative Framework – Section 225) and the annual cost of maintenance of that system. Concerns were also raised about any potential requirement for a compliance director (see below).

One suggestion put forward was the introduction of a '*slimmed down*' version of the DCS for smaller companies (within scope) to reduce the associated impact. In circumstances where compliance is, at present, optional, what 'slimmed down' would look like would require further consideration.

4. Complements the current focus on ESG and Tax governance but is duplicate of existing compliance measures

There was positive feedback that the DCS complements the current focus across the EU on ESG and tax compliance. However, a significant minority of respondents expressed the view that the DCS is an unnecessary duplication of existing compliance measures with which a company ought to comply. This, of course, does not take into account the fact that, as above, the DCS is optional and directors are free to explain why they have elected not to comply with certain measures, as set out in s 225(3).

5. Expansion of the current definition of "*relevant obligations*"

The view was expressed by 26% (16/62) of all participants that the current definition of "*relevant obligations*" should be expanded. However, 42% (26/62) voted to continue the existing definition of relevant obligations.

6. Delegation of the DCS and the potential involvement of a compliance officer

The results of the directors' survey indicate that compilation of the DCS is often delegated by the directors. However, that is both unsurprising and consistent with the approach usually adopted by directors as regards the preparation of a company's financial statements. Clearly, however, in both cases, responsibility for approval resides with the directors.

The surveys also asked about the potential involvement of a compliance officer (similar to the SAO regime in the UK). While some participants noted the effectiveness of the SAO regime, the results showed a slight apprehension about the introduction or involvement of a compliance officer.

7. The Role of Auditor

Introducing a role for the auditor in the DCS process was perceived as favourable to a certain extent, with half of the practitioners who responded voting to introduce a requirement for the auditors to declare 'inconsistencies' as well as a large minority voting to introduce a verification role for the auditors.

8. Non-Compliance, Penalties and Enforcement

From the responses received, it is clear that there is a significant lack of understanding/clarity as to what does, and does not, constitute an offence under the provision. Against that backdrop, a number of respondents called for increased penalties for non-compliance. However, there is no evidence available to suggest that the provision is not being complied with, and none was proffered by any of the respondents.

THE CONTEXT WITHIN WHICH THE DIRECTORS' COMPLIANCE STATEMENT WAS ORIGINALLY INTRODUCED

The directors' compliance statement was first introduced by Section 45 of the 2003 Act, although this section was never commenced. Its introduction was set against the backdrop of the 1998 McDowell Working Group on Company Law Compliance and Enforcement which identified a "culture of non-compliance" in Irish Company law[28], and also the Review Group on Auditing's 2000 DIRT report[29], which recommended the introduction of the directors' compliance statement owing to its finding that non-compliance by Irish companies was more widespread than had been thought.

The objective of the directors' compliance statement was to foster a culture of compliance within Irish companies by ensuring appropriate procedures were in place and to emphasise to directors their responsibility in ensuring the company's compliance with its statutory obligations. Under section 45 of the 2003 Act, directors of qualifying companies would have been required to prepare a compliance statement setting out the company's policies for ensuring compliance with its statutory obligations, its internal control procedures for securing compliance and the arrangements for implementing and reviewing the effectiveness of its policies. They would also have been required to include an annual compliance statement in their annual report to the shareholders in which they were to acknowledge that they were responsible for securing the company's compliance with its relevant obligations and confirm the necessary procedures were in place to ensure such compliance. If this was not done, they would be required to explain why not – "comply or explain".

Failing to prepare a compliance statement under the Act was a criminal offence carrying up to a 12-month sentence on summary conviction or up to 5 years on indictment. Making a false statement was also an offence under the Act.

Section 45 was to apply to all public companies and to private limited companies with a turnover exceeding €15,236,853 and a balance sheet exceeding €7,618,428.

The relevant obligations under section 45 were to include any obligations under the Companies Acts, Tax Acts, and any other enactments that may materially affect the company's financial statements.

The Act also created a role for audit committees who would have been required to review the compliance statement and make a recommendation to the board prior to its approval. Auditors

[28] *Parliamentary Inquiry into DIRT*, First Report by the Committee of Public Accounts (Stationery Office, Pn 7963, 1999)
[29] See *The Report of the Review Group on Auditing* (Stationery Office Pn 8683, 2000)

would have also been required to state in the auditor's report whether the assertions in the directors' compliance statement were fair and reasonable in their opinion and to report any deficiencies to the Director of Corporate Enforcement. It would also be a criminal offence under the Act if an auditor failed to comply with these obligations.
Following opposition from the business community[30], the compliance statement was referred to the CLRG for its views on the proportionality, efficacy and appropriateness as set out in section 45. The CLRG recommended against commencing the provision and instead proposed a compromise text, known as *Section X,* which sought to minimise the burden to businesses while achieving the same aims as the original section 45. The CLRG's draft text was ultimately adopted, almost verbatim, as section 225 of the Companies Act 2014.

THE LEGISLATIVE FRAMEWORK – SECTION 225

Section 225 of the Companies Act 2014 requires directors of in-scope companies to complete an annual Directors' Compliance Statement ("DCS"), which requires to be set out within the Directors' Report. The DCS requires the directors to:

i. acknowledge their responsibility for securing the company's compliance with its relevant obligations, and

ii. either confirm that certain measures, as set out in s 225(3), have been complied with, or, if those measures have not been complied with, to explain why not.

There is, therefore, no legal obligation to comply with the measures set out in s 225(3). Rather, it is permissible to elect not to comply with those measures provided that the directors explain their rationale. This is often referred to as a "*comply or explain*" provision.

Section 225(6) provides that (i) failure to include a DCS in the Directors' Report, or (ii) to comply with the comply or explain requirement referenced above constitutes an offence. These are the only DCS-related offences provided for under company law.

The penalty for failure to comply with the requirements of s 225(2) is provided for in s 225(6) as a category 3 offence.[31] A person found guilty of a category 3 offence shall be liable, on summary conviction, to a class A fine (not exceeding €5,000) or imprisonment for a term not exceeding 6 months, or both. Such alleged offences are prosecuted in the District Court only.

CONSIDERATION OF COMMON THEMES

1. Knowledge levels, enhanced guidance and practical advice

Despite the fact that section 225 was commenced in 2015 and that there is a wealth of information available on the subject of the DCS, including:

⇒ a plain reading of s 225 itself,

[30] Deirdre Ahern *Directors' Compliance Statements under the microscope* Commercial Law Practitioner 2006, 13(5), 137-145
[31] All categories of offences are set out in the Appendix hereto.

⇒ guidance notes (published free of charge) from many different professional services firms including Deloitte; Grant Thornton; McCann Fitzgerald; and William Fry amongst many others,

⇒ a detailed practice note published by the Law Society, and

⇒ the CRO and CEA websites, both of which contain information on the DCS and on directors' duties more generally,

it is apparent, from both surveys, that some respondents – both company directors and, somewhat surprisingly, professional advisors – do not understand what is required by s 225 or what is, and what is not, a criminal offence under the provision.

There also appears to be a misunderstanding by some survey respondents as to which companies fall under the remit of the DCS; one will recall the caveats of s 225(7). It is not clear what participants understood as the definition of "small company".[32]

Some respondents suggested that additional information or guidance should be provided regarding directors' obligations. While there may be merit to that suggestion, at a practical level, the question arises as to what additional guidance/advice could be provided that is not already available on a statutory provision that is far from complex in its construction.

2. Potential for success but is now a "*tick box*" exercise

The results of the survey highlighted that when the DCS was first introduced, there was a flurry of activity to implement processes and protocols. Now, however, some respondents are of the view that the DCS is a "*tick box*" exercise. It was suggested that the level of scrutiny afforded to the DCS by directors appears to be "*light touch*" in nature. There is an apparent correlation between the size (in turnover terms) of the company and the level of engagement by, and/or knowledge of, the director of the DCS – which is perhaps unsurprising.

The results of the directors' survey indicate that drafting of the DCS is often delegated by the directors. However, this is unsurprising in that it is consistent with the approach that, for example, is usually adopted by company directors as regards the preparation of a company's financial statements. Clearly, however, in both cases, ultimate responsibility for review and approval resides with the directors.

Points made by respondents included the following:

⇒ the DCS has become generic, i.e., it does not actually detail the work which is being done by the directors to ensure compliance. While this may be true, it is also the case that s 225 does not currently require such information to be provided in the DCS. Any such criticism is, therefore, a criticism of the provision itself as opposed to the practical operation of same.

[32] The definition of an SME is anchored in sections 280A-G of the 2014 Act and is linked to staff headcount, turnover or balance sheet total.
A medium sized company has <250 staff headcount, turnover ≤ € 50 m or balance sheet total ≤ € 43 m.
A small company has <50 staff headcount, turnover ≤ € 10 m or balance sheet total ≤ €10 m.
A micro company has <10 staff headcount, turnover ≤ € 2 m or balance sheet total ≤ € 2 m.

⇒ the DCS has potential, but the true potential is underutilised,

⇒ it was suggested that there is a difference in approach to compliance with the DCS, depending upon the size of the company involved. It was suggested that, whereas larger companies have incorporated the DCS process into their corporate governance structures and arrangements, this is much less so amongst smaller companies. This could not, however, be described as a revelation.

⇒ many companies see the cost of implementation and maintenance of procedures as a hinderance. Many companies do not wish to spend the money required to set it up.

⇒ a number of solicitors stated that they have a template in being which is used for the DCS; they will prepare the wording and it will be subsequently adopted and approved by the Board. Again, this couldn't be described as surprising; company directors pay professional service firms to assist them with such matters.

From the responses to the directors' survey, a correlation can be drawn between the size (turnover) of the company and the level of engagement by a director and/or knowledge of the director of the DCS. In companies with higher turnover, the DCS has, according to some respondents, become formulaic and, it is suggested, a statement is presented to directors who sign on the dotted line. There is a perception that directors do not themselves engage with the DCS and that it is the practitioners who are actually engaging with the DCS and presenting it for sign off.[33] While that may well be true in some instances, there is no evidence, and none was proffered, that company directors in general do nothing more than sign a document that is placed in front of them.

On the other hand, 67% (21 of 31) of practitioners agreed that the DCS promoted awareness of directors' responsibility for securing the company's compliance with its obligations. There is a disconnect between the surveys on this point.

3. Costs to the smaller company

Concern was expressed by directors of, and advisors to, smaller companies about the perceived costs associated with the DCS. Concerns were expressed about both the establishment and implementation of the DCS system (which, as above, is optional under the provision) and the annual cost of maintenance of that system. One company secretary suggested that the initial cost of implementation was €10,001- 50,000 and the ongoing costs are between €0 – 10,000.

One suggestion put forward was the introduction of a '*slimmed down*' version of the DCS for smaller companies (within scope) to reduce the associated impact. As s 225 does not require information on the internal control procedures for securing compliance, what '*slimmed down*' would look like would require further consideration.

4. Complements the current focus on ESG and Tax governance but is duplicate of existing compliance measures

There is a push at present for enhanced ESG and tax governance; in some companies the DCS has complemented these issues.

[33] There is further discussion of delegation at subheading number 5.

In July 2021, the European Commission announced a renewed Sustainable Finance Strategy which aimed to direct greater investment towards environmentally sustainable activities. This included a number of measures including EU Regulation 2021/1119, Climate Action and Low Carbon Development (Amendment) Act 2021, Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464) and the EU Taxonomy Climate Complementary Delegated Act.[34]

There is a suggestion in some of the responses that this is important to various stakeholders, e.g., investors. It is also suggested by a professional adviser that "*some large institutional investors are divesting from companies where they have concerns over tax governance.*"

There was positive feedback that the DCS complements the current focus across the EU on ESG and tax compliance. However, a significant minority of respondents expressed the view that the DCS is an unnecessary duplication of existing compliance measures with which a company ought to comply. This, of course, does not take into account the fact that, as above, the DCS is optional and directors are free to explain why they have elected not to comply with certain measures, as set out in s 225(3).

When questioned about any additional measure for the DCS, adding further tax requirements did not prove popular. Of the practitioners' responses, only 10% of the votes cast voted to introduce a materiality requirement for tax law by specifying a mandatory percentage or amount while 14% of the votes cast by the directors voted for this requirement.

One director of a DAC suggested that compliance with the DCS forces the establishment of appropriate controls and policies, particularly on tax. The results of the survey varied depending on whether or not a company invested in compliance with the DCS or whether a "tick box" approach was used.

Complementarity is one of the perceived benefits but when asked what challenges participants perceived from the DCS, the biggest perceived challenge at 40% of the total participants (25 of 62) agreed that it was unnecessary duplication of existing corporate governance standards.

5. Delegation of the DCS and the potential involvement of a compliance officer

The results of the directors' survey indicate that compilation of the DCS is often delegated by the directors (the person to whom this task is delegated varied in the responses and included accountant, secretary director, auditors and audit teams, and legal teams. However, that is both unsurprising and consistent with the approach usually adopted by directors as regards the preparation of a company's financial statements. Clearly, however, in both cases, responsibility for approval resides with the directors.

From the responses, two large companies (€10million to €50 million turnover) delegated the task. The first company completed all requirements at their annual financial audit tests of transactions and review of the systems. They have implemented ISO systems which allow for ongoing monitoring of various systems to ensure compliance with relevant legislation. The second company noted the DCS was prepared by internal management, then it was reviewed by the external

[34] This is not an exhaustive list but serves to highlight the steps being taken to promote enhanced ESG and tax governance measures within the EU.

auditors to ensure accuracy and overall consistency with the annual Audited Financial Statements.

Twelve companies completed the survey with a turnover greater than €50million. Based on the comments of the foregoing two companies, one would expect that these companies also would have systems in place or clear lines of delegation. The results varied. The majority however had systems in place to ensure compliance, although one director stated that the level of "*stress test from directors is light touch*".

The surveys also asked about the potential involvement of a compliance officer (similar to the SAO regime in the UK). While some participants noted the effectiveness of the SAO regime, the results showed a slight apprehension about the introduction or involvement of a compliance officer. 58% (7 of 12) voted no to having a compliance director, 16% (2 of 12) voted yes and 16% (2 of 11) voted for implementation of the same regime as the UK (single accountable person).[35]

Bearing this is mind, when asked whether there should be a requirement for a compliance officer, over both surveys there were 28 votes for no, 23 for yes and 10 don't know/other. This would indicate a slight apprehension (28 no versus 23 yes) for the introduction or involvement of a compliance officer.

6. Expansion of the current definition of "*relevant obligations*"

Of the 62 participants across both groups, 26 voted to continue existing definition of "relevant obligations" while 16 voted to expand the scope to include more relevant obligations. Fewer still voted to introduce materiality requirements relating to tax law, or additional requirements in relation to loans to directors or dividends from distributable profits.

7. The Role of the Auditor

As mentioned above, against a backdrop of non-compliance section 45 of the Companies (Auditing and Accounting) Act 2003 proposed an amendment to the Companies Act 1990 to insert two sections, i.e., ss 205E and 205F. An extensive DCS was proposed which impacted both the company directors and the auditor. Following opposition from the business community, many of whom believed the requirement for a directors' compliance statement would create a significant burden for companies, the CLRG reviewed the section. This review produced a lengthy and considered Report on Directors' Compliance Statement, (Company Law Review Group, 2005) ("**the 2005 Report**").

For the purposes of this note on the role of the auditor, only s 205F will be discussed. Section 205F sought to impose strict requirements on the auditor (or any affiliate of the auditor) to undertake an annual review of the DCS by virtue of carrying out audit work or audit related work for the company. Subsection 2 provided that the auditor's report, appended to the company's annual financial statements, would include the conclusions of the review of the DCS which the auditor undertook. Where the auditor was of the opinion that the DCS was not fair and reasonable, the auditor would be required to make a report to the directors and include that report in the auditor's report. Section 205F(3) mandated that where, in the opinion of the auditor, a director failed to prepare a DCS, or failed to include the matters listed in s 204E(4)(d) or sufficiently explain non-compliance, the auditor would be required to report that opinion and the reasons for forming that opinion to the (then) Office

[35] An overview of the SAO regime can be found in the Appendix to this report.

of the Director of Corporate Enforcement.

For the reasons outlined in the 2005 Report, a mitigated DCS was proposed and was referred to as Section X.

Section X proposed the removal of the requirement that a company's auditors must specifically opine on the reasonableness or otherwise of the proposed revised Annual Statement on Compliance in Directors' Reports. The underlying rationale was the additional compliance costs, described in the report as the "*chief factor*", which a company would expend to ensure compliance.[36] At p 132, the Committee noted that even if s 205F was not commenced, auditors would continue to have responsibility to consider the Annual Compliance Statement under both company law and auditing standards, at that time.

Submissions, which included arguments for and against the commencement of s 45, were outlined in the 2005 Report.[37] Common issues with regard to auditors, which were considered by the CLRG in its 2005 Report, included the suggestions that:

- auditors do not have the expertise to perform the functions that it was proposed would be required of them under s 45,
- auditors would be cautious about confirming a compliance statement as being fair and reasonable due to insufficient knowledge of enactments that provide the legal framework within which companies operate,
- the legislation potentially extended the responsibilities of auditors beyond those of directors (by requiring auditors to make an assessment of what is fair and reasonable),
- the legislation risked making auditors perform a 'policing' role which was inconsistent with their primary responsibility of reporting to shareholders on companies' financial statements

As already outlined, the mitigated DCS, Section X, was accepted by the Oireachtas and the role of the auditor was removed.

Participants of the survey were asked two questions in relation to the role of auditors in the verification of the DCS. First, participants were asked whether a requirement should be introduced for the auditors to say whether the DCS was inconsistent with matters that have come to the auditor's attention during the course of an audit of the company. Second, participants were asked whether a more general verification role should be introduced for the auditors in relation to the DCS.

In the participants survey, 13 of 39 (33%) participants answered yes to the first question and 10 of 39 (25%) answered yes to the second question. Introducing a role for the auditor in the DCS process was perceived as favourable to a certain extent, with half of the practitioners who responded voting to introduce a requirement for the auditors to declare 'inconsistencies' as well as a large minority voting to introduce a verification role for the auditors.

One auditor suggested that clients will simply not pay the added costs which would be incurred by

[36] A detailed cost benefit analysis can be found in Chapters 5 and 9 of the 2005 Report.
[37] Chapter 6, 2005 Report

an auditor. Of course, was the Oireachtas to introduce such a role, it would become a mandatory cost of compliance.

A company secretary noted that further verification might add value to the DCS process but would only serve to increase company spending on further resources. A cost benefit analysis was considered in the 2005 Report[38] by the CLRG and may be worth further discussion.

8. Compliance, Enforcement, and Penalties

Offence provisions, compliance, and enforcement

As detailed earlier herein, there is no legal obligation to comply with the measures set out in s 225(3). Rather, it is permissible to elect not to comply with those measures provided that the directors explain their rationale.

Section 225(6) provides that (i) failure to include a DCS in the Directors' Report, or (ii) to comply with the comply or explain requirement referenced above constitutes an offence. These are, therefore, the only DCS-related offences provided for under company law.

Participants were asked about amending the content of the DCS, which included an option to retain or remove the comply or explain format. 8 of the 27 directors who responded voted to retain the comply or explain format, while only one voted to remove it. Similarly with the 30 practitioners who responded, 13 voted to retain it while 4 voted to remove it.

Courtney[39] explains the consequences for directors where there is a breach of their relevant obligations at para 15.023:

> *It is important to note that the only criminal dimension to the directors' compliance statement regime is where the directors of a company in scope fail to either comply or explain. So, if a default is made in complying with s 225(2) of the Act, each director to whom the default is attributable will be guilty of a category 3 offence. It follows that there is no offence created by s 225 where, for example, it transpires that the arrangements or structures were put in place but were inadequate and did not operate to prevent the company from breaching one of its relevant obligations. Of course, where the breach results in the company or its officers in default committing an offence, the company and its officers will be open to prosecution for that breach but not under s 225.*
>
> *It is also important to note that s 225 creates no civil liability for directors. So, where it transpires that the policies adopted or arrangements or structures put in place were inadequate, neither the company nor any other person is conferred by s 225 with any right to sue the directors. This is, of course, without prejudice to any other remedies that company may have against its directors, e.g., for breach of their fiduciary duty.*

This aspect of both surveys highlighted the greatest lack of knowledge and understanding of the requirements of s45. While only one respondent (who is a professional advisor) engaged with the issue of compliance and enforcement, that respondent did so in somewhat colourful terms, i.e.,

> "*Enforce it. At the moment there is little or no visible enforcement in the private sector and*

[38] Report on Directors' Compliance Statement 2005, pg53

[39] Thomas B Courtney, *The Law of Companies*, (4th ed., Bloomsbury, 2016)

> *auditors are unsure of their responsibilities as they are not clearly stated. Therefore, the current DCS regime is broken and some large privates that should follow it just don't bother.*"

However, as detailed above, there is currently no role for the auditor is reviewing, or opining upon, the DCS. Despite the assertion that there is little or no visible enforcement, there is no evidence of non-compliance with s45. In that regard, the Corporate Enforcement Authority has confirmed that, since s45 came into operation, neither it, nor its predecessor body, have received any complaints regarding, or other indications of, non-compliance with those of the DCS provisions non-compliance with which could constitute a criminal offence. Similarly, none of the respondents to either survey proffered any evidence to suggest or evidence non-compliance with s225.

Put simply, there is no enforcement of s225 (i.e., prosecutions) because there is no evidence of non-compliance with the provision. The lack of evidence of non-compliance is unsurprising given that, to remain compliant with the provision, all that is required is for the directors to explain why they have elected not to implement certain measures, as set out in s 225(3).

If there is anything to be taken from this contribution it is, perhaps, the perception that, while companies are complying with the legal requirements (i.e., to publish a DCS and to comply or explain), there are not engaging with it in a meaningful sense. That, of course, is an entirely different matter; one that goes to whether the DCS, as currently constituted, needs to be fundamentally revisited.

Penalties for criminal non-compliance
As above, the only offences provided for under section 225 are a failure to:

- include a DCS in the Directors' Report, or
- comply with the comply or explain requirement.

Criminal non-compliance is a category 3 offence, i.e., the Oireachtas has determined it appropriate that such an alleged offence is capable of being tried summarily only.

This contrasts with the considerably more onerous obligations that were provided for under the original s45, non-compliance with which was an indictable offence (i.e., capable of being tried in the Circuit Court before a jury).

Participants were asked if the consequence of non-compliance should be more or less severe than the current penalty – 50% of the total participants (29 of 57) answered that they did not know. Of the remaining practitioners, 9 said more severe and 5 said less severe. A solicitor suggested that the penalties for non-compliance should be linked to turnover, while a company secretary said the penalty for non-compliance should not involve imprisonment.

APPENDIX 1 Responses to Questions Common to Both Surveys

Q2/5 - Is it worthwhile?

	Practitioners(31)	Directors (31)	Total of 62 responses
Yes	14	10	24
No	8	5	13
Don't know	0	12	12
Undecided	9	4	13
Total	31	31	61

Q3/6 - Is it relevant?

	Practitioners	Directors	Total
Yes	20	14	34
No	6	3	9
Don't know	0	12	12
Undecided	4	1	5
Total	30	30	60

Q4/7 - Does Compliance have a tangible value?

	Practitioners	Directors	Total
Yes	19	18	37
No	4	7	12
Don't know	0	4	4
Undecided	4	2	6
Other	3	0	3
Total	30	31	61

Q5/8 - Does the DCS contribute towards a company's compliance structures?

	Practitioners	Directors	Total
Yes	18	11	29
No	6	6	12
Don't know	0	7	7
Undecided	7	7	14
Total	31	31	62

Q6/9 - Does the DCS promote awareness of directors' responsibility for securing the company's compliance with its obligations?

	Practitioners	Directors	Total
Yes	20	11	31
No	7	11	18
Don't know	2	5	7
Undecided	2	4	6
Total	31	31	62

Q7/10 - To your knowledge, are systems in place to enable directors to meet their DCS obligations?

	Practitioners	Directors	Total
Yes	17	11	28
No	4	9	13
Don't know	3	6	9
Undecided	7	5	12
Total	31	31	62

Q13/12 - Tick the benefits (if any) you perceive the DCS achieves:

	Practitioners	Directors	Total
Contributes to a planned and systematic approach to compliance	17	10	27
Greater assurance on the standard of management of the company	14	7	21
Reputational advantages – international and/or domestic	12	12	24
Greater shareholder engagement and/or investment	8	5	13
Wider/greater awareness of legal obligations within the company	22	9	31
Other	5	6	11
Don't agree	2	4	6

Q14/13 - Tick the challenges (if any) you perceive the DCS achieves:

	Practitioners	Directors	Total
Disproportionate costs to the company as compared with perceived benefits	14	5	19
Unnecessary duplication of existing corporate governance standards	12	13	25
Dissuading potential candidates for non-executive directorship roles	2	7	9
Other – none of the above	1	2	3
Other	2	3	5

Q15/19 - The DCS should (tick all that you agree with):

	Practitioners	Directors	Total
Continue to apply to all companies to which it currently applies	16	14	30
Be limited in application to listed PLCs	4	8	12
Be limited in application to PLCs - listed and unlisted	3	8	11
Have increased thresholds for application to private companies	12	7	19
Exempt companies already subject to other corporate governance requirements (e.g. the UK Corporate Governance Code and the Irish Corporate Governance Annex)	5	5	10

Q 16/20 - The DCS should (tick all that you agree with):

	Practitioners	Directors	Total
Continue existing definition of "relevant obligations"	12	14	26
Expand its scope to include more relevant obligations	9	7	16
Introduce an additional requirement in relation to loans to directors	5	9	14
Introduce an additional requirement in relation to financial assistance for the acquisition by a company of its shares or shares in its holding company	3	5	8
Introduce an additional requirement in relation to dividends from distributable profits	5	4	9
Introduce a materiality requirement for tax law by providing that the provisions in question must materially affect the company's financial statements	9	6	15
Introduce a materiality requirement for tax law by specifying a monetary amount or percentage	6	5	11
Permit composite Directors' Compliance Statements to be prepared for corporate groups	14	11	25
Retain the "comply or explain" format of the section	13	8	21
Remove the "comply or explain" option and simply require compliance	4	1	5
Other	5	4	9

Q18/23 - In relation to the persons required to make the statement, should there be a Compliance Director responsible for the DCS?

	Practitioners	Directors	Total
Yes	10	10	20
No	15	12	27
Don't know	1	5	6
Other	2 (SAO)	2 (SAO)	4
Other	3	1	4

APPENDIX 2 Section 871, Companies Act 2014

Section 871 of the Companies Act 2014 provides:

Categories 1 to 4 offences — penalties

871. (1) A person guilty of an offence under this Act that is stated to be a category 1 offence shall be liable—

(a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment, to a fine not exceeding €500,000 or imprisonment for a term not exceeding 10 years or both.

(2) A person guilty of an offence under this Act that is stated to be a category 2 offence shall be liable—

(a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

(3) A person guilty of an offence under this Act that is stated to be a category 3 offence shall be liable, on summary conviction, to a class A fine or imprisonment for a term not exceeding 6 months or both.

(4) A person guilty of an offence under this Act that is stated to be a category 4 offence shall be liable, on summary conviction, to a class A fine.

A “Class A fine” is a fine within the meaning of the Fines Act 2010 i.e. a fine not exceeding €5,000.

APPENDIX 3 Section 45, Companies (Auditing and Accounting) Act 2003

Section 45 provides an amendment to the Companies Act 1990 which would insert ss 205E and 205F:

Directors' compliance statement and related statement.

205E.—(1) In this section—

… 'relevant obligations', in relation to a company, means the company's obligations under—

(a) the Companies Acts,

(b) tax law, and

(c) any other enactments that provide a legal framework within which the company operates and that may materially affect the company's financial statements;

'tax law' means—

(a) the Customs Acts,

(b) the statutes relating to the duties of excise and to the management of those duties,

(c) the Tax Acts,

(d) the Capital Gains Tax Acts,

(e) the Value-Added Tax Act 1972 and the enactments amending or extending that Act,

(f) the Capital Acquisitions Tax Act 1976 and the enactments amending or extending that Act,

(g) the statutes relating to stamp duty and to the management of that duty, and

(h) any instruments made under an enactment referred to in any of paragraphs (a) to (g) or made under any other enactment and relating to tax.

(2) This section applies to—

(a) a public limited company (whether listed or unlisted), and

(b) a private company limited by shares,

…

(3) The directors of a company to which this section applies shall, as soon as possible after

the commencement of this section or after this section becomes applicable to the company, prepare or cause to be prepared a directors' compliance statement containing the following information concerning the company:

(a) its policies respecting compliance with its relevant obligations;

(b) its internal financial and other procedures for securing compliance with its relevant obligations;

(c) its arrangements for implementing and reviewing the effectiveness of the policies and procedures referred to in paragraphs (a) and (b).

(4) The directors' compliance statement (including any revisions) must—

(a) be in writing,

(b) be submitted for approval by the board of directors,

(c) at least once in every 3 year period following its approval by the board, be reviewed and, if necessary, revised by the directors, and

(d) be included in the directors' report under section 158 of the Principal Act.

(5) The directors of a company to which this section applies shall also include in their report under section 158 of the Principal Act a statement—

(a) acknowledging that they are responsible for securing the company's compliance with its relevant obligations,

(b) confirming that the company has internal financial and other procedures in place that are designed to secure compliance with its relevant obligations, and, if this is not the case, specifying the reasons, and

(c) confirming that the directors have reviewed the effectiveness of the procedures referred to in paragraph (b) during the financial year to which the report relates, and, if this is not the case, specifying the reasons.

(6) In addition, the directors of a company to which this section applies shall in the statement required under subsection (5)—

(a) specify whether, based on the procedures referred to in that subsection and their review of those procedures, they are of the opinion that they used all reasonable endeavours to secure the company's compliance with its relevant obligations in the financial year to which the annual report relates, and

(b) if they are not of that opinion, specify the reasons.

(7) For the purposes of this section, a company's internal financial and other procedures are considered to be designed to secure compliance with its relevant obligations and to be effective for that purpose if they provide a reasonable assurance of compliance in all material

respects with those obligations.
(8) Where the directors of a company to which this section applies fail—

(a) to prepare, or to cause to be prepared, a directors' compliance statement as required by subsections (3) and (4)(a) to (c),

(b) to include a directors' compliance statement in the directors' report as required by subsection (4)(d), or

(c) to comply with subsections (5) and (6),

each director to whom the failure is attributable is guilty of an offence.

(9) A private company limited by shares qualifies for an exemption from this section in respect of any financial year of the company if—

(a) its balance sheet total for the year does not exceed—

(i) €7,618,428, or

(ii) if an amount is prescribed under section 48 (1)(l) of the Act of 2003 for the purpose of this provision, the prescribed amount,

and

(b) the amount of its turnover for the year does not exceed—

(i) €15,236,856, or

(ii) if an amount is prescribed under section 48 (1)(l) of the Act of 2003 for the purpose of this provision, the prescribed amount.

Auditor's review of compliance statement and related statements.

205F.—(1) The auditor of a company to which section 205E applies shall undertake an annual review of—

(a) the directors' compliance statement under subsections (3) and (4) of that section, and

(b) the directors' statement under subsections (5) and (6) of that section,

to determine whether, in the auditor's opinion, each statement is fair and reasonable having regard to information obtained by the auditor, or by an affiliate of the auditor within the meaning of section 205D, in the course of and by virtue of having carried out audit work, audit-related work or non-audit work for the company.

(2) The auditor shall—

(a) include in the auditor's report appended to the company's annual accounts a report

on, and the conclusions of, the review undertaken under subsection (1), and
(b) where any statement reviewed under subsection (1) is not, in the auditor's opinion, fair and reasonable—

(i) make a report to that effect to the directors, and

(ii) include that report in the auditor's report appended to the annual accounts.

(3) Where, in the auditor's opinion, the directors have failed—

(a) to prepare, or to cause to be prepared, a directors' compliance statement as required by section 205E(3) and (4)(a) to (c),

(b) to include a directors' compliance statement in the directors' report as required by section 205E(4)(d), or

(c) to comply with section 205E(5) and (6), the auditor shall report that opinion and the reasons for forming that opinion to the Director of Corporate Enforcement.

(4) Section 194(6) applies, with the necessary modifications, in relation to an auditor's compliance with an obligation imposed on him by or under this section as it applies in relation to an obligation imposed by or under section 194.

(5) A person who contravenes this section is guilty of an offence.".

APPENDIX 4 The UK Regime – SAO Regime

In order to ensure that companies establish and maintain appropriate tax accounting arrangements, the United Kingdom introduced a Single Accounting Officer ("**SAO**") in 2009. Based on the comments provided in the survey, an overview of the regime is now included. It is somewhat similar to the DCS but the main aim is to secure tax compliance as opposed to a company's compliance with its "*relevant obligations*" and tax law.

First, detailed guidance for compliance is provided by HM Revenue & Customs ("**HMRC**").

Overview and duties of the SAO

Schedule 46 of the Finance Act 2009 contains the SAO provisions, which only apply to a qualifying company.

An SAO of a qualifying company must take reasonable steps to ensure that the company establishes and maintains appropriate tax accounting arrangements. As part of this duty, an SAO must monitor the arrangements and identify any respects in which the arrangements fall short of the requirement. A certificate must be provided by the SAO to the HMRC each financial year. In section 2, it provides:

> *(2) The certificate must—*
>
> > *(a) state whether the company had appropriate tax accounting arrangements throughout the financial year, and*
> >
> > *(b) if it did not, give an explanation of the respects in which the accounting arrangements of the company were not appropriate tax accounting arrangements.*
>
> *(3) The certificate must be provided—*
>
> > *(a) by such means and in such form as is reasonably specified by an officer of Revenue and Customs, and*
> >
> > *(b) not later than the end of the period for filing the company's accounts for the financial year (or such later time as an officer of Revenue and Customs may have allowed).*
>
> *(4) A certificate may relate to more than one qualifying company.*

A company will be a qualifying company, and must appoint an SAO, if it is a company incorporated in the UK for the financial year; and it has a turnover of more than £200 million and/or a relevant balance sheet total of more than £2 billion, either alone or when its results are aggregated with other UK companies in the same group, for the preceding financial year. It applies equally to dormant companies and active companies in a group.

The SAO can be a director or officer of a company, who in the reasonable opinion of the company, has overall responsibility for the company's financial accounting arrangements.

Each qualifying company must identify their SAO; the role of SAO cannot be filled by an agent. There can only be one SAO of a company at any one time. An SAO can act as SAO for more than one company.

In each financial year, a qualifying company must notify the name of its SAO to HMRC (only one per financial year).

Tax accounting arrangements must allow for the tax liabilities of the company to be calculated accurately. Section 14 defines *appropriate tax accounting arrangements"* as:

> *(1) "Appropriate tax accounting arrangements" means accounting arrangements that enable the company's relevant liabilities to be calculated accurately in all material respects.*
> *(2) "Accounting arrangements" includes arrangements for keeping accounting records.*
> *(3) "Relevant liabilities", in relation to a company, means liabilities in respect of—*
>> *(a) corporation tax (including any amount assessable or chargeable as if it were corporation tax),*
>> *(b) value added tax,*
>> *(c) amounts for which the company is accountable under PAYE regulations,*
>> *(d) insurance premium tax,*
>> *(e) stamp duty land tax,*
>> *(f) stamp duty reserve tax,*
>> *(g) petroleum revenue tax,*
>> *(h) customs duties, and*
>> *(i) excise duties*

"Reasonable step"

Reasonable steps are required to be taken which would normally be expected to take to ensure awareness of all taxes and duties for which the company is liable. The steps that are reasonable will depend on the particular circumstances. Reasonable steps might include establishing and maintaining processes to ensure compliance with legal requirements and periodically checking and testing systems, controls, process flows and transactions. Reasonable steps for the SAO would include ensuring the maintenance and retention of records. An SAO would also be expected to ensure staff and any third party to whom responsibilities are delegated are appropriately trained, have the necessary guidance, qualifications, knowledge and experience needed to carry out their functions

The SAO must perform the duties throughout the period of their responsibilities and it is not possible to only deal with responsibilities towards the end of the financial year.

Penalties

The penalties denote that the SAO will be liable to a penalty of £5,000 for failure to comply with his/her obligations during the financial year. It applies if they fail to comply with their main duty or fail to provide a certificate or provides a certificate which contains careless or deliberate inaccuracies.

Liability to a penalty does not arise where the SOA satisfies HMRC that there is a reasonable excuse for the failure. The Schedule also provides for an appeal of a penalty; enforcement of penalties and the power to change the amount of a penalty.

Summary

It is interesting to note and compare that the SAO regime applies to the Company which must take reasonable steps etc and appoint an SAO whereas the DCS obligations apply to the directors of a company. In both regimes, there is no third party verification.

APPENDIX 5 Processes implemented to ensure compliance with DCS

20 of the responding practitioners described a process which included a review of structures against compliance obligations, with a few referring to the testing of the internal controls and sourcing external advice. 3 of these respondents also commented that it depends on the company, with some companies using a tick box approach.

9 practitioners responded saying it was a more or less a tick box exercise, often amending last year's form with no review or little examination of the controls in place.

The directors' responses were less detailed, but of the 24 responses, 25% (6) showed little or no awareness of the DCS or the process supporting it. 33% (8) either believed it was a tick box exercise or had limited knowledge of the process. 42% were able to describe or refer to a robust process. For the reasons which are explored in this report, many directors have delegated this task and/or due to a lack of understanding on their part.

Responses from Practitioners with processes in place:

⇒ Review of company law and tax structures in place. Ensure DCS documentation is up to date. Obtain external advice every three years (Professional Adviser)
⇒ The board reviews or puts in place policies to enable it to meet its relevant obligations, which it sets out in statement, then meets to resolve to adopt or amend the policies as necessary and to adopt the statement. A review of the policies takes place each year. (Solicitor)
⇒ Meeting with the company; determining what processes and policies are already in place that can be leveraged; determining areas where gaps exist; recommending improvements. Agreeing on policy and risk rating. (Company Secretary)
⇒ Table the matter at the board; Enable Examination of list of compliance obligations and procedures and controls to support adherence to same; Secure statement (Company Secretary)
⇒ Review of compliance with environmental, regulatory standards. (Company Secretary)
⇒ Hire external experts knowledgeable in company law and tax law, independent of the auditors, to prepare a comprehensive checklist for compliance matters and verify that these are fully complied with. (Compliance Officer)
⇒ Various documents in place - an overall compliance policy statement; an accompanying document outlining all the compliance structures, processes and controls; finally, an outline of the steps undertaken by the Audit Committee and Board. The documents are kept up to date and reviewed annually by the Board. This leads to a disclosure in the accounts (Auditor)
⇒ At commencement of obligations, framework identified, ownership amongst management agreed, annual assurance review conducted, Assurance report presented to Board mid-year. (Company Secretary)
⇒ Review and test controls in place and where deficient improve them (Professional Adviser)
⇒ 80-page document prepared each year from Cosec, Finance and tax. Not clear what value that the introduction of the compliance statement has provided other than

additional red tape. It is really documentation of what is happening by our impacted companies but not sure what value it has for the directors. (Company Secretary)
⇒ This varies. In some/many cases, this could simply involve confirmation from tax / finance / legal personnel that obligations have been met. Based on experience, the best process adopted by those boards / companies really engaged would involve the following: 1) Year 1: Documentation of key principles in a compliance strategy 2) Year 1: Documentation of all tax and company law risks in a register. This register would map the specific procedures in place to manage these risks, together with the appropriate personnel responsible for managing each risk. 3) Annually: The register is reviewed and updated to reflect any changes to the legislation, obligations or key personnel. 4) Annually: Testing is performed on a sample of the risks to ensure that the relevant procedures have been followed. 5) Annually: The board is briefed by CFO / Head of Tax on the findings of the review undertaken, including any changes to the register. 6) Annually: Any issues identified are remediated through control enhancements (Professional Adviser)
⇒ Process includes: a. Assess company position in terms of qualification for DCS b. Prepare compliance policy statement c. Put in place appropriate arrangements to ensure compliance with the relevant obligations d. Review arrangements on an annual/periodic basis (Company Secretary)
⇒ This varies between organisations. In many cases, it may just be included. In certain cases, there will be a formal process where management have to demonstrate to that board that structures and controls are in place and have to evidence that they have been tested each year (Professional Adviser)
⇒ Once it is anticipated that the company will exceed the relevant thresholds, a DCS is drawn up by the directors setting out the company's policies to comply with its relevant obligations. Appropriate structures are also put in place to secure compliance. A review is conducted each year of these structures. The directors give a statement in their report that accompanies their statutory financial statements that they acknowledge that they are responsible for securing the company's compliance with its relevant obligations and that they have complied with the above three things, or where they have not complied to explain why. Regarding the required review that a given DCS covers, it must have been conducted in the financial year to which the statutory financial statements in which the DCS is included relates. (Solicitor)
⇒ Questionnaire for company to consider and complete around processes, responsibilities; Discussions with relevant parties on responsibilities, processes for compliance; Draft compliance statement and discuss with responsible parties; Present to board for approval with discussion; Review annually (Company Secretary)
⇒ In prior years this involved the initial preparation of a document that comprised: (i) a directors' compliance policy statement and (ii) a statement of the company's compliance structures and arrangements, with a schedule of the offences and penalties associated with relevant obligations.

It is intended that the statement of compliance structures and arrangements would be reviewed by the board or a committee in each year before the DCS was included in the annual report. ⇒ However, in our experience we have only been involved in the establishment of such documents/structures in the first year of compliance and the task was assumed by auditors/financial advisers in subsequent years in connection with the giving of the DCS. We have no further visibility as to whether the requirements have been followed in subsequent years. (Solicitor)
⇒ Meeting with Cosec / Legal / Tax function head; Ascertain what existing controls / documentation can be leveraged; Review of systems / procedures re legal and tax obligations; Review of DCS policy; Advise on gaps / make recommendations (Company Secretary)
⇒ Internal controls in place which are tested as part of our Corporate Global SOX testing process, as well as ongoing reviews of our compliance with obligations. We also liaise with external consultants to monitor changes in the Ireland regime and pick up any matters arising that need to be integrated into our processes. (In house tax department)
⇒ Akin to due diligence on the issues raised (Solicitor)

Responses from Practitioners who believed it was a tick box exercise:

⇒ Delegated to executives/advisers and reported on. As long as it looks reasonable and carefully considered, usually adopted without much comment. (Solicitor)
⇒ Disparity in how companies deal with DCS. My experience is that most mainly include the statement in their FS without any other substantive actions. (Solicitor)
⇒ Tick Box accounting software (professional adviser)
⇒ Template matrix prepared with all category 1 and 2 offences. GC or company secretary usually goes through it to identify if there are any particular compliance structures in place for those offences. If not, most firms have a fairly "generic" language template that is used. Template wording is in place for the compliance statement. Board adopts the statement (Solicitor)
⇒ Copy and paste from somewhere else (Auditor)
⇒ From experience, there is no prescribed process on what directors are expected to do. (Compliance officer)
⇒ In reality, in most companies this is copied from the previous year by middle management, updated slightly, tweaked by accountants and solicitors and signed by directors. (Solicitor)
⇒ The company's solicitors work off a template, which is adjusted to the details of management structure in the relevant company. That is then adopted. The annual statement in the company's annual report is generally the accountants' / auditors' responsibility. (Solicitor)
⇒ Generally, boilerplate examples are provided to the company accountants to include in statutory accounts. Companies most often do not have any evidence of compliance and can lead to management letter points or creating the required documentation only when asked by us as auditors. (Auditor)

Responses from Directors displaying a lack of awareness

⇒ Don't know
⇒ Not familiar with the process
⇒ I was not aware of it until I received this form.
⇒ No understanding/awareness.
⇒ I have yet to complete a DCS
⇒ I think our company is too small to come under the remit of DCS and even this questionnaire

Responses from Directors displaying limited knowledge or believing it to be a tick box exercise:

⇒ My accountant looks after this
⇒ Statement on accounts for companies with turnovers over 25m
⇒ From general experience, this involves a high-level attestation from finance / tax / others that controls are in place. Level of stress testing from directors is light touch
⇒ Our company auditors compile the directors' statement which is then signed by the directors, it does make a bit of an awareness of obligations, but it's just signed as a matter of course without much thought put into it
⇒ This form is useless unless it's audited. People just fill it out and with something like a CPD requirement and an audit or some test of their knowledge the form is just an exercise in box ticking.
⇒ The Secretary Director is the responsible person and the directors use this to blackmail them saying they are the most responsible person and they face prison if anything is wrong. It's such a shame the lack of understanding and lack of knowledge to what should and should not be acceptable.
⇒ another layer of red tape upon more red tape

Responses from Directors describing or referring to a robust process

⇒ Documented policies, procedures and controls/checks that feed up from the finance team to the MD and then to the board and audit committee
⇒ This is done mainly at the annual financial audit tests of transactions and review of systems. We have ISO systems which allow for ongoing monitoring of certain systems and also regular checking of legislative requirements relevant to the ISO standard.
⇒ The better processes I have seen involve the following: o Documentation in a register of all compliance obligations and mapping the specific processes and controls to ensure compliance. o On an annual basis, a sample of those obligations are tested to validate compliance o Formal briefing from company management to the board outlining steps taken to manage key risks. This would include reporting back on the findings of control testing performed o In my experience, many boards will sign off on the DCS without going through the above process.
⇒ The process is sponsored by the Internal Audit function and overseen by the Boards

	Audit & Risk Committee. All the compliance requirements are mapped and are considered in the light of the company's processes to ensure such compliance. The IA group test the systems and controls to give assurance to the Board / ARC that the processes were in place and were working in the year being reported on to ensure that the directors can report substantial compliance with the requirements.
⇒	Review of overall legal and tax compliance matters facing group company and ensure that the structures / controls are in place to adhere to directors' obligations
⇒	Have a policy statement in place confirming the Directors responsibility to comply with relevant obligations, ensure appropriate structures and arrangements are in place in the company and then review these annually to ensure they remain sufficient
⇒	CFO prepares compliance calendar showing all legal, co sec, tax, reporting and other obligations and deadlines during the year. Deadlines, completion dates and personnel involved are filed in during the year on a monthly basis. The calendar is circulated to directors annually at year end to give comfort that all relevant obligations are completed or being managed.
⇒	Prepared by internal management, then external auditors review and ensure accurate, plus consistent with the annual Audited Financial Statements.
⇒	Directors are required to formally acknowledge their roles and responsibilities as regards the compliance of the company to its relevant obligations (Tax & Legal).
⇒	Works in tandem with internal audit function and external audit review
⇒	Annual review of compliance with directors' obligations and completion of internal questionnaire based on internal policy

ANNEX 2: CLRG REPORT ON PARTS 17, 23 AND 24 OF THE COMPANIES ACT

COMPANY LAW REVIEW GROUP

REPORT ON THE REVIEW OF PARTS 17, 23 AND 24 OF THE COMPANIES ACT

DECEMBER 2023

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

Mr Simon Coveney, T.D.,
Minister for Enterprise, Trade and Employment
23 Kildare Street
Dublin 2
D02 TD30

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

21 December 2023

Dear Ministers,

I am pleased to present the Review Group's Report of its review of Parts 17, 23 and 24 of the Companies Act, being item number 3 on the Review Group's current work programme. The review set out to provide a rationale for the distinct responsibilities of the Minister for Enterprise, Trade and Employment and of the Minister for Finance which arise in particular under Parts 23 and 24 of the Act.

It became clear from the outset that the exercise of mapping the appropriate responsibilities between Ministers required very careful deliberation, being a complex area of law at the intersection of company law and financial services law. In this endeavour, the Review Group's Public Company Committee was greatly assisted by the research conducted by Shauna Keniry BL and by the key insights provided by Review Group member Tanya Holly of the Department of Enterprise, Trade and Employment.

I would like to acknowledge and thank each of the members of the PLC Committee for their diligence and input into the issues and Review Group Secretary Deirdre Morgan, and Dan O'Neill of the Department for their support and for preparation of the Report.

Yours sincerely,

____

Paul Egan SC
Chairperson
Company Law Review Group

5. Introduction

5.1 The Company Law Review Group

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

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

5.2 The Role of the CLRG

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

5.3 Policy Development

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

5.4 Contact Information

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

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

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

Email: clrg@enterprise.gov.ie

6. Company Law Review Group Membership

6.1 Membership of the Company Law Review Group

Paul Egan SC	Ministerial Nominee and Chairperson (Mason Hayes & Curran LLP)
Prof Deirdre Ahern	Ministerial Nominee (School of Law, Trinity College Dublin)
Alan Carey	Revenue Commissioners
Barry Conway	Ministerial Nominee (William Fry LLP)
Dr Margaret Cullen	Institute of Directors
Richard Curran	Ministerial Nominee (LK Shields LLP)
Emma Doherty	Ministerial Nominee (Matheson LLP)
Ian Drennan	Corporate Enforcement Authority (CEA)
Bernice Evoy	Banking and Payments Federation Ireland
James Finn	Courts Service
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Rosemary Hickey	Office of the Attorney General
Tanya Holly	Department Representative
Neil Keenan	Law Society of Ireland
Eamonn Kennedy	Irish Business and Employers Confederation (IBEC)
Gillian Leeson	Euronext Dublin
Prof Irene Lynch Fannon	Ministerial Nominee (Matheson LLP)
Kathryn Maybury	Small Firms Association (SFA)
Neil McDonnell	Irish Small and Medium Enterprises Association (ISME)
Dr David McFadden	Companies Registration Office (CRO)
Salvador Nash	The Chartered Governance Institute UK & Ireland (KPMG Law LLP)
Fiona O'Dea	Department Representative
Gillian O'Shaughnessy	Ministerial Nominee (ByrneWallace LLP)
Maureen O'Sullivan	Companies Registration Office (CRO)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority (IAASA)
Eadaoin Rock	Central Bank of Ireland
Niamh Ryan	Irish Funds Industry Association
Cathy Smith SC	Bar Council of Ireland
Doug Smith	Restructuring & Insolvency Ireland (Addleshaw Goddard (Ireland) LLP)
Tracey Sullivan	Consultative Committee of Accountancy Bodies – Ireland (CCAB-I)

6.2 Membership of the Public Company Committee

Paul Egan SC	Chairperson
Fergus Bolster	Matheson LLP
Nadine Conlon	The Chartered Governance Institute
Margaret Cullen	Institute of Directors and CLRG Member
Maria Doyle	Revenue Commissioners
Kevin Fee	Central Bank
Tanya Holly	Department Representative and CLRG Member
Gillian Leeson	Euronext Dublin and CLRG Member
Liam McCormack	Department of Enterprise, Trade and Employment
Niamh Ryan	Irish Funds Industry Association and CLRG Member
Mark Talbot	William Fry LLP

7. The Work Programme

7.1 Introduction to the Work Programme

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, in consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items of work to the programme as matters arise. The current work programme began in 2022 and runs until 2024. The work programme is focused on continuing to refine and modernise Irish company law.

7.2 Work Programme 2022-2024

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

10.	Respond to Department requests on an EU proposal of a Directive on harmonising certain aspects of substantive law on insolvency proceedings.
11.	Review the obligations outlined in relation to the directors' compliance statement in the Companies Act 2014, and, if appropriate, make recommendations as to how these might be enhanced in the interest of good corporate governance.
12.	Review appropriateness and utility of Parts 23 and 24 of the Companies Act 2014 in the context of how the financial markets and their regulation have developed.
13.	On the issue of corporate purpose, participate in Departmental public consultations in respect of the Corporate Sustainability Reporting Directive and proposed Corporate Sustainability Due Diligence Directive and consider issues arising as requested.
14.	Review examinership law in the context of applying the optional articles of the Preventive Restructuring Directive, having regard to developments at domestic, EU and international level.

15.	Engagement with Department on relevant legislative proposals concerning Limited Partnerships and Co-operative Societies.
16.	Provide ongoing advice to the Department of Enterprise, Trade and Employment in relation to EU, Brexit and international proposals on company law.
17.	Examine and make recommendations on whether it will be necessary or desirable to amend company law in line with recent case law and submissions received regarding the Companies Act 2014.
18.	Review enforcement provisions of company law and, if appropriate, make recommendations for change.

This Report is concerned with item 3 of the Work Programme.

7.3 Decision-making process of the Company Law Review Group

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

7.4 Committees of the Company Law Review Group

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

8. Report on the Review of Parts 17, 23, and 24 of the Companies Act

8.1 Introduction

Securities law originated as part of company law, with provisions in companies legislation setting out the obligation of companies to produce a prospectus in particular instances when raising finance by the issue of shares or debt securities. The law was largely an adjunct to that relating to the mechanics of issuing shares. In the last thirty years, the law relating to the issuance of securities has developed exponentially, with separate regimes regulating discrete and interrelated areas of securities law.

The Companies Act remains host to certain key measures underpinning the integrity of securities issuance and trading. Such measures are contained within Parts 17, 23 and 24 of the Act. However, policy responsibility for many of the measures relating to securities lies with the Minister for Finance rather than the Minister for Enterprise, Trade and Employment often because the ECOFIN Council (comprising economic and financial ministers from EU Member States with responsibility for economic policy, taxation issues and the regulation of financial services) dealt with the relevant EU proposals that underlie the company law provisions.

The Company Law Review Group ("CLRG") Work Programme 2022–2024 includes (under Item 3) the following work item:

"Review appropriateness and utility of Parts 23 and 24 of the Companies Act 2014 in the context of how the financial markets and their regulation have developed."

The Committee determined that its analysis should address the following:

Part 17:

- Provisions, so far as they relate to traded companies, as to the regulation of the transfer of securities, shareholders' rights and transparency;

Part 23:

- provisions as to civil and criminal liability for non-compliance with the law relating to prospectuses, where shares are offered to the public or admitted to a regulated market;
- provisions as to civil and criminal liability for non-compliance with the law relating to insider dealing, market manipulation, unlawful disclosure of inside information, and executives' dealings in shares;

These provisions in Part 23 sit alongside measures to do with corporate reporting and shareholder disclosure of shareholdings on regulated markets.

Part 24:

- provisions relating to a type of collective investment scheme (or investment fund), that of investment companies.

Other provisions of the Companies Act

- There are other provisions in the Companies Act where certain policy decisions under EU Regulations or Directives are a matter for the Minister for Finance whilst the consequences of those decisions have a bearing on parts of the Companies Act within the competence of the Minister for Enterprise Trade and Employment, or where the line of responsibilities between

the respective Ministers is not always clear, e.g. the Central Securities Depositories Regulation (EU) 909/2014 or the Consolidated Admissions and Reporting Directive 2001/34/EC.

8.2 Interpretation

In this Report:

"1996 Regulations" means the Companies Act, 1990 (Uncertificated Securities) Regulations 1996;

"2003 Market Abuse Directive" means Directive 2003/6/EC on insider dealing and market manipulation (market abuse);

"2003 Prospectus Directive" means Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading;

"2004 Transparency Directive" means Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market;

"2005 Prospectus Regulations" means the Prospectus (Directive 2003/71/EC) Regulations 2005;

"2007 Transparency Regulations" means the Transparency (Directive 2004/109/EC) Regulations 2007;

"2014 Market Abuse Regulation" means Regulation (EU) No 596/2014 on market abuse;

"2016 Market Abuse Regulations" means the European Union (Market Abuse) Regulations 2016;

"2017 MiFID Regulations" means the European Union (Markets in Financial Instruments) Regulations 2017;

"2017 Prospectus Regulation" means Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market;

"2020 SRD Regulations" means the European Union (Shareholders' Rights) Regulations 2020;

"AFFL" means the Advisory Forum on Financial Legislation;

"AIF" means an alternative investment fund;

"Central Bank" means the Central Bank of Ireland;

"CLRG" or "Review Group" means the Company Law Review Group;

"Commission Implementing Regulation" means Commission Implementing Regulation (EU) 2018/1212;

"Committee" means the Public Company Committee of the Review Group;

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

"CRO" means the Companies Registration Office;

"CSD" means a Central Securities Depository;

"CSDR" means Central Securities Depositories Regulation (EU) No 909/2014;

"FSMA 2000" means the UK Financial Services and Markets Act 2000

"IAASA" means the Irish Auditing and Accounting Supervisory Authority;

"ICAV" means an Irish Collective Asset-management Vehicle;

"IFCMPA 2005" means the Investment Funds, Companies and Miscellaneous Provisions Act 2005;

"IFCMPA 2006" means the Investment Funds, Companies and Miscellaneous Provisions Act 2006;

"ILP" means an investment limited partnership;

"IMC Rules 2019" means the Central Bank (Investment Market Conduct) Rules 2019;

"MiFID II" means Directive 2014/65/EU on markets in financial instruments;

"Minister" means the Minister for Enterprise, Trade and Employment;

"Part 17" means Part 17 of the Companies Act;

"Part 23" means Part 23 of the Companies Act;

"Part 24" means Part 24 of the Companies Act;

"PLC" means a public limited company registered under Part 17;

"SRD1" means Shareholders Rights Directive (EU) 2007/36/EC;

"SRD2" means Directive (EU) 2017/828 amending SRD1;

"UCITS" means an undertaking for collective investment in transferable securities;

8.3 Overall Objective

The purpose of this review is to identify whether it is appropriate for certain provisions that straddle traditional company law and modern securities law to remain in the Companies Act or if certain provisions are best excised from the Companies Act and relocated with other compatible measures in another piece or pieces of legislation.

Understanding where policy responsibility for decisions on these matters lies and aligning it with the appropriate Minister and regulatory body facilitates better navigation of the legislative and regulatory systems and promotes more prompt responses to legal issues that arise.

This exercise also brings to the fore that there are duplicative provisions in the Companies Act for public companies, particularly in the area of shareholder disclosure of holdings and rules on directors' share dealings and their disclosure.

We should say that we do not advocate that such a reorganisation of the law is immediately merited, acknowledging that the exercise will be complex. However, we believe that if there is in due course a consolidation of securities law or a restatement of company law, the opportunity could be taken to consider the recommendations of the Review Group. Although such consolidations or restatements are essentially once-in-a-generation affairs, we believe that this is an important exercise so as to provide a benchmark for legislative developments in due course.

This review has not discussed any change with regard to regulatory competences in respect of the relevant legislative provisions.

8.4 Method and approach

In the context of this review only, the Committee has worked on the following premise:

a) The Minister for Finance has overall responsibility for the development of domestic and EU/International financial services regulation, with the aim of supporting a well regulated, competitive and stable financial services sector. The Central Bank of Ireland is responsible for the oversight of the activities of financial institutions as regards financial services regulation, the authorisation and on-going supervision of regulated markets and of multilateral trading facilities. The legislation introduced by the Minister for Finance is relied on by the Central Bank of Ireland in its regulatory and supervisory role.

b) The responsibility of the Minister for Enterprise, Trade and Employment is to sponsor legislation that will provide appropriate corporate structures and procedures that will facilitate and promote business and commercial probity generally.

The Committee conducted a detailed analysis of the provisions in question with a view to developing advice to the Minister on the following:

- the provisions of the Act that might be removed from the Companies Act, to be located in distinct enactments where the Minister for Finance is the responsible Minister;
- the removal of unnecessarily duplicative provisions from the Companies Act;
- other general areas for streamlining provisions and procedures.

8.5 Previous analysis of the issues

A Government Decision in November 2006 approved the preparation of a Bill to provide for the consolidation of the existing legislation governing the regulation of the financial services sector. This included consideration of the transfer of legislation relating to investment funds from the Minister to the Minister for Finance.

Another block of legislation relating to the Financial Securities Markets was also identified for consideration for transfer to the Minister for Finance. As part of this consideration, the views of the Advisory Forum on Financial Legislation (AFFL) were sought – a group of stakeholders set up to assist the Department of Finance in the consolidation exercise.

The AFFL was set up by the Department of Finance in 2007 to assist with the preparation of a Bill to consolidate and, in so far as was possible within the timeframe envisaged, to modernise Irish financial services legislation. Set out in Appendix A to this Report is a letter from the Chairperson of the Securities Working Group to the Chairman of the AFFL dated 8 April 2008.

A decision was taken in March 2009 to defer the work of the Advisory Forum given the global financial crisis that was occurring at that time. But before the deferment, some scoping work was carried out to identify which sections of the Companies Acts should transfer to the Minister for Finance. Between 2010 and 2012, there was further intermittent engagement between the two Departments on the possible phased transfer of responsibility for legislating on areas relating to the Financial Securities Markets and the Investment Funds Industry, but the transfer did not take place.

9. Part 17 – Public Limited Companies

9.1 Introduction

The Committee conducted an analysis of certain Chapters of Part 17 where the provisions that were sourced from EU measures focused on companies with securities admitted to trading and where the other provisions that were sourced domestically appeared to duplicate or intersect with provisions in the Transparency (Directive 2004/109/EC) Regulations 2007 and Central Bank (Investment Market Conduct) Rules 2019 Parts 1 and 2.

9.2 Chapter 4: Interests in shares: disclosure of individual and group acquisitions

The Review Group analysed this Chapter, in light of its duplicating provisions in the Transparency (Directive 2004/109/EC) Regulations 2007 and Central Bank (Investment Market Conduct) Rules 2019 Parts 1 and 2.

In summary this Chapter gives rise to the following obligations:

- a person with a 3% or more interest in the voting shares of a PLC, whether or not listed, must notify the PLC of the interest held by the person, their spouse, civil partner, or minor children or any company in which they own or control 1⁄3 of the share capital, when they pass 3% or any whole percentage number;
- shares held by persons acting in concert to acquire those shares are aggregated for the purposes of the notification requirements;
- the PLC, on its own initiative may, or at the request of a 10% shareholder must, make an enquiry of a person as to their present or prior interest in a PLC's voting shares.

The law in this Chapter was drawn from the UK's Companies Act 1985 and originally enacted in Part IV of the Companies Act 1990. Since that time, the combination of EU measures, notably the Transparency Directive 2004/109/EC, Rules made under the Irish Takeover Panel Act 1997 and market rules have combined to make much of this Chapter redundant.

9.3 Chapter 4: Conclusion and recommendation

The Committee debated whether the Companies Act was the appropriate vehicle for disclosure of interests in shares and concluded that transparency of company ownership was a fundamental cornerstone of commercial probity. In the words of United States Supreme Court Justice Louis Brandeis "sunlight is the best disinfectant". Accordingly it is properly contained within the Companies Act. However, the Committee was of the view that the law regulating disclosure of interest that should apply to PLCs should not be this remnant of pre-2004 Transparency Directive law, but that it should be remodelled so as to be aligned with the disclosures mandated under the Transparency regime that apply to companies with voting securities admitted to a regulated market.

It is recognised that to realign the law in light of this analysis will, on the face of it, result in certain interests in shares which are at present notifiable under the Companies Act ceasing to be notifiable by persons holding those interests[40], summarised in this table:

[40] Companies Act 2014, ss 1054, 1055.

Nature of interest	Extent of interest
Family interests	Shares held by a spouse, civil partner, or a child under 18 years of age or the person
Indirect interests	Shares held by a body corporate where one third or more of the voting capital is held or controlled by the person
Concerted interests	Shares acquired by persons acting in concert together pursuant to a share acquisition agreement

That said, the 2007 Transparency Regulations[41] require notification of interests effectively controlled by the person concerned, which therefore operate to address the core intent of those more literal Companies Acts provisions.

The Review Group recommends:
- **that Chapter 4 be retained as part of companies legislation.**
- **The Review Group also recommends that, as part of a future Work Programme, the Committee reviews Chapter 4 again in the context of the 2004 Transparency Directive regime with the intention of aligning the regimes where practical and optimal.**

9.4 Chapter 7: Uncertificated securities

The title to shares in a PLC can be in certificated or uncertificated form:

- certificated shares will be evidenced by a paper share certificate; or
- uncertificated shares will be evidenced by electronic means and the title and transfer of the shares are registered on a computer based system.

The framework for regulation of uncertificated shares was originally set out in S.I. No. 68/1996 - Companies Act, 1990 (Uncertificated Securities) Regulations 1996, which enabled the title to securities in companies registered in Ireland to be evidenced otherwise than by a certificate and transferred without a written instrument. The 1996 Regulations were continued in force by section 5(7) and Schedule 6, para. 5(2) of the Companies Act, which provides that the 1996 Regulations "shall continue in force and may be amended or revoked under section 1086 accordingly." The 1996 Regulations were and are the responsibility of the Minister and remain in force.

In the 1996 Regulations:

- Chapter II provides for procedures for evidencing and transfer of uncertificated units of a security on a dematerialised, computer-based system without a written instrument, entry on registers of securities held in uncertificated form, and related matters.
- Chapter III provides for the approval and compliance of the approved operator of a "relevant system".
- Chapter IV provides rules for provision to prevent persons sending "properly authenticated dematerialised instructions" from denying particular matters relating to them. It also makes

[41] Regulation 15, transposing art 10 of the 2004 Transparency Directive

provision for persons receiving such instructions to accept with, certain exceptions, that the information contained in them and matters relating to them are correct.

- Chapter V, VI and the Schedules to the 1996 Regulations provide for a number of incidental and related matters, and for the detailed rules and procedures applying to approved operators of a relevant system.

Section 1085 is expressed in similar terms to regulation 5 of the 1996 Regulations and provides that section 6 of the Statute of Frauds 1695, section 28(6) of the Supreme Court of Judicature (Ireland) Act 1877, section 94(4) of the 2014 Act, and any other enactment or rule of law requiring the execution, under hand or seal, of a document in writing for the transfer of property, shall not apply (if they would otherwise do so) to any transfer of title to securities pursuant to section 12 of the Electronic Commerce Act 2000 or authorised or required pursuant to regulations made by the Minister under section 1086.

Section 1086 provides that the Minister may make provision by regulations for enabling or requiring title to securities or any class of securities to be evidenced and transferred without a written instrument. The “Minister” here means the Minister for Enterprise (see section 2(1) of the 2014 Act). Section 1087 provides for supplemental measures relating to section 1086 of the 2014 Act.

Sections 984, 1193, and 1256 in Parts 16, 18 and 19 apply Chapter 7 (sections 1085–1087) in Part 17 to the securities of a DAC, CLG, PUC and PULC as they apply to securities of a PLC.

The settlement of trades in securities is done by central securities depositories (CSDs), which operate settlement systems by maintaining records of securities of participating issuers and those entitled to them. CSDs hold the title to the securities by taking custody of securities, either by physical custody of certificated securities or by entry of the CSD or its nominee as registered holder of the securities. All Member States of the EU, other than Ireland, have a domestic CSD normally linked to its stock exchange. As a result of the close historic links between the Dublin and London stock exchanges, Ireland had traditionally relied on a CSD based in the United Kingdom, operated by Euroclear UK & Ireland (EUI) Ltd utilising a settlement system called CREST.

In December 2018, in preparation for the expected ultimate expiry of EUI’s recognition as an authorised CSD, Euronext Dublin announced the conclusion of analysis it had carried out on options for long-term post-Brexit securities settlement. It decided that it would look at migrating the Irish securities market business from EUI’s CREST system to a Belgium-based unit of Euroclear, one of the world’s largest settlement houses. With Irish government and securities industry support, the Migration of Participating Securities Act 2019 was passed, enabling Irish issuers to use a special procedure, rather than a court-approved scheme of arrangement, to migrate their securities into this Euroclear-operated intermediated system.

The procedure for migration under the 2019 Act required the passing by the issuer of a special resolution approving the migration of its participating securities – securities the title to which was permitted to be transferred by means of a CSD’s system (i.e. the securities in CREST) – to the new intermediated system. All Irish-registered PLCs with equity securities admitted to Euronext Dublin, Euronext Growth, the LSE official list and AIM had used this procedure to migrate their participating securities into the Euroclear system which went live on 15 March 2021.

The Migration of Participating Securities Act 2019 was an enactment under the responsibility of the Minister for Finance and was commenced on 29 January 2020. The procedure by which holders of

securities of an Irish registered PLC were enabled to consent to migration of its participating securities by special resolution was set out in sections 4,5, and 6 of the 2019 Act.

S.I. No. 111/2021 - Migration of Participating Securities Act 2019 (Appointment of Live Date) (Section 12(5)) Order 2021 prescribed the live date of 15 March 2021 for migration of securities by Irish registered PLCs to Euroclear Bank NV/SA. Each of the PLCs to which the live date was to apply are listed in the Schedule to the Order. S.I. No. 609/2020 - Companies Act 1990 (Uncertificated Securities) (Amendment) Regulations 2020 amended the 1996 Regulations to alert the market to the fact of the EU Commission temporary UK equivalence decision for the purposes of the CSDR and European Securities and Markets Authority's recognition which legally provided for CREST to continue to operate until 30 June 2021.

9.5 Chapter 7: Conclusion and recommendation

As the rationale for Chapter 7 has been superseded by the migration of listed PLCs' securities into the Euroclear system, the Committee concluded that it was logical for the Minister to revoke this Chapter and the 1996 Regulations.

The Review Group recommends that Chapter 7 and the 1996 Regulations be revoked, as they no longer serve any purpose for PLCs.

9.6 Chapter 7A: Uncertificated securities of relevant issuers
Chapter 7B: Dematerialisation of applicable securities

The Companies Act was amended by section 12 of the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 to insert a new Chapter 7A into Part 17, which was commenced on 15 March 2021. The Explanatory Memorandum (while not relevant to the legal interpretation of Chapter 7A) indicated that the purpose of these amendments was to provide "for miscellaneous amendments to the Companies Act 2014 to facilitate the operation of a substitute securities settlement system, compatible with the law of the European Union after the transition period."

Central Securities Depositories Regulation (EU) No 909/2014 prescribes the rules that apply to settlement of securities and CSDs in the Member States of the EU. One of CSDR's key provisions is the obligation under Article 3 applying to issuers established in the EU that issues of, and transactions in, traded securities shall be represented or recorded in "book-entry form", that is, recorded in an electronic register, without any separate document.

Article 3(1) provides:

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

"Immobilisation" means the act of concentrating the location of physical securities in a CSD in a way that enables subsequent transfers to be made by book entry, and "dematerialised form" means the fact that financial instruments exist only as book entry records.

Article 3(2) provides:

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

Chapter 7A contains provisions which give further effect to CSDR and enable PLCs registered in Ireland to participate in the settlement system operated by the CSD (now Euroclear Bank NV/SA) in respect of Irish-registered PLCs.

Chapter 7B was inserted in the Companies Act by SI No 353 of 2023 European Union (Dematerialised Securities) Regulations 2023, mirrored by similar provisions in the Act for companies other than PLCs. It contains provisions compelling PLCs to comply with the requirements as to dematerialisation of securities prescribed by Article 3 of CSDR, from 1 January 2023 in relation to new issues and from 1 January 2025 for existing issued securities.

Section 1087A (as amended) sets out relevant definitions for the purposes of the chapter.

- "relevant issuer" means a PLC that has issued securities that are relevant securities.
- "relevant securities" means securities that are (a) issued by a relevant issuer, and (b) registered in the name of a CSD, or a body as may from time to time be nominated by a CSD to hold securities represented in the CSD's securities settlement system.

S.I. No. 119/2021 - European Union (Central Securities Depositories) (CSD Nominee) (Amendment) Regulations 2021, made by the Minister for Enterprise, provided, with effect from 16 March 2021, that "[f]or the purposes of Chapter 7A of Part 17 of the Act of 2014, 'relevant securities' shall include securities registered in the name of a CSD nominee." That would appear to be to the same effect as the (now) amended definition of "relevant securities" in section 1087A, but the regulations remain in force.

Section 1087B provides that notwithstanding section 99(2) of the 2014 Act, a PLC (who is a relevant issuer) is not required to issue share certificates in respect of relevant securities that are registered in the name of a CSD or its nominee, and the title of same to the relevant securities shall be evidenced by a record in the register of members of the PLC.

Section 1087C provides, in overview, that a written instrument of transfer shall not be necessary to transfer title to relevant securities in a CSD.

Sections 1087D–1087H make provision for a number of supplementary and consequential matters.

9.7 Chapters 7A and 7B: Conclusion and recommendation

The Committee concluded that these Chapters are properly in the Companies Act, as they relate to the mechanics of share transfer and associated implications for certain corporate governance provisions arising from the manner in which listed securities must be dealt.

The Review Group recommends that Chapters 7A and 7B be retained in companies legislation.

9.8 Chapter 8: Corporate governance
Chapter 8A: Rights of shareholders

Chapters 8 and 8A (sections 1088–1110E) set out corporate governance requirements that apply to PLCs. Of interest in this context are, in particular:

- Sections 1094–1096 which apply where a PLC is a "participating issuer" within the meaning of the 1996 Regulations, namely a PLC that has issued uncertificated units of security, the title to which can be transferred by a computer-based system, and
- Sections 1099–1110, which transpose SRD1;
- Sections 1110A–1110E, which transpose SRD2, being provisions inserted by S.I. No. 81 of 2020 – European Union (Shareholders' Rights) Regulations 2020.

Sections 1094–1096 provide rules by which a PLC that is a "participating issuer" shall determine how far in advance persons must be entered on a register of securities in order that they may be entitled to attend and vote at meetings, or receive notice of meetings.

Section 1099 provides that sections 1100 to 1110 have effect in relation to a notice of a general meeting given by a traded PLC, or otherwise in relation to a general meeting of a traded PLC. In this context, under section 1099(4), "traded PLC" means a PLC whose shares are admitted to trading on a regulated market in any Member State of the EU, but is not a UCITS, or a collective investment undertaking under Article 4(1) of Directive 2011/61/EU ("the AIFM Directive"). In summary:

- Section 1100 provides for equal treatment of members of a traded PLC regarding voting rights and participation in the general meeting of the company.
- Section 1101 provides that the directors of a traded PLC shall convene an EGM on the requisition of 5% of the paid up shareholders of the company.
- Sections 1102–1103 provide for matters relating to notice of general meetings of a PLC.
- Section 1104 provides that members holding at least 3% of the issued share capital representing 3% of the voting rights of all issued shares may put an item on the agenda of an AGM or EGM, subject to the conditions laid out the section.
- Section 1105 provides for rules for determining when a person must be registered in a register of securities in order to exercise rights of participation and voting in a general meeting.
- Section 1106 provides for a traded PLC to allow for participation in a general meeting by electronic means.
- Section 1107 provides that members of a traded PLC have the right to ask questions relating to items on the agenda of a general meeting of the traded PLC, etc.
- Section 1108 contains provisions relating to the appointment of proxies to attend and act on behalf of members at a general meeting of a traded PLC.
- Section 1109 provides that a traded PLC may permit, by appropriate arrangements, voting for the purpose of a poll that is to be taken at a general meeting to be cast in advance by correspondence.

- Section 1110 provides for traded PLCs to give full accounts of a vote on the request of a member before the declaration of a vote at a general meeting.
- Section 1110A(1) sets out key definitions for the purpose of Chapter 8A:
  - "intermediary" means "a person, whether situated in a Member State or elsewhere, that provides services, in relation to a traded PLC, of safekeeping of shares, administration of shares or maintenance of securities accounts on behalf of shareholders or other persons". The definition includes an investment firm under the 2017 MiFID Regulations, a credit institution under Capital Requirements Regulation (EU) No 575/2013 and a CSD under the CSDR.
  - "traded PLC" has the meaning given in section 1099(4) of the 2014 Act, that is, a PLC whose shares are admitted to trading on a regulated market in any Member State, but is not a UCITS or a collective investment undertaking under Article 4(1) of the AIFM Directive.

The absence of a definition of "shareholder" in the Chapter 8A of Part 17 and in the 2020 SRD Regulations leads to a lack of clarity as to whether the intermediary is obliged to identify the 'real' or beneficial owner as appears intended by SRD2, or the registered holder of the shares. Under Article 2(b) of SRD1, "shareholder" means the natural or legal person that is recognised as a shareholder under the applicable law, and so does not give a uniform definition that will apply in all Member States of the EU.

Section 1110A(3) provides that Chapter 8A of Part 17 is to be read together with any applicable provision of European Union law adopted by the European Commission as an implementing act in accordance with SRD1, including the Commission Implementing Regulation (EU) 2018/1212. The Commission Implementing Regulation lays down a set of detailed rules standardising, inter alia, the format of the information that may be requested of and transmitted by intermediaries under SRD1 and SRD2.

Section 1110B(1)–(3) provides for intermediaries, on the request of a traded PLC, or its nominee, to provide information, or facilitate the provision of information, regarding shareholder identity that relates to shares held in the traded PLC, and the details of the next intermediary, if any, in the chain of intermediaries. Section 1110B(4)–(7) provides for a legal basis (to meet the requirements of data protection law) for the processing of personal data that is necessary for intermediaries and traded PLCs to operate section 1110B of the 2014 Act.

Section 1110C provides, in overview, for the provision by a traded PLC of information required by a shareholder in order to exercise rights attaching to his or her shares, to an intermediary that provides services in relation to that shareholder's shares, and which said intermediary shall transmit the information on to the shareholder as soon as practicable. The traded PLC may transmit the information to the shareholder directly, in which case the obligation on the intermediary will not be in play. The intermediary is required, in turn, to transmit an instruction relating to the exercise of rights attaching to the shareholder's shares as soon as practicable to the traded PLC, whether directly, or through the chain of intermediaries.

Section 1110D provides for obligations for intermediaries and traded PLCs to facilitate the exercise of shareholders' rights attaching to the shareholders' shares, including, inter alia, with regard to provision to the shareholder of confirmation that votes cast electronically are received, and were validly recorded and counted.

Section 1110E provides for fees charged by intermediaries for their services to be charged in a transparent way, and not to unjustifiably discriminate with regard to the fees charged for services provided cross-border to persons in other Member States of the EU.

9.9 Chapters 8 and 8A: Conclusion and recommendation

The Committee concluded that these Chapters are properly located in the Companies Act, as these are all matters that are intrinsic to the operation of general meetings and the participation of shareholders in the general meetings of a PLC.

The Review Group recommends that Chapters 8 and 8A be retained in companies legislation.

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

Chapter 8B (sections 1110F–1110K) of Part 17 was inserted by regulation 7 of the 2020 SRD Regulations. It transposes Chapter Ib (Articles 3g–3j) of (the amended) SRD1, inserted by Article 1(3) of SRD2.

In summary, its innovations include:

- obligations for institutional investors and asset managers to develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement in their investment strategy, or, otherwise, explain why they do not publish an engagement policy.
- obligations of transparency on institutional investors to publicly disclose matters relating to their investment strategy and arrangements with asset managers.
- obligations of transparency on asset managers to disclose to institutional investors matters relating to their investment strategy.
- obligations of transparency on proxy advisors to publicly disclose reference to a code of conduct which they apply and report on the application of that code of conduct, or, otherwise, explain why they do not apply, or depart from, a code of conduct.

9.11 Chapter 8B: Conclusion and recommendation

The Committee concluded that these provisions, although connected to the exercise of shareholder rights, do not relate to the relationship of shareholders i.e., registered members and their company. They concern the relationship between institutional shareholders and asset managers with their respective clients, and the duties of proxy advisory firms.

The Review Group recommends that the provisions of Chapter 8B be detached from companies legislation and located in dedicated financial services regulation.

9.12 Chapter 8C (sections 1110L–1110O) - Remuneration policy, remuneration report, related party transactions

i Overview of Chapter 8C

Chapter 8C (sections 1110L–1110O) apply to "traded PLCs" defined in section 1099(4), i.e., PLCs with shares admitted to trading on a regulated market in any Member State, other than a UCITS or an AIF. The Chapter transposes Article 9a–9c of (the amended) SRD I, inserted by Article 1(4) of SRD II.

The key provisions are, in overview, the following:

- Under section 1110M, the obligation of a traded PLC to prepare a remuneration policy regarding the remuneration of its directors, and cause a remuneration vote to be held on the remuneration policy at a general meeting of the PLC at least every 4 years.
- Under section 1110N, the obligation of a traded PLC to prepare a remuneration report providing a comprehensive overview of the remuneration awarded or due, during the most recent financial year, to all of its directors in accordance with a remuneration policy prepared under section 1110M, and cause a vote to be held at a general meeting of the PLC on the remuneration report prepared in respect of the most recent financial year. It is relevant to note that section 1102A provides that, in the case of a traded PLC, a director's report prepared for each financial year under section 325 shall now include a remuneration report under section 1110N.
- Under section 1110O(1)–(3), the obligation of a traded PLC to publicly announce a "material transaction with a related party" no later than at the conclusion of the transaction, and not enter into such a transaction without the transaction being approved, prior to the conclusion of the transaction, by a resolution of the traded PLC in general meeting. These obligations under section 1110O(1)–(3) are subject to the exemptions in section 1110O(5), including, for example, the exemption for a transaction entered into in the ordinary course of business and concluded on normal market terms.

ii Material transactions

Under section 1110O(7) a traded PLC must also publicly announce the entry of its subsidiary into a material transaction with a related party. For this purpose:

- a "material transaction" is defined in section 1110O(11) to mean a transaction in which any percentage ratio, calculated in accordance with one or more class tests, is 5% or more;
- the "class tests" are set out in Schedule 21 of the 2014 Act;
- a "related party" is defined in Article 2(h) of (the amended) SRD1 to have the same meaning it has in the international accounting standards adopted in accordance with Regulation (EC) No 1606/2002 ("the IAS Regulation") (and set out in IAS 24 (Related Party Disclosures) in Commission Regulation (EC) No 1126/2008).

The purpose of the rules on "material party transactions" is outlined in recital 42 of SRD2, which explains that: "Transactions with related parties may cause prejudice to companies and their shareholders, as they may give the related party the opportunity to appropriate value belonging to the company. Thus, adequate safeguards for the protection of companies' and shareholders' interests are of importance. […]"

iii Director remuneration

The Companies Act's corporate governance provisions relating to director remuneration require a traded PLC:

- to prepare a remuneration policy for directors and, if not already directors, the chief executive and (if any) deputy chief executive, addressing specified prescribed factors such as how the policy contributes to the traded PLC's business strategy and long-term interests and sustainability;
- to conduct a shareholder vote at a general meeting on the policy at least once every 4 years, which vote may be advisory or binding;
- where the policy is approved by shareholder vote on a binding basis, to pay remuneration to its directors only in accordance with that policy;
- where the policy is approved by shareholder vote on a non-binding advisory basis, to pay remuneration to its directors only in accordance with that policy subject to derogation from it:
    - where "necessary in exceptional circumstances, to serve the long-term interests and sustainability of the traded PLC as a whole or to assure its viability, and
    - the derogation is in accordance with the procedural conditions and other provisions on derogation set out in the remuneration policy";
- to prepare an annual remuneration report, providing a comprehensive overview of the remuneration awarded or due, during the most recent financial year, to all of its directors and former directors (and, if not already directors, the chief executive and (if any) deputy chief executive), in accordance with its remuneration policy; and
- to include the remuneration report in the report of the directors on the annual financial statements.

9.13 Chapter 8C: Conclusion and recommendation

The Committee concluded that the obligations of traded PLCs relating to transparency for shareholders on remuneration of directors and material related party transactions are key elements of corporate governance and appropriately located in the Companies Act.

The Review Group recommends that Chapter 8C be retained in companies legislation.

9.14 Chapter 8D: Offences and penalties

Chapter 8D (section 1110P) of Part 17 sets out a list of provisions of Chapters 8, 8A, 8B, and 8C, the infringement of which shall be a category 3 offence.

9.15 Chapter 8D: Conclusion and recommendation

The Committee concluded that these provisions were appropriately located in the Companies Act.

The Review Group recommends that Chapter 8D be retained in companies legislation.

10. Part 23 – Public Offers of Securities, Financial Reporting by Traded Companies, Prevention of Market Abuse, Etc.

10.1 Introduction

Part 23 (sections 1348–1384A) deals with offers of securities to the public, financial reporting by traded companies, market abuse (insider dealing, market manipulation, unlawful disclosure of inside information) and certain related matters. Nearly all of the provisions in Part 23 are as a consequence of the requirement to transpose EU directives and facilitate the implementation of EU Regulations. It is split into five chapters, titled, respectively:

- Chapter 1 (sections 1348–1364), 'Public offers of securities',
- Chapter 2 (sections 1365–1371), 'Market abuse',
- Chapter 3 (sections 1372–1378), 'Requirement for corporate governance statement and application of certain provisions of Parts 5 and 6 where company is a traded company',
- Chapter 4 (sections 1379–1384), 'Transparency requirements regarding issuers of securities admitted to trading on certain markets', and
- Chapter 5 (section 1384A), 'Application of section 393 to a company to which Part 23 applies'.

The provisions of Part 23 will apply, in general, to companies whose securities are offered to the public or listed or admitted to trading on a regulated market (such as a stock exchange).

In the Review Group's General Scheme of Companies Consolidation and Reform Bill 2007, these provisions appeared in Part B2 of Pillar B, relating to public limited companies. By the time the Companies Bill 2012 was initiated in the Oireachtas, these provisions had been grouped together in Part 23. The Explanatory Memorandum to the Companies Bill 2012 records that "*it was decided, for the sake of clarity, to house these provisions in a stand-alone Part rather than in Part 17 of the Bill on PLCs, as originally envisaged in the General Scheme.*"[42] This would appear to be in recognition that there was a need to apply many provisions of what is now Part 23 to all traded companies, and not just PLCs.[43]

The various provisions of the 2014 Act applying Chapters 1, 2 and 4 of Part 23 to different types of company are as follows:

- Chapter 8 of Part 16 (section 999) provides that Chapters 1, 2 and 4 of Part 23, so far as they are applicable to companies other than public limited companies, shall apply to a DAC,
- Chapter 18 of Part 17 (section 1171) provides that Chapters 1, 2 and 4 of Part 23 shall apply to a PLC,
- Chapter 9 of Part 18 (section 1226) provides Chapters 1, 2 and 4 of Part 23, so far as they are applicable to companies other than public limited companies, shall apply to a CLG,
- Chapter 9 of Part 19 (section 1282) provides that Chapters 1, 2 and 4 of Part 23, so far as they are applicable to companies other than public limited companies, shall apply to a PUC and a PULC,

[42] Explanatory Memorandum to Companies Bill 2012, p. 383.

[43] Conroy, *The Companies Act 2014: Annotated and Consolidated –2018 Edition* (Round Hall, 2018), p. 1536.

- Chapter 7 of Part 24 (section 1404) provides that Chapters 1, 2 and 4 of Part 23 (a) so far as they are applicable to companies other than public limited companies that fall within Part 17, and (b) with the exception, in particular, of sections 1358 to 1360, shall apply to an investment company.

There are also a number of provisions applying Chapter 3 of Part 23 to different types of company in the 2014 Act:

- Section 992 (in Chapter 5 of Part 16) provides that Chapter 3 of Part 23 has effect in relation to, amongst other companies, a DAC that has debentures admitted to trading on a regulated market in an EEA state,
- Section 1115 (in Chapter 10 of Part 17) provides that Chapter 3 of Part 23 has effect in relation to, amongst other companies, a PLC that has shares or debentures admitted to trading on a regulated market in an EEA state,
- Section 1212 (in Chapter 5 of Part 18) provides that Chapter 3 of Part 23 has effect in relation to, amongst other companies, a CLG that has debentures admitted to trading on a regulated market in an EEA state,
- Section 1266 (in Chapter 5 of Part 19) provides that Chapter 3 of Part 23 has effect in relation to, amongst other companies, a PUC and a PULC that have debentures admitted to trading on a regulated market in an EEA state.

A *"regulated market*" in the context of the 2014 Act is (having regard to section 1000 relating to PLCs) a regulated market within the meaning of point 21 of Article 4(1) of Directive 2014/65/EU on markets in financial instruments (**"the MiFID II Directive").** The sole regulated market in Ireland is the Main Securities Market operated by the Irish Stock Exchange plc, trading as Euronext Dublin.

The Minister responsible for matters falling within Part 23 in general is the Minister for Finance. This appears from section 2(1) of the 2014 Act, where "*prescribed*" is defined, for the purpose of Parts 23 and 24 of the 2014 Act, to mean prescribed by regulations made by the Minister for Finance, and sections 1348, 1365, and 1379 (in Chapters 1, 2 and 4 of Part 23, respectively) state that "Minister" means the Minister for Finance.

It has been observed that *"[t]here has been a steady migration of responsibility for financial services legislation to the Minister for Finance […] the transfer of political responsibility to the Minister for Finance has been matched by the transfer of supervisory responsibility to the Central Bank"*.[44] This is because the EU measures which underlie these provisions were, over time, brought under the ECOFIN Council, and the Minister for Finance has policy responsibility for the financial services area.

10.2 Chapter 1: Public offers of securities

i Legislative history

Chapter 1 largely reflects, in its design, Part 5 (sections 38–55) of the Investment Funds, Companies and Miscellaneous Provisions Act 2005. Part 5 had been enacted to transpose Prospectus Directive 2003/71/EC into Irish law in time for the transposition date of 1 July 2005 and to give further effect to Commission Regulation (EC) No. 809/2004.

[44] Murphy, Financial Services Law in Ireland, (1st edn., Round Hall, 2018), §[3–115].

IFCMPA 2005 was amended soon after its coming into force by the Investment Funds, Companies and Miscellaneous Provisions Act 2006 to provide for the limitation of liability of a guarantor for the content of a prospectus only as far as it relates to the guarantor or the guarantee given by the guarantor and for the requirement for an expert to give consent for his or her expert opinion to be included in a prospectus.

The Minister responsible in general for the IFCMPA 2005 was, by virtue of section 3(1) of the 2005 Act, the Minister, rather than the Minister for Finance, as at this time the Prospectus Directive was a company law measure. In particular, the ICFMPA 2005 contained, in section 46 thereof, a power for the Minister to make regulations giving effect to the 2003 Prospectus Directive, and supplementing and making consequential provision in respect of the 2004 Implementing Regulation. That power was exercised for the making of S.I. No. 324/2005 - Prospectus (Directive 2003/71/EC) Regulations 2005. The 2005 Prospectus Regulations were substantially amended in the years subsequent to their entry into effect, and were revoked by regulation S.I. No. 380/2019 - European Union (Prospectus) Regulations 2019, with a saver for enforcement procedures by the Central Bank and legal proceedings relating to matters in existence at, or before, the time of the revocation.[45]

The general approach in Part 5 of the IFCMPA 2005 was to provide, in primary legislation, for matters relating to civil liability and criminal penalties for infringement of prospectus law, and provide in secondary legislation (that is, the 2005 Prospectus Regulations) for the detailed transposition of the 2003 Prospectus Directive and commission measures made under that Directive.[46]

ii Outline of Chapter 1

Chapter 1 replicates the approach taken by Part 5 IFCMPA 2005, setting out provisions relating to civil liability and criminal penalties for infringement of prospectus law, with further detailed rules laid out in secondary legislation.

Sections 1349 and 1350 provide, respectively, for civil liability for misstatements in prospectuses and for the conditions for exemption from civil liability. Section 1356 provides, without prejudice to any penalties provided by law in respect of a summary conviction, that a person may be liable, on conviction on indictment for an offence under Irish prospectus law, to a fine not exceeding €1,000,000 or imprisonment for a term not exceeding 5 years or both.

The 2014 Act, as initially enacted, referenced the 2003 Prospectus Directive and was amended in 2019 to reflect the updated prospectus regime in EU law, now based in Prospectus Regulation (EU) 2017/1129.

Section 1348 provides that:

- "Irish prospectus law" means (in summary for present purposes) the law of the State giving further effect to Regulation (EU) 2017/1129 or a delegated act, for the time being in force, adopted by the European Commission in accordance with Article 44 of the 2017 Prospectus Regulation, and

[45] Somewhat unusually, though the 2005 Regulations were revoked with effect from 21 July 2019, they have amendments up to and including amendments made by S.I. No. 711/2020 - European Union (Capital Requirements) (No. 2) (Amendment) Regulations 2020.

[46] That framework was replicated in Part 4 of the IFCMPA 2005 and Part 3 of the IFCMPA 2006 relating to market abuse law and transparency (regulated markets) law respectively.

- “EU prospectus law” means (in summary for present purposes) the 2017 Prospectus Regulation or a delegated act, for the time being in force, adopted by the European Commission in accordance with Article 44 of that Regulation.

The Minister responsible for matters falling within Chapter 1 of Part 23 in general is the Minister for Finance, by virtue of section 2(1) of the 2014 Act, representing a change from the position under IFCMPA 2005.

Under section 1354(1) of the 2014 Act, the Minister for Finance is conferred with a power to make regulations for the purposes of giving further effect to the 2017 Prospectus Regulation or supplementing and making consequential provision in respect of delegated acts adopted by the European Commission under Article 44 thereof.

The regulations presently in force giving further effect to the 2017 Prospectus Regulation are:

- S.I. No. 380/2019 - European Union (Prospectus) Regulations 2019,
- S.I. No. 670/2019 - European Union (Prospectus) (Amendment) Regulations 2019, and
- S.I. No. 702/2021 - European Union (Crowdfunding) Regulations 2021.

All of the above are made by the Minister for Finance in the exercise of the powers conferred by section 3 of the European Communities Act 1972.

The Central Bank was designated as the authority responsible for carrying out the functions of a competent authority under the 2017 Prospectus Regulation. Section 1363 empowers the competent authority, i.e. the Central Bank, to make certain rules and issue guidelines. It has done so on one occasion, via S.I. No. 366 of 2019 – Central Bank (Investment Market Conduct) Rules 2019, Part 4 of which contains certain further requirements of the Central Bank relating to prospectuses.

iii Legacy provisions from the Prior Companies Acts

A small number of provisions that had been in the prior Companies Acts relating to prospectuses were carried over into the 2014 Act. This can be traced to the urgency with which the transposition of the 2003 Prospectus Directive was addressed in early 2005, when IFCMPA 2005 was being progressed through the Oireachtas. At the time a decision was taken to retain these provisions rather than to analyse their relevance in the context of the then new prospectus regime.

Sections 1358 to 1360 contain provisions relating to minimum subscriptions in a public offer of shares. Section 1358(2) provides that where there is a minimum amount to be raised on a public issue, no allotment of shares can occur until that minimum amount has been subscribed. Section 1359 provides for the repayment to subscribers of their subscription moneys if within 40 days, the minimum amount has not been raised. Section 1360 provides that an allotment made in breach of the requirement for the minimum amount to have been raised is voidable at the option of the allottee within 30 days of allotment.

Section 1361 relates to “local offers”, offers of securities that are outside the scope of EU prospectus law. For reasons to those that underpinned the inclusion of sections 1358-1360, section 1361 is included, having originated in section 49 of IFCMPA 2005, as it was perceived in 2005 that the exclusion of public offers without any regulation might be to the prejudice of investors. Section 1361 requires the document offering securities to contain a number of rubrics, e.g., “Investments may fall as well as rise in value”. These rubrics originated in the then appliable Central Bank

advertising requirements made under the Investments Intermediaries Act. Somewhat ironically, section 1362 disapplies the Investment Intermediaries Act 1995 to any prospectus, but that was to disapply the then cooling-off period for investments provided for under that Act.

iv Chapter 1: Conclusions and recommendations

The Committee concluded that the provisions of this Chapter relate primarily to investor protection and would more appropriately be contained in dedicated financial services legislation.

The Committee observed that sections 1358 to 1360 deal with a narrow area of default under broader prospectus law and consideration might be given to their being repealed. The Committee observed that the rubrics to be included appeared to be largely a tick-the-box exercise. These are however matters for the Minister for Finance (in consultation with the Central Bank where relevant), rather than the Minister for Enterprise, Trade and Employment.

The Review Group recommends that the provisions of Chapter 1 be detached from the Companies Act and relocated in dedicated financial services legislation.

10.3 Chapter 2: Market Abuse

i Legislative history

Chapter 2 deals with market abuse law, largely reflecting Part 4 (sections 29–37) of the IFCMPA 2005. The purpose of Part 4 of IFCMPA 2005 was to give effect to Market Abuse Directive 2003/6/EC together with related measures. Part 4 of IFCMPA 2005 had, in relation to companies with securities admitted to a regulated market, repealed Part V of the Companies Act 1990 which had contained provisions on insider dealing in Irish law, and the Companies (Amendment) Act 1999 which amended Parts IV and V of the 1990 Act to enable the operation of rules on stabilising or maintaining the market price of securities if it is done in conformity with the Stabilisation Rules set out in the Schedule to the 1999 Act.

Part 4 of IFCMPA 2005 also provided for civil liability and criminal penalties for infringements of Irish market abuse law, and provided for regulations to be made for the detailed transposition of the 2003 Market Abuse Directive and related measures. The relevant powers in this regard were:

- the power of the Minister for Enterprise, Trade and Employment under section 30 to make regulations giving effect to the 2003 Market Abuse Directive and related measures;
- the power of the Central Bank under section 34 to make rules for the application and enforcement of Irish market abuse law, and
- the power of the Minister for Enterprise, Trade and Employment, after consultation with the Central Bank, under section 37 to extend the application of the 2003 Market Abuse Directive, with appropriate modifications if necessary, to markets other than regulated markets, subject to Oireachtas confirmation.

The power under section 30 was exercised by the Minister for Enterprise, Trade and Employment to make S.I. No. 342 of 2005 - Market Abuse (Directive 2003/6/EC) Regulations 2005 which have since been revoked.

ii Outline of Chapter 2

Chapter 2 has on the whole replicated the manner in which Part 4 of the ICFMPA 2005 gave effect to the 2003 Market Abuse Directive and related measures. The 2014 Act, as enacted, referenced the 2003 regime although earlier in 2014 the EU market abuse regime had been changed with the enactment of the 2014 Market Abuse Regulation. Chapter 2 was amended in 2016 to reflect that development.

Section 1365 now provides (in summary for present purposes) that "Irish market abuse law" means measures implementing or giving further effect to the 2014 Market Abuse Regulation and related measures.

Section 1368 and 1369 provide for civil liability and criminal penalties for infringement of Irish market abuse law. In particular, section 1368(2) of the 2014 Act provides, without prejudice to the penalties provided by law on summary conviction, for a maximum penalties for conviction on indictment of €10 million and imprisonment for up to 10 years.

Previously, the Minister responsible for market abuse law had been the Minister for Enterprise, Trade and Employment by virtue of section 3(1) of IFCMPA 2005. Currently, it is the ECOFIN Council that deals with the EU Proposals relating to Prospectus, Market Abuse and Transparency Directives.

Rules transposing the Market Abuse Regulation and related measures are now contained in S.I. No. 349 of 2016 - European Union (Market Abuse) Regulations 2016, made by the Minister for Finance under section 3 of the European Communities Act 1972.

The Minister for Finance may also exercise the power under section 1371 of the 2014 Act, after consultation with the Central Bank, to extend, by provisional order, the application of the one or more provisions of Irish market abuse law, with appropriate modifications if necessary, to further markets, which provisional order can then be confirmed by an Act of the Oireachtas.

The Central Bank is designated as the competent authority for the Market Abuse Regulation. It has the power, under section 1370 to make supplementary rules for the application and enforcement of Irish market abuse law.

The Central Bank has exercised the power under section 1370 to provide for matters falling within the scope of Chapter 2 of Part 23 in S.I. No. 366/2019 - Central Bank (Investment Market Conduct) Rules 2019.

iii Chapter 2: Conclusion and recommendation

The Committee concluded that all of Chapter 2 is concerned with investor protection and properly under the responsibility of the Minister for Finance.

The Committee observed that the 2014 Market Abuse Regulation and Commission delegated Regulation (EU) 2016/522 contain a comprehensive regime regulating and requiring disclosure of dealings in shares of companies by "persons discharging managerial responsibilities" – in practice, directors and, if not directors, chief executive officers and chief financial officers. This regime intersects with and duplicates the obligations of directors under Chapter 5 of Part 5 of the Companies Act to disclose interests in shares and other securities of a company.

The Review Group recommends:	
-	**that the provisions of Chapter 2 be detached from the Companies Act and relocated in dedicated financial services legislation; and**
-	**that in due course an examination of the alignment of the Companies Act provisions as to disclosure of interests in shares and those of the 2014 Market Abuse Regulation be conducted, with a view to removing unnecessary duplication between the two. The Review Group could undertake this work as part of a future Work Programme.**

10.4 Chapter 3: Requirement for corporate governance statement and application of certain provisions of Parts 5 and 6 where company is a traded company

i Outline of Chapter 3

Chapter 3 requires "traded companies" to include corporate governance statements in their directors' reports, and applies certain provisions of Parts 5 and 6 of the 2014 Act to traded companies. A "traded company" is a defined term in section 1372 as a PLC, DAC, CLG, PUC or PULC that, in the case of a PLC has shares or debentures, or in the case of the other types of company has debentures, admitted to trading on a regulated market in an EEA state.

Section 1373(1) provides for an obligation on traded companies to include in their directors' report (provided for in section 325) a corporate governance statement for the financial year concerned. Section 1373(2)(a) to (f) specifies in detail the information the statement is to contain, and section 1373(7) provides for the statement to be audited by the company's statutory auditor. Section 1373(8) provides that more limited information in the statement may be given by traded companies which has only issued securities, other than shares, admitted to trading on a regulated market, unless it has also issued shares which are traded in a multilateral trading facility.

Section 1373 has its origins in section 158(6C)–(6J) of the Companies Act 1963. Those provisions were inserted by regulation 13 of S.I. No. 450/2009 - European Communities (Directive 2006/46/EC) Regulations 2009 and regulation 5 of S.I. No. 83/2010 - European Communities (Directive 2006/46/EC) (Amendment) Regulations 2010. The latter regulations transposed Directive 2006/46/EC in Irish law, which in turn amended the Fourth Council Directive 78/660/EEC on the annual accounts of certain types of companies and the Seventh Council Directive 83/349/EEC on consolidated accounts. The Directives are part of a group of measures termed the "Accounting Directives". The more recent Consolidated Accounting Directive 2013/34/EU was transposed by, inter alia, the Companies (Accounting Act) 2017, which amended the 2014 Act in various respects.

Section 1374 applies section 225 (relating to directors' compliance statements) to traded companies.

Section 1375 excludes holding companies that are traded companies from the definition of "relevant holding company" in section 279(1) of the 2014 Act. That provision allowed US accounting standards to be availed of, in limited circumstances, for the purpose of the relevant financial statements of a relevant holding company for the years it is incorporated in the State until the end of 2030.

That section also excludes holding companies that are traded companies from being made the subject of regulations under section 280 of the 2014 Act, which enabled regulations to be made for the use of other internationally recognised accounting standards for the relevant financial statements of specified categories of holding company for a particular transitional period.

Sections 1376–1378 contain a number of other provisions relating to the financial statements of traded companies.

ii Chapter 3: Conclusion and recommendation

The Committee concluded that, although the obligations in the Chapter were triggered by the companies in scope having securities admitted to trading, they related to the internal governance of those companies and it was appropriate that they continue to be included in the Companies Act.

The Review Group recommends that Chapter 3 be retained in companies legislation with the Minister for Enterprise Trade and Employment as the responsible minister.

10.5 Chapter 4: Transparency requirements regarding issuers of securities admitted to trading on certain markets

i Legislative history

Chapter 4 (sections 1379–1384) relates to the implementation of Transparency Directive 2004/109/EC. The previous legislation dealing with the matters now falling within Chapter 4 of Part 23 was contained in Part 3 (sections 19–24) of the Investment Funds, Companies and Miscellaneous Provisions Act 2006. Part 3 of IFCMA 2006 made provision for transposing the 2004 Transparency Directive in a largely similar way to how Parts 4 and 5 of IFCMA 2005 had transposed the EU legislation on prospectuses and market abuse, discussed in the previous sections above. Section 3 of IFCMA 2006 Act made clear that the Minister responsible for matters within the scope of that Act was the Minister for Enterprise, Trade and Employment.

ii Outline of Chapter 4

Chapter 4 substantially re-enacts Part 3 of IFCMA 2006. Section 1379(1) defines “transparency (regulated markets) law” as (in broad overview, for present purposes) Irish law giving effect to the 2004 Transparency Directive.

Section 1382 provides for penalties for conviction on indictment under transparency (regulated markets) law as defined in section 1379(1) of the 2014 Act, stating that, without prejudice to any penalties provided by that law in respect of a summary conviction for the offence, be liable, on conviction on indictment, to a fine not exceeding €1,000,000 or imprisonment for a term not exceeding 5 years or both.

There is no provision in the 2014 Act for civil liability for infringement of transparency (regulated markets) law in primary law, but section 1380(3) envisages that civil liability may be imposed by ministerial regulations, although only in relation to certain specified matters (untrue or misleading statements, or omissions from statements purporting to comply with transparency (regulated markets) law or causing a loss to a person who relied on the statement when acquiring securities).

The relevant regulations giving effect to the 2004 Transparency Directive in Ireland are the Transparency (Directive 2004/109/EC) Regulations 2007, as amended. The regulations were initially made by the Minister for Enterprise, Trade and Employment under section 20 of IFCMPA 2006. Regulations under Chapter 4 of Part 23 are now made by the Minister for Finance in the exercise of the power conferred by section 1380.

The Central Bank has made rules for the purpose of section 1383 in Part 2 of the 2019 IMC Rules, which revoke the Transparency Rules that had previously issued by the Central Bank. The Central Bank has also issued guidance on the transparency regulatory framework in accordance with the provisions of Section 1383(7) of the Companies Act 2014.

Under section 1384 of the 2014 Act, the Minister for Finance may, after consultation with the Central Bank, extend, by provisional order, the application of the one or more provisions of transparency (regulated markets) law, with appropriate modifications if necessary, to further markets, which provisional order can then be confirmed by an Act of the Oireachtas. At present, the transparency (regulated markets) regime applies only to regulated markets rather than to multilateral trading facilities.

The substantial law under the 2004 Transparency Directive is contained in the 2007 Transparency Regulations. Those regulations cover the following principal obligations:

- Part 2 – periodic financial reporting obligations of companies;
- Part 2A – reporting of payments to governments;
- Part 4 – liability for false and misleading statements in certain publications by companies;
- Part 5 – obligations of major shareholders to disclose interests in voting shares and disclosure obligations of companies;
- Part 6 – continuing obligations of companies and access to information.

There are two competent authorities under this regime – the Central Bank and the Irish Auditing and Accounting Supervisory Authority.

iii Chapter 4: Conclusion and recommendation

The Committee concluded that, although the obligations in the Chapter were triggered by the companies in scope having securities admitted to trading, they relate to the internal governance of those companies and relationship of a company with its shareholders. It was therefore appropriate that they continue to be included in the Companies Act.

The Review Group recommends that Chapter 4 be retained in companies legislation but that in due course an examination of the Companies Act provisions that overlap with the requirements of the 2007 Transparency Regulations be undertaken with a view to aligning the obligations of all PLCs where practicable and where appropriate. The Review Group could undertake this work as part of a future work programme.

10.6 Chapter 5: Application of section 393 to a company to which Part 23 applies

i Outline of Chapter 5

Chapter 5 (section 1384A) applies a modified version of section 393 to a statutory auditor of a traded company, so that the statutory auditor is obliged to make a report to the Corporate Enforcement Authority where he or she has reasonable grounds to suspect the commission of an offence contrary to market abuse law, prospectus law, or transparency (regulated markets) law.

ii Chapter 5: Conclusion and recommendation

The Committee concluded that this provision relates to corporate governance.

The Review Group recommends that Chapter 5 be retained in companies legislation.

11. Part 24 – Investment Companies

11.1 Introduction

Investment companies as provided for by Part 24 are a discrete form of public limited company. They are, by a complex series of internally referring provisions, subject to the provisions of Parts 1 to 14, save to the extent disapplied by sections 1002 and 1387(3), and Part 17, save to the extent disapplied by section 1388(3) or (4). A key benefit of Part 24 is that it collects all of the various referring provisions relating to investment companies in one place.

Although situated in the Companies Act 2014, for which the Minister has overall responsibility, all relevant regulation-making powers concerning investment companies under Part 24 are conferred on the Minister for Finance, and all relevant authorisation, regulatory and supervisory powers reside with the Central Bank. Save that they are companies incorporated and subject to the provisions of the Companies Act 2014, the role of the Minister for Enterprise, Trade and Employment relating to investment companies under Part 24 is relatively limited.

Investment companies under Part 24 are generally those investment companies which are not authorised as UCITS (pursuant to the UCITS Regulations) may be viewed as alternatives to UCITS, but for those investment companies which are also authorised as UCITS, they are still subject to certain provisions of the UCITS Regulations for which the Minister for Finance has overall responsibility. They are also subject to the prospectus law, market abuse law, and transparency (regulated markets) law provisions of Part 23 which come within the general responsibility of the Minister for Finance.

11.2 Legislative history

Investment companies, as regulated by Part 24, originated in Part XIII of the Companies Act 1990, under which the responsible Minister was the Minister for Industry and Commerce, now the Minister for Enterprise, Trade and Employment. It was originally intended that what ultimately became Part 24 would eventually be moved to a separate legislative code for all existing forms of investment funds (whether UCITS or non-UCITS) in the form of a Collective Investment Schemes Bill. It appears clear, in that regard, that the location of investment companies in Part 24 was intended to be a temporary measure.

However, as investment companies are a type of company, it would seem likely that situating them within any alternative piece of legislation would require that legislation to cross-refer extensively to the provisions of the Companies Act 2014.

11.3 Mix of Ministerial roles and responsibilities with respect to investment funds.

The Minister for Finance has responsibility for legislation relating to a number of similar types of collective investment scheme, including UCITS, ICAVs and ILPs. The ILP legislation in particular is an example of the recent transfer of ministerial responsibility for legislation relating to collective investment schemes from the Minister for Enterprise, Trade and Employment to the Minister for Finance. Similarly, the ICAV was created by recent legislation within the remit of the Minister for Finance and is expressly envisaged as an alternative to the investment company under Part 24 of the 2014 Act.

The Minister for Enterprise, Trade and Employment continues to have ministerial responsibility for two other main types of legislation on collective investment schemes other than the investment

company under Part 24, namely the legislation on unit trusts and common contractual funds. Its role in relation to them is relatively limited however and, in the manner typical of all legislation relating to collective investment schemes, is more minor than that of the regulator, the Central Bank.

This is illustrated in the below table

	Type of Investment Fund	Legislation governing formation	Where registered	Responsible Minister
	AIF Unit Trust	Unit Trusts Act 1990	Central Bank	ETE
	UCITS Unit Trust	Unit Trusts Act 1990 S.I. No 352 of 2011 (as amended)	Central Bank	ETE + Finance
	Fixed capital UCITS PLC	Companies Act 2014 Part 17 S.I. No 352 of 2011 (as amended)	CRO	ETE + Finance
	Variable capital UCITS PLC	Companies Act 2014 Part 17 S.I. No 352 of 2011 (as amended)	CRO	ETE + Finance
	AIF Common Contractual Fund	Investment Funds, Companies and Miscellaneous Provisions Act 2005, Part 2	Central Bank	ETE + Finance
	UCITS Common Contractual Fund	Investment Funds, Companies and Miscellaneous Provisions Act 2005, Part 2 S.I. No 352 of 2011 (as amended)	Central Bank	Finance
	AIF fixed or variable capital investment company	Companies Act 2014 Part 24	CRO	Finance
	AIF ICAV	Irish Collective Asset-management Vehicles Act 2015	Central Bank	Finance

	Type of Investment Fund	Legislation governing formation	Where registered	Responsible Minister
	UCITS ICAV	Irish Collective Asset-management Vehicles Act 2015 S.I. No 352 of 2011 (as amended)	Central Bank	Finance
	AIF Investment Limited Partnership	Investment Limited Partnerships Act, 1994 and Investment Limited Partnerships (Amendment) Act 2020	Central Bank	Finance

11.4 Relevant comparisons from other jurisdictions

In the United Kingdom, His Majesty's Treasury (the UK's finance ministry) has overall responsibility for the UK's financial system and the institutional structure of financial regulation.[47] Several key regulators have responsibility of the enforcement of financial services legislation, including the Bank of England, the Financial Policy Committee, the Prudential Regulatory Authority, the Financial Conduct Authority, and the Payment Systems Regulator. The Financial Services and Markets Act 2000 is an significant piece of legislation in the framework of financial services legislation in the United Kingdom. Most matters relating to prospectus law, market abuse, and transparency (regulated markets law are dealt with in this Act and the statutory instruments made under its provisions, rather than in the UK's Companies Act 2006.

Prior to Brexit, the Treasury was the ministry designated for the purposes of section 2(2) of the European Communities Act 1972 to make regulations for the implementation of EU law in relation to financial services,[48] including EU law on prospectus law, market abuse and transparency. In the context of the UK's withdrawal from the EU, the Treasury has been the ministry responsible for making regulations concerning retained EU law in the area of prospectus law, market abuse and transparency, including regulations relating to the United Kingdom version of Prospectus Regulation (EU) 2017/1129,[49] regulations relating to the United Kingdom version of Market Abuse Regulation (EU) No. 596/2014,[50] regulations relating to the United Kingdom law deriving from Transparency Directive 2004/109/ EC.[51] These and similar regulations are made by the Treasury under section 2(1) of the UK's European Communities Act 1972 and section 8(2) of the UK's European Union (Withdrawal) Act 2018.

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[47] See generally Morris, *Financial Services Regulation in Practice* (1st edn, Oxford, 2016), §§[4–01]–[4–03] and §§[4–97]–[4–98].
[48] S.I. No. 2012 / 1759 - The European Communities (Designation) Order 2012.
[49] S.I. No. 1235 / 2019 - Prospectus (Amendment etc.) (EU Exit) Regulations 2019 and Official Listing of Securities, Prospectus and Transparency (Amendment etc.) (EU Exit) Regulations 2019.
[50] S.I. No. 310 of 2019 - Market Abuse (Amendment) (EU Exit) Regulations 2019.
[51] S.I. No. 707 / 2019 - Official Listing of Securities, Prospectus and Transparency (Amendment etc.) (EU Exit) Regulations 2019.

The Financial Conduct Authority is the main regulator for matters falling within the scope of Parts VI and VIII of FSMA 2000, and the statutory instruments made thereunder.

Part 17 of FSMA 2000 contains provisions relating to collective investment schemes. There are a number of different types of collective investment scheme in the United Kingdom, including unit trust schemes, contractual schemes (co-ownership schemes and partnership schemes), UCITS funds and open ended investment companies. Responsibility for regulating collective investment schemes appears to be mainly shared by the Treasury and the Financial Conduct Authority.

11.5 Conclusion and recommendation

The Committee noted the history of Part 24 and concluded that Part 24 would sit more comfortably within financial services legislation, in particular legislation relating to collective investment schemes.

The Review Group recommends that the provisions of Part 24 and the legislation on unit trusts and common contractual funds be detached from companies legislation and located in financial services legislation.

Appendix A - Letter from the Chairperson of the Securities Working Group to the Chairman of the AFFL dated 8 April 2008

Mr Pádraig Ó Ríordáin
Chairman
Advisory Forum on Financial Legislation
Arthur Cox
Earlsfort Centre
Earlsfort Terrace
Dublin 2

8 April 2008

Dear Pádraig

Re: Report of the Securities Working Group of the Advisory Forum on Financial Legislation

The Securities Working Group (the 'Group') of the Advisory Forum on Financial Legislation has concluded the first part of its work outlining the scope of securities legislation which might form part of financial services legislation in the future. In particular, the Group has considered which securities legislation could be included within financial services legislation and the benefits of its inclusion to the securities industry in Ireland.

The purpose of this letter is to outline the findings of the Group.

Securities Legislation

The Group identified the following securities legislation as possibly being included within financial services legislation:

- Prospectus (Directive 2003/71/EC) Regulations 2005 (SI 324/2005) plus Part 5 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 and Sections 13, 14 and 15 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006, as well as existing provisions (sections 53, 55 and 57) relating to prospectuses in the Companies Act 1963;
- Market Abuse (Directive 2003/6/EC) Regulations (SI 342/2005) plus Part 4 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005;
- Transparency (Directive 2004/109/EC) Regulations (SI 277/2007) plus Part 3 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006; and
- European Communities (Admissions to Listing and Miscellaneous Provisions) Regulations 2007 (SI 286/2007)[52] (together the 'Securities Legislation').

In addition, the Group identified the following related legislation as requiring examination:

[52] SI 286/2007 replaced the remainder of SI 282/1984.

- Part V of the Companies Act 1990 (relating to insider dealing in the securities of Irish-incorporated companies admitted to the Irish Enterprise Exchange and the Alternative Securities Market of the Irish Stock Exchange)[53];
- Part IV of the Companies Act 1990 (relating to the disclosure of interests in shares by directors, secretaries, substantial holders and concert parties)[54].

Benefits of including Securities Legislation within financial services legislation

Securities Legislation currently resides within the scope of the Companies Acts. Whereas company law is concerned with the corporate entity (e.g. form, governance, accounting, winding-up etc.) financial services law is concerned with certain economic activities that an entity engages in. In this context, Securities Legislation more comfortably fits within financial services law.

As the securities industry in Ireland has become increasingly international in its focus, the requirement for securities legislation in Ireland to meet best practice international standards, be transparent and as user friendly as possible is critical to the international reputation and competitiveness of the securities industry going forward. Incorporation of Securities Legislation within financial services legislation would give rise to a number of benefits for the securities industry in Ireland:

1. Securities Legislation is largely derived from EU requirements under the Financial Services Action Plan ('FSAP') and its inclusion within financial services legislation would be consistent with the FSAP approach and contribute to greater coherence and efficiency in legislative responsibilities imposed by the FSAP Directives.
2. Inclusion of Securities Legislation within financial services legislation is consistent with the approach adopted in other EU jurisdictions and meets best practice international standards. The quality and effectiveness of the legislative framework for financial regulation in Ireland, including securities regulation, is central to the reputation of Ireland's regulatory regime and the competitiveness of its securities industry internationally.
3. Inclusion of Securities Legislation within financial services legislation would lead to a more cohesive policy approach being adopted in relation to financial services law in Ireland. In addition, it would enable a more consistent, coordinated and timely response to the opportunities and challenges arising from legislative changes and market developments.
4. The integration of Securities Legislation into financial services legislation would assist in rendering Irish financial services law less opaque and more accessible, providing greater certainty and legal clarity for market participants (domestic and international) through a single, coherent and unified legal framework for financial services.

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[53] The Department of Enterprise, Trade and Employment is currently considering bringing the Irish Enterprise Exchange and the Alternative Securities Market within the scope of the provisions of the Market Abuse (Directive 2003/6/EC) Regulations 2005 which, if effected, would result in the repeal of Part V of the Companies Act 1990.

[54] While these provisions have been disapplied for shareholders in companies with securities admitted to the Main Market of the Irish Stock Exchange, they continue to apply to shareholders in IEX companies. The power exists in Part 3 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006 to extend the major shareholding requirements to other markets, such as IEX, and the Department of Enterprise, Trade and Employment intends to examine this as well.

5. The Financial Regulator is competent authority in Ireland for the purposes of the Prospectus Directive, Transparency Directive (except Article 24(4)(h)), Market Abuse Directive and the Markets in Financial Instruments Directive, all of which have been transposed into Irish law. As the arrangements that apply nationally or operate under EU mechanisms are serviced by the Financial Regulator and/or the Department of Finance, inclusion of securities legislation within financial services law would provide for a more cohesive approach to dealing with these directives on an ongoing basis. Appendix 1 elaborates on the arrangements that apply nationally or operate under EU mechanisms.

Methodology

The Group highlighted that consideration needs to be given to the method of incorporating Securities Legislation into the proposed Financial Services Regulation Bill (the 'Bill') and, in particular, whether it should be consolidated into the broader provisions of the Bill or form a distinct section within the Bill. The Group also pointed out that consolidation of Securities Legislation may give rise to benefits in its own right[55].

Conclusion

The Group recommends that, similar to other EU jurisdictions, Securities Legislation should form part of financial services legislation in Ireland. The Group highlighted that a cohesive, consistent and clear legislative framework for financial services in Ireland, including Securities Legislation, is essential to the promotion and reputation of Ireland internationally as having a flexible and sound regulatory environment.

Should you wish to discuss any aspect of this letter, please contact me.

Yours sincerely

Deirdre Somers

Chairperson

Appendix 1 [to the letter from the Chairperson of the Securities Working Group to the Chairman of the AFFL dated 8 April 2008]

Securities Legislation

In the case of Securities Legislation, historically, at national level, the areas identified in this letter for possible inclusion within financial services legislation were dealt with in Company Law, for example the requirement to publish a prospectus when making an offer of securities of a company to the public, or the provisions relating to insider dealing which are now encompassed by market abuse.

At European level, these were dealt with as part of the Financial Services Action Plan - a series of 42 specific measures designed to commence the process of integrating the European Financial Services Industry. The grand design for most of these measures falls within the so-called 'Lamfalussy Process' – a four tier process under which the main EU Directive dealing with a particular subject contains the

[55] For example, there may be an opportunity to consolidate the administrative sanctions provisions of the Prospectus Regulations, Market Abuse Regulations and Transparency Regulations given their similarity.

general principles which are then fleshed out as necessary in second "implementation tier" Commission Regulations or Directives, while the third level involves co-operation between relevant authorities and the fourth level involves review by the Commission to ensure all Member States properly apply the laws.

The arrangements that apply nationally or operate under EU mechanisms are serviced by the Department of Finance and/or the Financial Regulator – such as –

- It is the ECOFIN Council that deals with the EU Proposals relating to Prospectus (PD), Market Abuse (MAD) and Transparency (TD) Directives;
- MAD, PD, TD all deal with securities law/regulation of financial markets;
- This area is dealt with by Finance/Treasury Departments in all other Member States;
- The Department of Finance also services the EU forum which will deal with ongoing issues relating to much of this legislation as has been the subject of EU intervention, namely European Securities Committee (ESC) working group/membership of ESC committee;
- CESR, which is serviced exclusively by the Financial Regulator, will continue to have an important role to play in advising/helping to resolve ongoing issues;
- The Department of Finance deals with all other financial services directives which have links to MAD, PD and TD; and
- When transposing the PD, MAD and TD, the Financial Regulator was appointed central competent authority (whereas the Stock Exchange had discharged such functions under earlier EU Directives).

With the transposition in June 2007 of the Transparency Directive, and the replacement of the remainder of the 1984 Regulation to now deal solely with Admissions to Listing, all of the necessary transposing measures for the financial markets are now in place.

Going forward, the focus will be on ensuring compliance, or resolving issues arising, and this is a matter that is and will remain the sole responsibility of the central Competent Authority - the Financial Regulator - either directly or in co-operation with the Department of Finance.

Appendix B - Table of Provisions under Review

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<tr><td rowspan="21">CHAPTER 4</td><td>Interests in shares: disclosure of individual and group acquisitions</td><td rowspan="21">Minister for Enterprise Trade and Employment</td><td rowspan="21">Retain in the Companies Act
CLRG to review Chapter 4 again in the context of the 2004 Transparency Directive regime with the intention of aligning the regimes where practical and optimal. To be part of a future Work Programme</td><td rowspan="21">Minister for Enterprise Trade and Employment</td></tr>
<tr><td>1046. Purpose of Chapter</td></tr>
<tr><td>1047. Interpretation and supplemental (Chapter 4)</td></tr>
<tr><td>1048. Duty of disclosure — first class of case in which duty arises</td></tr>
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<tr><td>1063. Registration of interest disclosed under section 1062</td></tr>
<tr><td>1064. Company investigations on requisition by members</td></tr>
<tr><td>1065. Company reports on investigation</td></tr>
</table>

PART 17 - PUBLIC LIMITED COMPANIES		Relevant Minister	CLRG Recommendation	Proposed Responsible Minister
	1066. Penalty for failure to provide information			
	1067. Removal of entries from register			
	1068. Entries, when not to be removed			
	1069. Where register to be kept, inspection of register, inspection of reports, etc.			
	1070. Duty of PLC to notify authorised market operator			
CHAPTER 7	**Uncertificated securities**	Minister for Enterprise Trade and Employment	Revoke Chapter 7 and the 1996 Regulations	N/A
	1085. Transfer in writing			
	1086. Power to make regulations for the transfer of securities			
	1087. Supplemental provisions in relation to section 1086			
CHAPTER 7A	**Uncertificated securities of relevant issuers**	Minister for Enterprise Trade and Employment	Retain in the Companies Act	Minister for Enterprise Trade and Employment
	1087A. Interpretation			
	1087B. Share certificates			
	1087C. Written instrument of transfer			
	1087D. Alternative special majority for Schemes of Arrangement			
	1087E. Disapplication of additional requirement			
	1087F. Irrevocable power of attorney			
	1087G. Record date for participation and voting in general meeting			
	1087H. Definition of subsidiary			
CHAPTER 7B	**Dematerialisation of applicable securities**	Minister for Enterprise Trade and Employment	Retain in the Companies Act	Minister for Enterprise Trade and Employment
	1087I. Interpretation			
	1087J. Application of Chapter			
	1087K. Abolition of certificates in respect of applicable securities			

PART 17 - PUBLIC LIMITED COMPANIES		Relevant Minister	CLRG Recommendation	Proposed Responsible Minister
	1087L. Transfer of applicable securities			
	1087M. Restrictions on transfer of applicable securities			
	1087N. Disapplication of certain provisions to applicable securities			
	1087O. Disapplication of requirement for certificate in respect of applicable securities			
	1087P. Representation of applicable securities			
CHAPTER 8	**Corporate governance**	Minister for Enterprise Trade and Employment	Retain in the Companies Act	Minister for Enterprise Trade and Employment
	1088. Number of directors of a PLC			
	1089. PLC, with 2 or more members, may not dispense with holding of a.g.m.			
	1090. Rotation of directors			
	1091. Modification of section 149(8)'s operation where public or local offer coincides with change among directors			
	1092. Remuneration of directors			
	1093. Application of section 193 in relation to PLC			
	1094. Provisions consequent on participation by PLC in system for uncertificated transfer of securities			
	1095. Attendance and voting at meetings			
	1096. Notice of meetings			
	1097. Application of section 167 to PLC that is not a public-interest entity under S.I. No. 220 of 2010			
	1098. Length of notice of general meetings to be given			
	1099. Additional rights of shareholders in certain PLCs (provisions implementing Shareholders' Rights Directive 2007/36/EC)			
	1100. Equality of treatment of shareholders			

PART 17 - PUBLIC LIMITED COMPANIES			Relevant Minister	CLRG Recommendation	Proposed Responsible Minister
	1101.	Requisitioning of general meeting by members — modification of section 178(3)			
	1102.	Length of notice of general meetings to be given by traded PLC			
	1102A.	Modification of application of section 325(1) to traded PLC			
	1103.	Additional provisions concerning notice under section 181 by a traded PLC			
	1104.	Right to put items on the agenda of the general meeting and to table draft resolutions			
	1105.	Requirements for participation and voting in general meeting			
	1106.	Participation in general meeting by electronic means			
	1107.	Right to ask questions			
	1108.	Provisions concerning appointment of proxies			
	1109.	Traded PLC may permit vote to be cast in advance by correspondence			
	1110.	Voting results			
CHAPTER 8A	**Rights of shareholders**		Minister for Enterprise Trade and Employment	Retain in the Companies Act	Minister for Enterprise Trade and Employment
	1110A.	Interpretation, application and commencement (Chapter 8A)			
	1110B.	Identification of shareholders			
	1110C.	Transmission of information			
	1110D.	Facilitation of exercise of shareholder rights			
	1110E.	Non-discrimination, proportionality and transparency of costs			
CHAPTER 8B	**Transparency of institutional investors, asset managers and proxy Advisors**		Minister for Enterprise Trade and Employment		Minister for Finance

PART 17 - PUBLIC LIMITED COMPANIES		Relevant Minister	CLRG Recommendation	Proposed Responsible Minister
	1110F. Interpretation and application (Chapter 8B)		Detach from Companies Act and relocate in dedicated financial services legislation	
	1110G. Engagement policy - institutional investors			
	1110H. Engagement policy - asset managers			
	1110I. Investment strategy of institutional investors and arrangements with asset managers			
	1110J. Transparency of asset managers			
	1110K. Transparency of proxy advisors			
CHAPTER 8C	**Remuneration policy, remuneration report and transparency and approval of related party transactions**	Minister for Enterprise Trade and Employment	Retain in the Companies Act	Minister for Enterprise Trade and Employment
	1110L. Interpretation and application (Chapter 8C)			
	1110M. Right to vote on remuneration policy			
	1110N. Remuneration report			
	1110O. Transparency and approval of related party transactions			
CHAPTER 8D	**Offences and penalties**	Minister for Enterprise Trade and Employment	Retain in the Companies Act	Minister for Enterprise Trade and Employment
	1110P. Offences and penalties			

PART 23 - PUBLIC OFFERS OF SECURITIES, FINANCIAL REPORTING BY TRADED COMPANIES, PREVENTION OF MARKET ABUSE, ETC.		Relevant Minister	CLRG Recommendation	Proposed Responsible Minister
CHAPTER 1	**Public offers of securities**	Minister for Finance	Detach from the Companies Act and relocate in dedicated financial services legislation	Minister for Finance
	1348. Interpretation (Chapter 1)			
	1349. Civil liability for misstatements in prospectus			
	1350. Exceptions and exemptions			
	1351. Restriction of liability where non-equity securities solely involved			
	1352. Indemnification of certain persons			
	1353. Expert's consent to issue of prospectus containing statement by him or her			
	1354. Regulations (Chapter 1)			
	1355. Saver for existing Prospectus Regulations			
	1356. Penalties on conviction on indictment and defences in respect of certain offences			
	1357. Untrue statements and omissions in prospectus: criminal liability			
	1358. Requirements about minimum subscriptions, matters to be stated in offer documentation in that regard, etc.			
	1359. Supplemental provisions in relation to section 1358			
	1360. Further supplemental provisions in relation to section 1358: effect of irregular allotment			
	1361. Local offers			
	1362. Exclusion of Investment Intermediaries Act 1995			
	1363. Power to make certain rules and issue guidelines			
	1364. Certain agreements void			
CHAPTER 2	**Market abuse**	Minister for Finance		Minister for Finance
	1365. Interpretation (Chapter 2)			

PART 23 - PUBLIC OFFERS OF SECURITIES, FINANCIAL REPORTING BY TRADED COMPANIES, PREVENTION OF MARKET ABUSE, ETC.		Relevant Minister	CLRG Recommendation	Proposed Responsible Minister
	1366. Regulations (Chapter 2) (repealed)		Detach from the Companies Act and relocate in dedicated financial services legislation CLRG to review relevant Companies Act provisions and 2014 Market Abuse Regulation to avoid duplication. To be part of a future Work Programme	
	1367. Saver for existing Market Abuse Regulations (repealed)			
	1368. Conviction on indictment of offences under Irish market abuse law: penalties			
	1369. Civil liability for certain breaches of Irish market abuse law			
	1370. Supplementary rules, etc., by competent authority			
	1371. Application of Irish market abuse law to certain markets			
CHAPTER 3	**Requirement for corporate governance statement and application of certain provisions of Parts 5 and 6 where company is a traded company**	Minister for Enterprise, Trade and Employment	Retain in the Companies Act	Minister for Enterprise Trade and Employment
	1372. Definition (Chapter 3)			
	1373. Corporate governance statement in the case of a traded company			
	1374. Application of section 225 to a traded company			
	1375. Application of sections 279 and 280 to a traded company excluded			
	1376. Application of sections 290(7)(b), 293 and 362 to a traded company			
	1377. Certain exemptions from consolidation of financial statements not available to traded company			
	1378. DAC or CLG that is a traded company may not file abridged financial statements			
CHAPTER 4	**Transparency requirements regarding issuers of securities admitted to trading on certain markets**	Minister for Finance	Retain in the Companies Act CLRG to review Companies Act provisions that overlap with the requirements of the 2007 Transparency	Minister for Finance
	1379. Interpretation (Chapter 4)			
	1380. Power to make certain regulations (Chapter 4)			

PART 23 - PUBLIC OFFERS OF SECURITIES, FINANCIAL REPORTING BY TRADED COMPANIES, PREVENTION OF MARKET ABUSE, ETC.		**Relevant Minister**	**CLRG Recommendation**	**Proposed Responsible Minister**
	1381. Saver for existing Transparency Regulations		Regulations with a view to aligning the obligations of all PLCs where practicable and where appropriate. To be part of a future Work Programme	
	1382. Conviction on indictment of offences under transparency (regulated markets) law			
	1383. Supplementary rules, etc. by competent authority			
	1384. Application of transparency (regulated markets) law to certain markets			
CHAPTER 5	**Application of section 393 to a company to which Part 23 applies**	Minister for Enterprise Trade and Employment	Retain in the Companies Act	Minister for Enterprise Trade and Employment
	1384A. Application of section 393 to a company to which Part 23 applies			

Part 24 - Investment Companies		**Relevant Minister**	**CLRG Recommendation**	**Proposed Responsible Minister**
CHAPTER 1	**Preliminary and interpretation**	Minister for Finance	Detach from the Companies Act and relocate in financial services legislation	Minister for Finance
	1385. Interpretation (Part 24)			
	1386. Definition of “investment company” and construction of references to nominal value of shares, etc.			
	1387. Application of Parts 1 to 14 to investment companies			
	1388. Application of Part 17 to investment companies			
	1389. Adaptation of certain provisions of UCITS Regulations			
CHAPTER 2	**Incorporation and registration**	Minister for Finance	Detach from the Companies Act and relocate in financial services legislation	Minister for Finance
	1390. Way of forming an investment company			
	1391. Investment company to carry on activity in the State			
	1392. The form of an investment company's constitution			
	1393. Supplemental provisions in relation to constitution and continuance in force of existing memorandum and articles			
	1394. Status of existing investment company			
	1395. Authorisation by Central Bank			
	1396. Powers of Central Bank			
	1397. Default of investment company or failure in performance of its investments			
CHAPTER 3	**Share capital**	Minister for Finance	Detach from the Companies Act and relocate in financial services legislation	Minister for Finance
	1398. Power of company to purchase own shares			
	1399. Treatment of purchased shares			
CHAPTER 4	**Financial statements**	Minister for Finance	Detach from the Companies Act and relocate in financial services legislation	Minister for Finance
	1400. Statutory financial statements			
	1400A. Modification of definition of “ineligible entities” in case of investment companies			

Part 24 - Investment Companies		Relevant Minister	CLRG Recommendation	Proposed Responsible Minister
	1401. Requirement for corporate governance statement and modification of certain provisions of Parts 5 and 6 as they apply to investment companies			
	1401A. Filing of financial statements by investment company			
CHAPTER 5	**Winding up**	Minister for Finance	Detach from the Companies Act and relocate in financial services legislation	Minister for Finance
	1402. Circumstances in which company may be wound up by the court			
CHAPTER 6	**Restoration**	Minister for Finance	Detach from the Companies Act and relocate in financial services legislation	Minister for Finance
	1403. Restoration by the court			
CHAPTER 7	**Public offers of securities, prevention of market abuse, etc.**	Minister for Finance	Detach from the Companies Act and relocate in financial services legislation	Minister for Finance
	1404. Application of Chapters 1, 2 and 4 of Part 23 to investment companies			
CHAPTER 8	**Umbrella funds and sub-funds**	Minister for Finance	Detach from the Companies Act and relocate in financial services legislation	Minister for Finance
	1405. Segregated liability of investment company sub-funds			
	1406. Requirements to be complied with by, and other matters respecting, an umbrella fund to which section 1405(1) applies			
	1407. Further matters respecting an umbrella fund to which section 1405(1) applies			
CHAPTER 9	**Migration of funds**	Minister for Finance	Detach from the Companies Act and relocate in financial services legislation	Minister for Finance
	1408. Definitions (Chapter 9)			
	1409. “Registration documents”— meaning			
	1410. Continuation of foreign investment company			
	1411. Supplemental provisions in relation to section 1410			
	1412. Definitions for the purposes of de-registration provisions contained in sections 1413 and 1414			

Part 24 - Investment Companies		Relevant Minister	CLRG Recommendation	Proposed Responsible Minister
	1413. De-registration of companies when continued under the law of place outside the State			
	1414. Supplemental provisions in relation to section 1413			
	1415. Statutory declaration as to solvency			
UNIT TRUSTS – relevant provisions		Minister for Enterprise Trade and Employment	Relocate in financial services legislation	Minister for Finance
COMMON CONTRACTUAL FUNDS – relevant provisions		Minister for Enterprise Trade and Employment	Relocate in financial services legislation	Minister for Finance

ANNEX 3: Opening Statement for Paul Egan SC, Company Law Review Group to the Joint Oireachtas Committee on Enterprise, Trade and Employment, 1 Feb 2023

Introduction

Good morning, Cathaoirleach and members of the Committee.

My name is Paul Egan and I appear as Chairperson of the Company Law Review Group, the CLRG. I am joined on line, remotely, by Professor Irene Lynch Fannon, Chair of the Corporate Insolvency Committee of the CLRG, and beside me is Ms Deirdre Morgan, Secretary to the CLRG.

I would like to thank the Committee for facilitating Professor Lynch Fannon's joining in the CLRG's presentation to the Committee at this time, in light of her being abroad at present.

Company Law Review Group

The CLRG is the statutory advisory body charged with advising the Minister for Enterprise, Trade and Employment on the review and development of company law in Ireland. It operates under Section 958 of the Companies Act 2014.

The CLRG consists of individuals with an expertise, an interest, and a stake in the development of company law, including:

- the State, its agencies, and regulators, such as DETE, Revenue, the Corporate Enforcement Authority and IAASA
- practitioners such as lawyers and accountants
- users and stakeholders such as business groups and trade unions

It is unique, not replicated in neighbouring jurisdictions. It has the advantage of gathering together all these stakeholders to identify issues, to review the law, and to design solutions for consideration by the Minister. The past two and a half years has seen two particular initiatives that originated at CLRG which led to prompt enactment of statutes – the 2020 Act which amended the Companies Act in the light of Covid, to allow for virtual meetings, and the Companies (Rescue Process for Small and Micro Companies) Act 2021. Act which introduced the SCARP rescue process.

Ultimately, policy is decided by the Minister, not by the CLRG, but we are very happy to contribute to the development of that policy.

Statutory functions

Our statutory functions are specified in section 959 of the Companies Act 2014. These include a requirement to monitor, review and advise the Minister on:

- the Companies Act and the amendment of the Act;
- the introduction of legislation on the operation of companies and commercial practices;
- the rules of court, judgments of courts;
- issues arising from the State's EU membership;
- international developments in company law; and
- other related matters.

In so doing we must seek to promote enterprise, facilitate commerce, simplify the operation of the 2014 Act, enhance corporate governance and encourage commercial probity.

Work programmes and Reports

The CLRG operates on a two-year work programme which is determined by the Minister.

In the information materials provided to the Committee this morning, the current work programme for 2022-2024 and the previous work programme for 2020-2022 are included.

The CLRG works through expert committees that focus on particular aspects of law – insolvency, governance, enforcement, public companies. We also have a Standing Committee to deal with urgent items requiring an immediate response.

The busiest Committee has been our Corporate Insolvency Committee, chaired by Professor Irene Lynch Fannon, which has produced 5 reports since 2018 as well as feeding into other reports.

The issues that gave rise to this Bill have been subject to lengthy and detailed analysis by the Corporate Insolvency Committee and the full CLRG. Our March 2021 report in particular is the most relevant. This Report reviewed existing legislative provisions regarding the provision of information to creditors generally and, in particular, to employees. This took account of the 2017 Report on the protections for employees and unsecured creditors and the Duffy Cahill report of 2016.

In summary, the Review Group, considered but did not recommend what is proposed in Section 2 of the Bill – the expansion of the class of preferential payments. I and Professor Lynch Fannon will be happy to explain the Review Group's reasoning in our Q&A session.

The Review Group has not considered what is proposed in section 3.

Insolvency Reports

We look forward to discussing these matters with you. Our responses today will aim to explain the consensus or near consensus of the CLRG on these matters. The Review Group has, since its establishment, sought to arrive at a consensus in its reports to reflect the diverse perspectives and interests of company law stakeholders.